THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM UNION COUNTY
Court of Common Pleas
William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000853

Dwayne Thompson, ... Respondent,

v.

Rolling Fog Vapor Company, LLC,

Of whom LG Chem, Ltd. and LG Chem America, Inc. are the..... Petitioners.

PETITIONERS LG CHEM, LTD. AND LG CHEM AMERICA, INC.'S RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

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INTRODUCTION

The Court has subject-matter jurisdiction over this appeal. Respondent ignores that this Court is considering the issues in this appeal after granting a petition for writ of certiorari to determine the meaning and application of § 14-3-330. Under Respondent's argument, this Court would lack subject-matter jurisdiction to review its own prior precedents interpreting the very statute on which this appeal is based. Indeed, this Court has previously recognized that "by its nature, the question of whether an order is immediately appealable is determined on a case by case basis." *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019).

Contrary to Respondent's argument, statutory interpretation is the very province of this Court, which is called upon now to determine whether Petitioners are correct that immediate appeal of an order denying a motion to dismiss for lack of personal jurisdiction should be allowed under §14-3-330 when the absence of constitutionally sufficient minimum contacts is at issue. Here, the lack of appellate guidance led two circuit court judges to reach inconsistent conclusions on the issue of personal jurisdiction when confronted with the exact same facts. This case demonstrates exactly why appellate review is appropriate and necessary.

I. This Court's grant of certiorari to interpret South Carolina law does not violate the separation of powers doctrine.

The parties agree that under South Carolina's governmental system, "the judicial department interprets and declares the laws." (*See* Resp't's Mot. to Dismiss Appeal, at 4 (quoting *State ex re. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).) Here, Petitioners asked this Court to interpret South Carolina Code Section 14-3-330 and to consider whether its prior decisions—such as *Mid-State Distributors, Inc. v. Century Importers*, 310 S.C. 330, 426 S.E.2d 777 (1993))—allows immediate appeal pursuant to § 14-3-330 in these circumstances or should be overruled if it does not. This Court then properly granted certiorari to do just that.

Respondent did not cite one single case to support an argument that this Court lacks subject-matter jurisdiction to interpret § 14-3-330 and decide if its own precedent supports immediate appealability or if precedent should be changed. In fact, South Carolina appellate courts have done just that in numerous cases cited by both parties. *See, e.g.*, *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005); *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997); *Mid-State Distributors*, 310 S.C. 330, 426 S.E.2d 777 (1993); *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004). For this reason alone, Respondent's Motion to Dismiss should be denied.

To the extent Respondent argues that this Court is bound by controlling precedent, citing *Mid-State Distributors*, he inexplicably relies on an Ohio Court of Appeals case; ancient cases such as *Agnew v. Adams*, 24 S.C. 86 (1885) (which has not been cited by any appellate court for any proposition since being overturned by *Mid-State Distributors*); and a list of cases following the 1902 predecessor statute to § 14-3-330—which are not part of the Code but are merely lists of cases citing the statute and do not change the decisions from more current cases finding that cases involving substantial rights are immediately appealable.

II. The underlying orders are immediately appealable under South Carolina Code § 14-3-330.

Section 14-3-330(2) provides that "[a]n order affecting a substantial right" is immediately appealable if it "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action."

A. Respondent does not dispute that the order at issue implicates a substantial right.

As to the first issue, South Carolina appellate courts have previously recognized that an order implicating a party's constitutional rights is immediately appealable because it concerns a substantial right. *See, e.g.*, *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004). Respondent does not argue otherwise in response to Petitioners' arguments on this point in

their Final Brief and has waived any further argument on this point.[1] Instead, Respondent argues only that the second prong is not satisfied, although the only cases Respondent cites in support of that point are from 1872 and 1886 and neither supports Respondent's argument that this Court lacks subject matter jurisdiction to hear this appeal.

B. Under this Court's prior precedents, § 14-3-330 allows an interlocutory appeal when appeal after judgment would effectively prevent the appellate court from correcting the error, as is the case here.

