**No. 22-35099**

# United States Court of Appeals
## FOR THE NINTH CIRCUIT

ERICA DAVIS, as Personal Representative of the Estate of Andrew Dale Davis, deceased, and minor children, JC, minor child, SD, minor child; MICHAEL M. MASCHMEYER, as Personal Representative of the Estate of R. Wayne Estopinal, deceased; JAMES JOHNSON, individually and as Independent Co-Administrators of the Estate of Sandra Johnson, deceased; BRADLEY HERMAN, individually and as Independent Co-Administrators of the Estate of Sandra Johnson, deceased,
*Plaintiffs-Appellants*,

vs.

CRANFIELD AEROSPACE SOLUTIONS, LIMITED,
*Defendant-Appellee*.

On Appeal from the United States District Court
for the District of Idaho, No. 2:20-cv-00536-BLW (Hon. B. Lynn Winmill)

# BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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August 17, 2023

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the American Association for Justice certify that it is a non-profit organization. It has no parent corporation or publicly owned corporation that owns 10% or more of its stock.

Respectfully submitted this 17th day of August 2023.

/s/ Robert S. Peck

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## INTEREST OF AMICUS CURIAE[1]

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. For more than 75 years, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful injury.

AAJ files this brief to urge this Court to grant rehearing en banc not only because precedent supports the exercise of personal jurisdiction but also because as the applicant and holder of Federal Aviation Administration certification for the product at issue, the facts demonstrate a larger role in Idaho for the Defendant-Appellee in the development and certification of the component that allegedly caused the tragic crash. The panel majority did not consider what that meant as a matter of law.

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[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or in part. Apart from the amicus curiae, no person, party, or party's counsel contributed money intended to fund the brief 's preparation and submission.

AAJ and its members who litigate these cases also provide unique perspective that should be helpful to the Court.

## SUMMARY OF ARGUMENT

The panel majority's decision, denying personal jurisdiction over the supervisory participant in the preparation of a aircraft component (the ATLAS system) for approved usage that was the alleged proximate cause of a plane's fatal crash, creates unwarranted conflicts with sister circuits and state courts, has broad implications for personal jurisdiction in product-liability cases throughout the Ninth Circuit, and rests on a misapprehension of the regulatory process that results in aircraft certification, which, by itself, provides a basis for satisfying the minimum-contacts inquiry that the panel undertook.

The conflicts with decisions of other jurisdictions incentivizes forum-shopping while also rendering issues of personal jurisdiction under today's modern manufacturing arrangements to become an even more hotly contested issue with the potential to render compensation unavailable in similarly tragic circumstances.

Further, the panel's decision misconstrues the nature of the business relationship that justifies the exercise of personal jurisdiction in cases like this one and mistakenly treats that relationship as it would contacts that are merely "'random,' 'fortuitous,' or 'attenuated,'" or the "'unilateral activity of another party or a third person.'" *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)

(citations omitted). Instead, as was the case here, the process of obtaining certification from the Federal Aviation Administration (FAA), as a matter of law, establishes a closer partnership that should guide the correct analysis. By selling the business relationship short, the panel's decision creates the type of uncertainty in the law that additionally justifies reconsideration en banc and permits one partner in this business relationship to transfer all potential risk to the other partner by carefully limiting its in-person involvement in the subject state. That is a result at odds with precedent and supports this Court's reconsideration en banc.

## ARGUMENT

### I. THE PANEL'S DECISION HAS BROAD IMPLICATIONS FOR PRODUCTS LIABILITY LITIGATION.

More than merely resolve a jurisdictional dispute between the parties, the panel's decision will affect the full range of products liability decisions in state and federal courts throughout the Ninth Circuit. Its conclusion that federal due process prevents courts from exercising personal jurisdiction over an out-of-state defendant who participates in a supervisory capacity to prepare a product for market, albeit largely from a remote location, places unwarranted and novel limitations on the exercise of personal jurisdiction that deserves reconsideration.

The decision creates a forum-shopping incentive because the results are likely to be different in state and federal court. Moreover, in contrast to other courts, the decision ignores the nature of modern manufacturing relationships, erroneously

treating a multi-year business relationship the same as an isolated instance of a consumer who brings a product into the state. Contrary to the majority's approach, when a continuing business relationship is established, as it was here, it is irrelevant which party initiated the first contact.

### A. The Panel's Decision Creates a Conflict Between State and Federal Court for Cases Filed in Idaho and Will Engender Similar Conflicts Throughout the States That Comprise the Ninth Circuit.

