No. 94746-5

SUPREME COURT
OF THE STATE OF WASHINGTON

NAM CHUONG HUYNH and LIN R. BUI, husband and wife, et al.,

Respondents,

v.

AKER MARINE ANTARCTIC AS, a Norwegian corporation; AKER BIOMARINE ANTARCTIC II AS, a Norwegian corporation,

Petitioners.

MEMORANDUM OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS IN SUPPORT OF PETITION FOR REVIEW

Michael B. King, WSBA No. 14405
Rory D. Cosgrove, WSBA No. 48647
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Amici Curiae WDTL

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I. INTRODUCTION

Recent U.S. Supreme Court decisions have reshaped the constitutional limits on a state court's power to exercise specific personal jurisdiction over a nonresident defendant. At the same time, this Court has worked to conform our state's jurisprudence to the constitutional limits established by those decisions. *See, e.g., Noll v. Am. Biltrite, Inc.*, 182 Wn.2d 402, 395 P.3d 1021 (2017); *State v. LG Electronics, Inc.*, 186 Wn.2d 169, 375 P.3d 1035 (2016), *cert. denied sub. nom Koninklijke Phillips N.V. v. Washington*, ___ U.S. ___, 137 S. Ct 648, 196 L. Ed. 2d 522 (2017).

Division One of the Court of Appeals here failed to recognize the extent to which the U.S. Supreme Court has been narrowing the scope of a state court's power to exercise specific personal jurisdiction over a nonresident defendant. Relying on this Court's decisions predating by decades the recent landscape-changing decisions of the U.S. Supreme Court, Division One upheld jurisdiction over a foreign defendant because the defendant's contract-based actions in Washington set in motion a chain of events that put the plaintiff in a foreign country, where he was then injured. The foreign defendant's actions in Washington were not tortious. Yet the court held that our state could exercise jurisdiction over the foreign defendant on a tort claim brought against that defendant for the injury the plaintiff had suffered in another country on a different continent.

Division One's "but for" approach to personal jurisdiction conflicts with the federalism concerns that the U.S. Supreme Court recently made

clear limit a state's power to exercise specific personal jurisdiction over a nonresident defendant. Division One compels the petitioner to submit to the coercive power of our state courts to resolve a dispute in which our state can claim little, if any, legitimate interest and in which our state's substantive law likely does not apply. No connection exists between the petitioner's actions in this state and the plaintiff's injury abroad, except that the act of contracting with a corporation in Washington set in motion events that placed the plaintiff in Uruguay, where he was later injured. The plaintiff neither alleged nor proved after an evidentiary hearing that the act of contracting itself embodied some form of negligence that contributed in any way to his injury. No operative facts on which the plaintiff's negligence claims rest relate jurisdictionally to the petitioner's actions in this state.

In sum: this Court should grant review to instruct our state's courts that the Constitution requires more than some causal chain set in motion within the boundaries of this state before a Washington court may exercise specific personal jurisdiction over a nonresident defendant.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, includes more than 750 Washington attorneys engaged in civil-defense litigation. WDTL's purpose is to promote the highest professional and ethical standards for Washington civil-defense attorneys and to serve our members through education, recognition, collegiality, professional development, and advocacy. One important way

in which WDTL represents its member is through amicus-curiae submissions in cases that present issues of statewide concern to Washington civil-defense attorneys and their clients. The scope of the coercive power of Washington courts to exercise specific personal jurisdiction over a nonresident defendant is such an issue, as shown by WDTL's participation as an amicus curiae in this Court's last three cases in which this Court addressed the scope of that power: *LG Electronics*, *Noll*, and most recently *Swank v. Valley Christian School*, ___ Wn.2d ___, 398 P.3d 1108 (July 6, 2017).

III. ARGUMENT IN SUPPORT OF REVIEW

A. Division One's "but for" approach to specific personal jurisdiction conflicts with *Bristol-Meyers Squibb* and the federalism concerns that the U.S. Supreme Court made clear limit a state's power to exercise personal jurisdiction over a nonresident defendant.