As to the second issue, Respondent incorrectly asserts that Petitioners' do not address this aspect of 14-3-330 in their Final Brief. And yet Respondent then attempts to distinguish the cases cited by Petitioners on this point.

In *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005), for example, the Court found that an order disqualifying a party's counsel of his choice was an immediately appealable order despite the plaintiff-respondent's argument that any error could be corrected on appeal after final judgment. Indeed, Respondent concedes that this Court has previously interpreted § 14-3-330 to be subject to exceptions when appeal after final judgment would effectively prevent the appellate court from correcting the error on appeal, as is the case here.

Here, requiring a foreign defendant to suffer through a trial and final judgment in a court that lacks power over it violates constitutional due process, an error that cannot be adequately remedied by reversal on appeal. Contrary to Respondent's argument that due process in the context of personal jurisdiction only guarantees protection against "judgments," due process protects a foreign defendant from the burden of defending itself in a court that lacks power over it, and once

[1] Respondent has arguably waived his right to file any brief on the merits of this appeal, having failed to file his Respondent's brief after requesting an extension of time to do so by May 22, 2022. Petitioners ask that this Court deny Respondent's Motion to Dismiss, require Respondent to file his brief within 10 days of that denial, and find any failure to do so a clear waiver of Respondent's right to file a merits brief.

deprived, those constitutional rights cannot be restored by simply reversing a judgment on appeal. This alone warrants a finding of finality and allows immediate appealability, as courts in other jurisdictions have recognized in this context. *See, e.g., Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942) ("In other words, a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term."); *see also Scott v. Kemp*, 460 P.3d 1264, 1269 (Ariz. Ct. App. 2020) (Arizona Court of Appeals recognizing that "when the motion to dismiss is based on an absence of jurisdiction, ...an appeal inadequately remedies a trial court's improperly requiring a defense in a matter where it has no jurisdiction"); *Fulbright & Jaworski v. Eighth Jud. Dist. Ct.*, 342 P.3d 997, 1001 (Nev. 2015) ("While an appeal is generally considered to be an adequate legal remedy precluding writ relief, the right to appeal is inadequate to correct an invalid exercise of personal jurisdiction over a defendant."); *Viega GmbH v. Eighth Jud. Dist. Ct.*, 328 P.3d 1152, 1156 (Nev. 2014) ("As no adequate and speedy legal remedy typically exists to correct an invalid exercise of personal jurisdiction, a writ of prohibition is an appropriate method for challenging district court orders when it is alleged that the district court has exceeded its jurisdiction."). And Respondent does not, and cannot, explain how the rights to choice of counsel or mode of trial outweighs the constitutional due process rights at stake in this appeal.

III. South Carolina courts have properly looked to North Carolina cases when addressing cases on immediately appealability as the Court should do here.

While arguing that this Court should not look to North Carolina decisions (as South Carolina appellate courts have frequently done[2]), Respondent instead urges the Court to rely on an

[2] *See, e.g.*, *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 451, 661 S.E.2d 81, 86-87 (2008); *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005); *Shields v. Martin Marietta Corp.*,

unpublished decision by the Ohio Court of Appeals that South Carolina courts have never cited for any reason (and neither has the Ohio Supreme Court).

North Carolina's appealability statute is similar to South Carolina's and likewise permits interlocutory appeals of orders "affecting a substantial right." *See* N.C. Gen. Stat. Ann. § 7A-27(b)(3). Although Respondent is correct that the North Carolina statute allows interlocutory appeals without a specific showing that the order "in effect determines the action and prevents a judgment from which an appeal might be taken," Respondent is incorrect in asserting that North Carolina and Minnesota are the only states that permit immediate appeal of interlocutory orders as a right without requiring a certification or application procedure. Texas, Florida, and New York all permit immediate appeals as a matter of right,[3] in addition to the numerous states that allow discretionary appeals of interlocutory orders deciding jurisdictional issues upon application for certification or motion for leave to appeal.[4]