This Court has emphasized that, "absent a strong reason to do so, we will not create a direct conflict with other circuits." *U.S. v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987) (citation omitted). As Plaintiffs-Appellants explain in their Petition, the panel's decision conflicts with decisions of sister circuits, as well as this Court's recent decision in *Silk v. Bond*, 65 F.4th 445 (9th Cir. 2023). The prudential rationales behind the policy of avoiding conflicts, to prevent the same law from yielding different results based on where it is filed, should apply as well to avoid conflicts based on whether the case is heard in state or federal court.

State courts applying federal law are only bound by decisions of the Supreme Court of the United States, *James v. City of Boise*, 577 U.S. 306, 307 (2016), not by the views of federal law determined in federal courts of appeal. *Johnson v. Williams*, 568 U.S. 289, 305 (2013). Thus, the majority's decision creates no imperative for the Idaho Supreme Court to abandon the sharp and unnecessary conflict the panel majority created with *Brockett Co., LLC v. Crain*, 483 P.3d 432 (Idaho 2021).

In *Crain*, the court explained that "an out-of-state defendant, which entered into a business relationship with another business with its principal place of business in Idaho, *has transacted business in Idaho* for the purposes of [Idaho's long-arm statute]." *Id.* at 438 (citing *Profits Plus Cap. Mgmt., LLC v. Podesta*, 332 P.3d 785, 794-95 (Idaho 2014) (emphasis added)). In contrast, the panel majority here dismissed as "too attenuated," *Davis v. Cranfield Aerospace Sols., Ltd.*, 71 F.4th 1154, 1166 (9th Cir. 2023), what the dissent accurately described as a multiyear business relationship sufficiently similar to what this Court held supported personal jurisdiction in *Silk*. *Id.* at 1170. Notably, Idaho's contrasting approach to that adopted by the panel is consistent with *Burger King*, which recognized that purposeful availment occurs, *inter alia*, when a nonresident "has created 'continuing obligations' between himself and residents of the forum." 471 U.S. at 476 (citing *Travelers Health Ass'n v. Com. of Va. ex rel. State Corp. Comm'n*, 339 U.S. 643, 648 (1950)). Cranfield unquestionably established continuing obligations in this case.

Because the panel's ruling does not mandate a change in Idaho's courts, that state's judiciary could justifiably continue to apply its *Crain* ruling, creating a palpable conflict in the application of *its* long-arm statute. The same divergence may occur in the other states within this circuit, all of which appear to exercise long-arm jurisdiction to the limits of due process. *See Alaska Telecom, Inc. v. Schafer*, 888

P.2d 1296, 1299 (Alaska 1995); *Williams v. Lakeview Co*., 13 P.3d 280, 282 (Ariz. 2000); *Vons Companies, Inc. v. Seabest Foods, Inc*., 926 P.2d 1085, 1091 (Cal. 1996); *Yamashita v. LG Chem, Ltd*., 518 P.3d 1169, 1171 (Haw. 2022); *Knutsen v. Cloud*, 124 P.3d 1024, 1027 (Idaho 2005) (citation omitted); *Simmons v. State*, 670 P.2d 1372, 1376 (Mont. 1983); *Viega GmbH v. Eighth Jud. Dist. Ct*., 328 P.3d 1152, 1156 (Nev. 2014); *State ex rel. Acad. Press, Ltd. v. Beckett*, 581 P.2d 496, 500 (Or. 1978); *Shute v. Carnival Cruise Lines*, 783 P.2d 78, 82 (Wash. 1989); *Barnes v. Superior Court*, 2012 Guam 11 ¶ 27; *Montecillo v. Di-All Chem. Co.*, No. 97-020, 1998 WL 34073645, at *2 (N. Mar. I. Nov. 23, 1998).

As in Idaho, Washington's courts focus on the establishment of a business relationship to justify personal jurisdiction. In its courts, it does not matter whether the defendant initiated the contact that resulted in a contract, but instead looks to the "the entire business transaction, including prior negotiations, contemplated future consequences, the terms of the contract and the parties' actual course of dealing, . . . in determining whether the defendant purposefully established minimum contacts by entering into a contract with a resident of the forum state." *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc*., 804 P.2d 627, 633 (Wash. App. 1991) (citing *Burger King*, 471 U.S. at 478-79); *see also SeaHAVN, Ltd. v. Glitnir Bank*, 226 P.3d 141, 150 (Wash. App. 2010) (citing *MBM Fisheries*). Similarly, California considers whether a foreign "defendant purposefully directed his or her activities at