This June, in *Bristol-Myers Squibb Co. v. Superior Court*, ___ U.S. ___, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017), the U.S. Supreme Court made clear that constitutional limitations on the exercise of personal jurisdiction concern the vitality of the charter of liberty that is our federal system of government. Writing for seven of his eight colleagues, Justice Alito stated:

> In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice. *But the primary concern is the burden on the defendant. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum,* ***but it also encompasses the more abstract matter of***

> ***submitting to the coercive power of a State that may have little legitimate interest in the claims in question.*** *As we have put it, restrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.* [T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States. And at times, this federalism interest may be decisive. As we explained in *World–Wide Volkswagen*, [e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

137 S. Ct. at 1780-81 (emphasis added) (quotation marks and citations omitted). The Court's discussion of interstate federalism in *Bristol-Meyers Squibb* is no less applicable in the international context with foreign states. *See, e.g.*, *Daimler AG v. Bauman*, ___ U.S. ___, 134 S. Ct. 746, 763, 187 L. Ed. 2d 624 (2014) (warning that courts should consider "risks to international comity" before extending jurisdiction); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 55 (D.C. Cir. 2017) ("Another purpose [of personal jurisdiction] is to protect the sovereign concerns of other nations whose courts might otherwise adjudicate the claims."). Division One did not consider these federalism-based restrictions, informed by the federal due process clause, on a state court's exercise of personal jurisdiction over a nonresident defendant for a *tort claim* entirely unrelated to the defendant's *contract-based* contacts with the forum state.

Division One's application of the "but for" test eviscerates meaningful limits on a state court's exercise of personal jurisdiction over a nonresident defendant and conflicts with recent U.S. Supreme Court precedent. *See, e.g.*, *Bristol-Meyers Squibb*, 137 S. Ct. at 1780-81; *Walden*, 134 S. Ct. at 1121-26. Courts around the country have rejected the "but for" test as constitutionally deficient under the due process clause for a court to assert specific personal jurisdiction over a nonresident defendant. *See, e.g.*, *Beydoun v. Wataniya Restaurants Holding*, 768 F.3d 499, 507-08 (6th Cir. 2014) (requiring something more than "but for" causation to support exercise of specific personal jurisdiction over nonresident defendant); *GCIU–Emp'r Ret. Fund v. Goldfarb Corp.*, 565 F.3d 1018, 1025 (7th Cir. 2009) (suggesting that a mere "but for" causal relationship is insufficient to establish the required nexus between a defendant's contacts and the underlying cause of action); *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 322 (3d Cir. 2007) (rejecting the "but for" test because it is "vastly overinclusive in its calculation of a defendant's reciprocal obligations" and "has . . . no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain."); *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) ("[T]he defendant's in-state conduct must form an 'important, or [at least] material, element of proof' in the plaintiff's case. A broad "but-for" argument is generally insufficient. Because but for events can be very remote, . . . due process demands something like a proximate cause nexus."); *Robinson v. Harley-Davidson Motor Co.*, 316 P.3d 287, 297-98

(Or. 2013) (rejecting the "but for" test for relatedness as "overinclusive."); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 584 (Tex. 2007) (rejecting the "but-for relatedness test" as "too broad and conceptually unlimited in scope).

This Court should grant review to recalibrate its approach to the "relatedness" requirement for specific personal jurisdiction—*i.e.*, the nexus between a nonresident defendant's forum contacts and the plaintiff's claim—consistent with the U.S. Supreme Court's recent jurisprudence, and join the many courts that have recognized that "but for" causation is no longer a tenable basis for the exercise of personal jurisdiction over a nonresident defendant.

B. Division One misapprehended the U.S. Supreme Court's decision in *Walden v. Fiore* and its impact on the law of specific personal jurisdiction.