As the North Carolina Court of Appeals explained in *Hardee ex rel. White v. Lowe's Companies, Inc.*, 640 S.E.2d 445 (N.C. Ct. App. 2007) (table), immediate appeal is permitted when the interlocutory order denying a motion to dismiss for lack of personal jurisdiction "raises questions concerning due process and minimum contacts." *Id.* at *2. This ensures that parties who have less than minimum contacts with the state "will never be forced to trial against their wishes," "promotes judicial economy[,] and protects the constitutional rights of foreign defendants." *Love v. Moore*, 291 S.E.2d 141, 146 (N.C. 1982); *see also Bartlett v. Estate of Burke*, 877 S.E.2d 432

303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991); *Pocisk v. Sea Coast Constr. of Beaufort*, 380 S.C. 584, 589, 671 S.E.2d 98, 101 (Ct. App. 2008) (all looking to North Carolina case law on immediate appeal questions).

[3] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(7); Fla. R. App. P. 9.130(a)(3)(C)(i); N.Y. C.P.L.R. 5701(a)(2)(v).

[4] *See, e.g.*, O.C.G.A § 5-6-34(b) (Georgia); IL R S CT Rule 306(a)(3) (Illinois); N.J. Ct. R. 2:2-4 (New Jersey).

(N.C. Ct. App. 2022) (finding in a products liability case that denial of a motion to dismiss for lack of personal jurisdiction affected a substantial right and was immediately appealable as it involved a question of minimum contacts). The same concerns and points support appealability under South Carolina's appealability statute.

Therefore, in light of the foregoing authorities and the requirement that appealability must be determined on a case-by-case basis, immediate appeal is proper in this narrow circumstance in which the question of constitutional minimum contacts is at issue, and especially when, as here, one circuit judge ruled that Respondent's showing ***was not*** enough to determine whether minimum contacts existed and a second circuit judge then decided the ***same*** showing ***was*** enough.

IV. Allowing immediate appeals of orders denying a motion to dismiss for lack of personal jurisdiction based on issues of minimum contacts will protect important constitutional rights without opening "the floodgates" of immediate appeals.

Respondent contends that allowing immediate appeals of interlocutory orders affecting a substantial right has opened the floodgates in North Carolina to interlocutory appeals. (*See* Resp't's Br. at 19 & Ex. B (*Guide to Appealability of Interlocutory Orders*, Appellate Rules Committee, North Carolina Bar Ass'n publication (May 13, 2022).) Respondent makes the leap of logic that if the majority of appeals in North Carolina result from the substantial right doctrine, that North Carolina appellate courts have been flooded with interlocutory appeals based on its appealability statute. The North Carolina Bar Appellate Committee's Guide says no such thing, and Respondent has provided no facts to back up such an argument. In fact, as the Guide notes, the right to immediate appeal of an order denying a motion to dismiss based on lack of personal jurisdiction "is limited to rulings on 'minimum contacts issues." *See Guide to Appealability of Interlocutory Orders*, III. (A)(2), at pg. 10) (citing *Credit Union Auto Buying Serv. , Inc. v.*

Burkshire Props. Grp. Corp., 776 S.E.2d 737, 739 (2015) and *Love v. Moore*, 291 S.E.2d 141, 146 (1982).)