forum residents or *purposefully derived benefit from forum activities*; and second, does the controversy arise from defendant's contacts with the forum." *Integral Dev. Corp. v. Weissenbach*, 122 Cal. Rptr. 2d 24, 31 (Cal. App. 2002) (emphasis added). *Cf. Willemsen v. Invacare Corp*., 282 P.3d 867, 869 (Or. 2012), *cert. denied sub nom. China Terminal & Elec. Corp. v. Willemsen*, 568 U.S. 1143 (2013) (holding Taiwanese battery manufacturer subject to personal jurisdiction under hold-harmless and state-by-state compliance guarantees in contract with Ohio motorized wheelchair manufacturer for injury in Oregon).

Reconsideration en banc would permit this Court to find a workable approach that avoids unnecessary conflicts with state court tests, providing a defendant, as the *Burger King* Court suggested, with a consistent "notice that it may be subject to personal jurisdiction in a state for the consequences of its commercial activities." 471 U.S. at 473.

If, however, reconsideration en banc is denied, the panel's ruling would encourage states to adopt measures similar to that of Colorado, which deems the available party for personal jurisdiction (here, Tamarack) to stand in the shoes of the unavailable business associate for purposes of additional liability. *See* Colo. Rev. Stat. § 13-21-402(2); *Garrett v. Beaver Run Ski Enterprises, Inc*., 702 F. Supp. 265, 266 (D. Colo. 1988).

### B. Modern Manufacturing Often Involves Multiple Far-Flung Business Enterprises That the Panel's Approach Misunderstands.

The majority's opinion does not appear to recognize and in fact overlooks that modern product development and manufacturing often involve efforts across states and across continents. *See* 4 Fed. Prac. & Proc. Civ. § 1067.4 (4th ed.) (recognizing the impact of the "increasingly interstate and international character of today's economy and the relatively free movement of goods and services without regard to state and national boundaries" on personal jurisdiction). Today, advanced communications technologies are creating global partnerships that were otherwise impossible or inefficient. Simon Ramo, *Globalization of Industry and Implications for the Future*, *in* GLOBALIZATION OF TECHNOLOGY: INTERNATIONAL PERSPECTIVES 13 (Janet H. Muroyama & H. Guyford Stever, eds., 1988). As a result, "no one company, not even the largest, can hope to originate more than a small fraction of the evolving technology that will be key to preserving its position." *Id*. at 15.

Those market conditions are a proper consideration that the panel overlooked. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (plurality) (noting that courts may consider "[t]he defendant's conduct and the economic realities of the market the defendant seeks to serve."); *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd*., 784 F.2d 1392, 1398 (9th Cir. 1986) (considering "economic reality"). *Cf. McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)

(recognizing the nature of modern commercial transactions, as well as advances in communication and transportation).

To compete in today's global economy, companies develop relationships with other companies across the globe. Ford, for example, is an iconic American manufacturer that refers to itself as "America's most storied auto company."[2] In 2017, its U.S.-sold Ford Fiesta was assembled in Mexico and contained a Brazilian engine and Mexican transmission. David Johnson, *How American Is Your Car?*, TIME (Mar. 2, 2017), https://time.com/4681166/car-made-american/. It boasted only 40 percent of its parts from the U.S. or Canada. *Id*.

Despite owning factories throughout the world, Ford partners with independent foreign manufacturers for such essential parts as steering columns (Hungary), instrument panel components (China), mufflers and exhaust systems (Columbia), airbags (Sweden), starter assemblies (Poland), and suspension stabilizer linkages (Japan). J.B. Maverick, *Who Are Ford's Main Suppliers*, INVESTOPEDIA (Nov. 29, 2021), https://www.investopedia.com/ask/answers/052715/who-are-fords-f-main-suppliers.asp. It is the same "economic reality" that explains Tamarack's partnership with Cranfield to develop its ATLAS system in Idaho.

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[2] Ford Motor Co. Corporate Home Page, https://corporate.ford.com/ (last visited Aug. 9, 2023).

Recently, the Supreme Court authorized a broad view of personal jurisdiction when it allowed Ford to be sued in Montana and Minnesota when used cars purchased elsewhere failed in those states, causing death and injury. In doing so, the Court rejected a more restrictive view of personal jurisdiction, argued by Ford, which would have limited personal jurisdiction to "only the States of first sale, manufacture, and design." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021). There is little doubt, however, that in expanding the places where Ford could be sued, the Supreme Court did not place the State where the design took place off-limits, as it still satisfies the minimum contact requirement for due process.