For a state court to exercise specific personal jurisdiction, the defendant's "suit-related conduct must create a substantial connection" with the forum state. *Walden*, 134 S. Ct. at 1121. The suit must arise out of or relate to the defendant's contacts with the forum. *Bristol-Meyers Squibb*, 137 S. Ct. at 1780. There "must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Id.* at 1781 (internal quotation marks and citation omitted).

Division One misinterpreted the U.S. Supreme Court's decision in *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014), and its impact on the law of specific personal jurisdiction. *Walden* altered

the specific personal-jurisdiction landscape, particularly the "effects" test derived from the U.S. Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). *See, e.g.*, *ClearOne, Inc. v. Revolabs, Inc.*, 369 P.3d 1269, 1273, 1277-78 (Utah 2016). *Walden* narrowed the broad interpretation of the "effects" test that this Court has applied in tort cases. *Walden* clarified that the effect in the forum state must be more than an effect on a plaintiff who is a resident of the forum state. The effects of an alleged tort must be felt by more than just a plaintiff with significant contacts with the forum state; the effects must be felt in some broader sense by the forum. *Walden* clarified that properly applying the "effects" test requires looking beyond the plaintiff's connections to the forum state and the plaintiff's injury to whether the defendant has "create[d] a substantial connection with the forum state." *Walden*, 134 S. Ct. at 1121.

Here, none of AKAS II's purported negligent conduct occurred in Washington or otherwise involved Washington. The *jurisdictionally relevant* conduct that purportedly caused Huynh's injury occurred solely in Uruguay. That AKAS II contracted with a Washington corporation is not a fact specifically tied to Huynh's negligence claim. AKAS II's purported actions neither occurred in Washington nor had any impact in Washington other than the alleged injury in Uruguay to a Washington resident. Huynh's negligence claim has no connection to acts AKAS II took in Washington. What the trial court did, and the Court of Appeals sanctioned, was use AKAS II's contract-based conduct—and not AKAS

II's alleged tort-based conduct—to assert specific personal jurisdiction over AKAS II for a tort claim.

An "individual's contract with an out-of-state party *alone* can[not] automatically establish sufficient minimum contacts in the other party's home forum." *Walden*, 134 S. Ct. at 1122-23 (citation omitted); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (same); *Raymond v. Robinson*, 104 Wn. App. 627, 638, 15 P.3d 697 (2001) ("[T]he mere execution of a contract with a state resident alone is not sufficient to fulfill the 'purposeful act' requirement."). A "mere injury to a forum resident is not a sufficient connection to the forum." *Walden*, 134 S. Ct. at 1125. While AKAS II contracted with a third-party Washington corporation, Marel Seattle, a "defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." *Bristol-Meyers Squibb*, 137 S. Ct. at 1781 (quoting *Walden*, 134 S. Ct. at 1123). None of AKAS II's contractual actions in Washington bear on the facts purportedly supporting Huynh's tort claim, which all occurred onboard a Norwegian vessel in Uruguay. *See, e.g.*, *Horn v. Seacatcher Fisheries, Inc.*, 876 P.2d 352, 354 (Or. Ct. App. 1994) (holding that "defendants' conduct in recruiting and hiring plaintiff [in the forum state] has no 'substantive relevance' to plaintiff's personal injury claims [that occurred in another state].") ("[A]llegations pertaining to the *creation* of the employment relationship are immaterial to the personal injury gravamen of that claim and, hence, cannot support jurisdiction."), *aff'd*, 354 Or. 572 (2013).

C. Under applicable choice-of-law principles, Washington substantive tort law would not apply to Huynh's negligence claim. That the putative forum has little interest should compel dismissal on lack of authority to exercise specific personal jurisdiction over a nonresident defendant.

This Court has emphasized the importance of a choice-of-law analysis as a factor in determining if specific personal jurisdiction exists. *See Pruczinski v. Ashby*, 185 Wn.2d 492, 503 n.7, 374 P.3d 102 (2016). Under applicable maritime tort choice-of-law principles, Washington State substantive law would likely not govern Huynh's negligence action. The U.S. Supreme Court has set forth several factors to be considered in deciding which country's law governs a maritime tort claim: the place of the wrongful act, the law of the flag, the allegiance or domicile of the injured party, the allegiance of the shipowner, the shipowner's base of operations, the place of contract, the inaccessibility of a foreign forum, and the law of the forum. *See, e.g.*, *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309, 90 S. Ct. 1731, 26 L.Ed.2d 252 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 583-91, 73 S. Ct. 921, 97 L. Ed. 1254 (1953).

The majority of these factors point to the application of the substantive tort law of either Uruguay or Norway—but not Washington. The accident occurred on a Norwegian-flagged vessel in Uruguay. AKAS II's base of operations is located in Norway, and the shipowner's allegiance is to Norway. No evidence supports that Uruguay or Norway is an inaccessible forum. In addition, Washington's choice-of-law principles point to the application of Uruguayan law. Under our state's approach to choice of law, the law of the state where the injury occurred presumptively

determines the rights and liabilities of the parties. *Future Select Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 967, 331 P.3d 29 (2014); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971); *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 735 n.6, 254 P.3d 818 (2011). Here, the injury occurred aboard a Norwegian vessel in Uruguay waters. Because Washington has little, if any, interest in the claims and the outcome of this case, which occurred thousands of miles away on a different continent, and because Washington tort law would likely not apply to Huynh's negligence claims, the trial court lacked authority to exercise specific personal jurisdiction over AKAS II.

IV. CONCLUSION

Because Division One's decision conflicts with recent U.S. Supreme Court precedent, this Court should grant AKAS II's petition for review.

Respectfully submitted: September 12th, 2017.

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
Michael B. King, WSBA No. 14405
Rory D. Cosgrove, WSBA No. 48647
Attorneys for Amici Curiae WDTL

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Attorneys for Plaintiffs: C. Steven Fury Francisco A. Duarte Scott D. Smith Fury Duarte PS 1606 - 148th Avenue SE, Suite 102 Bellevue, WA 98007 Email: steve@furyduarte.com fad@furyduarte.com scott@furyduarte.com	☐ VIA MESSENGER ☐ VIA FACSIMILE ☐ VIA U.S. MAIL ☒ VIA CM/ECF
Philip A. Talmadge Talmadge/Fitzpatrick/Tribe 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 Email: Phil@tal-fitzlaw.com	☐ VIA MESSENGER ☐ VIA FACSIMILE ☐ VIA U.S. MAIL ☒ VIA CM/ECF
Guardian ad Litem Jo-Hanna Read 600 North 36th Street, #306 Seattle, WA 98103 Email: jolawyer@read-law.com	☐ VIA MESSENGER ☐ VIA FACSIMILE ☐ VIA U.S. MAIL ☒ VIA CM/ECF

Attorneys for Defendant Marel Seattle, Inc. Jennifer K. Sheffield Erin M. Wilson Lane Powell PC 1420 Fifth Avenue, Suite 4200 Seattle, WA 98111 Email: SheffieldJ@lanepowell.com WilsonEm@lanepowell.com William J. Cremer Joshua D. Yeager Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC 1 North Franklin, 10th Floor Chicago, IL 60606 Email: WCremer@CremerSpina.com JYeager@CremerSpina.com	☐ VIA MESSENGER ☐ VIA FACSIMILE ☐ VIA U.S. MAIL ☒ VIA CM/ECF ☐ MESSENGER ☐ VIA FACSIMILE ☐ VIA U.S. MAIL ☒ VIA CM/ECF
Department of Labor & Industries Re: L&I Claim No. Y118595 Michael D. Patjens Third Party Section Department of L&I PO Box 44288 Olympia, WA 98504 Patj235@lni.wa.gov	☐ MESSENGER ☐ VIA FACSIMILE ☐ VIA U.S. MAIL ☒ VIA CM/ECF

I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed on September 12, 2017 at Seattle, Washington.

Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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