In doing so, the Court did not plow new ground. It has long recognized that when parties "reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of [the latter state's courts]." *Travelers Health*, 339 U.S. at 647.

Here, Idaho serves that purpose for Cranfield. Through its remote efforts to assist Tamarack in finalizing the product so it could meet FAA approval, all of which went into the design and ability to distribute the ATLAS system. In this way, Cranfield's actions were indistinguishable from the conduct the Texas Supreme Court found sufficient to exercise personal jurisdiction in *State v. Volkswagen*

*Aktiengesellschaft*, 669 S.W.3d 399 (Tex. 2023). Volkswagen and Audi resisted personal jurisdiction because a "Virginia-based distributor independently sold more than half a million affected vehicles nationwide." *Id.* at 405. The manufacturers further argued that the distributor's contacts could not be imputed to them for the vehicle's use of software that cheated emissions testing to appear to comply with environmental laws. *Id.*

As the Texas Supreme Court held, the "German manufacturers purposely structured their relationships with the distributor and dealerships to retain control over after-sale recalls and repairs and then used that control to tamper with vehicles in Texas after the initial sale to consumers," through remote software downloads, but maintained a claim that it never entered Texas. *Id.* at 406. Nonetheless, the court found the exercise of personal jurisdiction to be proper. *Id.* Similar reasoning would permit personal jurisdiction in Idaho for Cranfield's supervisory control over the ATLAS system's qualification for distribution in the United States.

After all, Idaho would have an interest in assuring that it is not the locus for the development of unsafe products. That interest satisfies due process concerns. The Supreme Court has held that Fourteenth Amendment due process is "an instrument of interstate federalism," *Bristol-Myers Squibb Co. v. Sup. Ct.*, 582 U.S. 255, 263 (2017), designed to order the competing interests of co-equal States under the Constitution. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292

(1980). By that consideration, personal jurisdiction is denied when a state's interest in a claim is weak, *see Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114-15 (1987) (finding that the case was "primarily about indemnification rather than [the State's] safety standards),[3] but granted where that interest is strong. *See Ford*, 141 S. Ct. at 1030 (holding that the forum states had "significant interests at stake," including enforcement of safety regulations). *Cf. Doucet v. FCA US LLC*, 210 N.E.3d 393, 407 (Mass. 2023) ("[A] State has a significant interest in protecting itself against the sale of defective products within its borders.").

The different approach to personal-jurisdiction undertaken by the panel majority encourages forum-shopping, which is normally disfavored by courts, and equally unwelcome piecemeal litigation. *See Am. Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988). Yet, as Professor Dustin Buehler has shown, the excessive cost of jurisdictional uncertainty and satellite litigation over personal jurisdiction dissuades plaintiffs from filing meritorious cases and hinders the deterrent effect of products liability law. Dustin E. Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105 (2012); *see also id.* at 155 n.7 ("[P]roducts liability law creates invaluable incentives-toward-safety for

[3] Eight justices joined in this portion of the opinion.

products that are not widely sold, when consumers and regulators lack sufficient information to accurately evaluate product risk").

The "canonical decision in this area," 141 S. Ct. at 1024, *International Shoe Co. v. Washington*, explained that the personal jurisdiction inquiry "cannot be simply mechanical or quantitative." 326 U.S. 310, 319 (1945). Instead, it requires "flexibility in ensuring that commercial actors are not effectively 'judgment proof' for the consequences of obligations they voluntarily assume." *Burger King*, 471 U.S. at 485. The panel's rigidity in undertaking its analysis is at odds with the task that should be undertaken and fails to appreciate fully the "relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). One way to assess that relationship is to ask whether Cranfield has more significant minimum contacts with Indiana, where the subject plane crashed, than it has with Idaho. The answer is obviously no, but the approach taken by the panel majority suggests otherwise without undertaking any analysis.

The majority's failure to factor in Idaho's interests, to consider the broader impact on litigation derived from modern manufacturing arrangements, and the resultant multiplication of litigation over the same nucleus of operative facts, resulting in wasted judicial and party resources and the potential for irreconcilable results in different courts, all support reconsideration en banc.

## II. THE PANEL ALSO OVERLOOKED THE IMPORTANCE OF THE SUPPLEMENTAL TYPE CERTIFICATION PROCESS IN SUPPORTING PERSONAL JURISDICTION, A DEFICIT THAT SEPARATELY AS WELL AS CUMULATIVELY SUPPORTS RECONSIDERATION EN BANC.

The business relationship between Tamarack and Cranfield was based in large part on Tamarack's need for supplemental type certification (STC) from the FAA in order to market its product. Under federal law, any "major change to an FAA-approved design then requires additional certification in the form of a supplemental type certificate." *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1171 (9th Cir. 2002). To understand the business relationship between the two, it is necessary to understand the STC process, which was satisfied here only because Cranfield partnered with Tamarack to prepare and apply for FAA approval.

As the panel majority explained, Cranfield previously "oversaw and provided technical assistance for the process to obtain the certification" necessary to satisfy European aviation requirements during the period from 2013 to 2105. *Davis*, 71 F.4th at 1160. During the course of that contract, Tamarack asked Cranfield to perform the same tasks in order to obtain FAA approval in the United States, which Cranfield succeeded in accomplishing in 2016. *Id.* The panel reports that, "[o]nce again, Cranfield acted as the primary interface with the agency [FAA]." *Id.* Cranfield then held the STC for Tamarack for a period of three years, until the year following the subject crash. *Id.*

The dissent provides important additional details from the complaint's allegations: Cranfield provided "'substantial and frequent engineering advice and opinions . . . relating to the design, function, and safety aspects' of the ATLAS system and 'worked jointly with [Tamarack] to develop materials, procedures, and data to be used in support of' the certification applications.'" *Id.* at 1172 (Baker, J., dissenting in part) (brackets in original).

The relationship described is more than that of an adviser, but of an entity that was a partner in the preparation of the system for approval and in the application for that approval. It is therefore palpably different from the analogy the panel majority used to "'normal incidents of [legal] representation' of an in-forum client" being insufficient to "establish minimum contacts." *Id.* at 1164 (quoting *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990)). Unlike a lawyer who provides independent advice or representation, Cranfield united with Tamarack to make ATLAS certification-worthy and then held the certification as the applicant for the STC. Holding the STC has particular salience.

The STC process involves *self-certification* that FAA minimum safety requirements are met. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 804-05 (1984). The applicant for FAA design or modification approval is responsible for conducting all inspections and tests to determine whether the aircraft meets FAA airworthiness requirements. *See* 14 C.F.R.

§§ 21.33, 21.35. Hence, "the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator." *Varig Airlines*, 467 U.S. at 816.

Once that inspection and testing process is completed, the applicant submits the drawings and data about the item, which consists of any inspections or tests necessary to ensure compliance with regulations. *Id.* at 805-07. Compliance with the FAA minimum safety and airworthiness requirements through this certification must occur "before [applicants] market[] their products." *Id.* at 805. The STC signifies that compliance. *Id.* at 806.

The FAA has made *the applicant* responsible for inspecting and certifying compliance with federal aviation regulations through employees "who possess detailed knowledge of an aircraft's design based upon their day-to-day involvement in its development." *Id.* at 807 (citing 49 U.S.C. § 1355).

Although manufacturers are typically the STC holders, a "manufacturer does not automatically become the type certificate holder for an aircraft or aircraft part—the FAA grants type certificates upon application." *Hasler Aviation, L.L.C. v. Aircenter, Inc.*, No. 1:06-CV-180, 2007 WL 2263171, at *4 (E.D. Tenn. Aug. 3, 2007) (citing 14 C.F.R. § 21.15). Regulations permit "any interested person [to] apply for a type certificate." 14 C.F.R. § 21.13. The regulations provide no definition of an "interested person," so at least one federal court expressed doubt, calling it a "poor" argument, that "someone besides a manufacturer could apply, because a non-

manufacturer is ill-equipped to provide the "drawings, data, and information on the model's ability to meet applicable FAA regulations and safety requirements." *Hasler Aviation*, 2007 WL 2263171, at *4. *See also* 14 C.F.R. §§ 21.15(b) (requiring the application include a "three-view drawing of that aircraft and available preliminary basic data"), 21.15(c) (for engine changes, a "description of the engine design features, the engine operating characteristics, and the proposed engine operating limitations."). This process means that Cranfield, as the applicant and STC holder, stepped into Tamarack's shoes in obtaining and maintaining FAA approval and comprised a co-venturer. As such, its connection to Idaho and the process by which the ATLAS system was developed, authorized, and added to aircraft is, as a matter of law, more than minimum and merits reconsideration of the panel majority's personal-jurisdiction ruling.

## CONCLUSION

For the foregoing reasons, this Court should grant reconsideration en banc.

Respectfully submitted,

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Dated: August 17, 2023

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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