Moreover, numerous other state court jurisdictions have allowed interlocutory appeals of denials of motions to dismiss for lack of personal jurisdiction, recognizing the importance of the constitutional rights at stake and the inadequacy of appeal after forcing a foreign defendant to defend itself through a trial in a jurisdiction that has no authority over it: **Alabama:** *Ex parte U.S. Bank Nat. Ass'n*, 148 So. 3d 1060, 1064–65 (Ala. 2014) (stating that the use of a discretionary writ of mandamus to appeal an interlocutory order has been limited to "well recognized" situations where there is a clear right in the petitioner to the order sought, including personal jurisdiction); **Alaska:** *Mod. Trailer Sales, Inc. v. Traweek*, 561 P.2d 1192, 1194 (Alaska 1977) (granting discretionary review of a denial of a motion to dismiss for lack of personal jurisdiction because to postpone review until a final judgment would "result in unnecessary delay and expense"); **Arizona:** *Scott v. Kemp*, 460 P.3d 1264, 1269 (Ariz. Ct. App. 2020) (holding that in contrast to the general rule that interlocutory appeals are not allowed for denials of motions to dismiss, special action jurisdiction may be granted for a motion to dismiss for a lack of jurisdiction because an appeal after final judgment would improperly require an individual to defend a suit in a matter where the court does not have jurisdiction); **Delaware:** *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016) (finding on an interlocutory appeal that a foreign corporation's compliance with statutory registration does not constitute implied jurisdiction and reversing a district court decision conferring personal jurisdiction on corporation); **Hawaii:** *In re Guardianship of Carlsmith*, 113 Haw. 211, 222 (Haw. 2007) (recognizing that a lower court may certify for appeal its order denying personal jurisdiction); **Idaho:** *Mann v. High Country Meats, Inc.*, 870 P.2d 1316 (Idaho 1994) (Quoting Idaho Appellate Rule 17(e)(1)(A), and determining "[t]hus this Court can review all

orders entered by the district court prior to entry of the final judgment which involve issues on appeal."); **Indiana:** *Avery v. Purdue University-IPFW*, 49 N.E.3d 195 (Ind. Ct. App. 2016) (unpublished) (accepting an appeal of an interlocutory order regarding a motion to dismiss for lack of personal jurisdiction following a trial court's certification); **Iowa:** *Sioux Pharm, Inc. v. Summit Nutritionals Int'l, Inc.*, 859 N.W.2d 182, 188 (Iowa 2015) (reviewing an interlocutory appeal of an order denying a motion to dismiss for lack of personal jurisdiction after a party timely filed an application under state rules); **Kansas:** *Aeroflex Wichita, Inc. v. Filardo*, 275 P.3d 869 (Kan. 2012) (hearing interlocutory appeal of a trial court's order granting a motion to dismiss for lack of personal jurisdiction upon proper application under appellate rules); **Louisiana**: *Henry v. Ocean Harbor Cas. Ins. Co.*, 2002-1325 (La. App. 4 Cir. 9/18/02); 828 So. 2d 663, 666 (granting defendant's application for a supervisory writ and overturning lower court's denial of the motion to dismiss for lack of personal jurisdiction); **Massachusetts:** *Carlson Corp. v. Univ. of Vermont*, 402 N.E.2d 483, 483 (Mass. 1980) (accepting appeal of an order denying motion to dismiss for lack of personal jurisdiction after petition to the appellate court judge); **Michigan:** *Comm'r of Ins. v. Albino*, 225 Mich. App. 547, 551, 572 N.W.2d 21, 23 (Ct. App. 1997) (noting that as an appeal court, it may grant defendant's interlocutory application for leave to appeal); **Minnesota:** *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 832–33 (Minn. 1995) (describing the rationale for why "a motion to dismiss for lack of personal jurisdiction [is] immediately appealable" as it is "more realistic to view such an order not merely as a retention of an action for trial, but as a determination of right, for a defendant is compelled thereby to take up the burden of litigation in this state that might otherwise be avoided.') (quoting *Hunt v. Nevada State Bank*, 285 Minn. 77, 89, 172 N.W.2d 292, 300 (1969)); **Mississippi:** *Webster v. Fanning*, 311 So. 3d 1157, 1159 (Miss. 2021) (stating the defendant "sought and received permission from [the] Court to file

an interlocutory appeal" of the lower court's denial of the motion to dismiss for lack of personal jurisdiction); **Montana:** *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 443 P.3d 407, 411, *aff'd*, 141 S. Ct. 1017 (2021) (Montana Supreme Court granting writ of supervisory control to review lower court's denial of Ford's motion to dismiss for lack of personal jurisdiction) ("We may exercise supervisory control when "urgency .. . . mak[es] the normal appeal process inadequate," "the case involves purely legal questions," and "[c]onstitutional issues of state-wide importance are involved." Mont. R. App. P. 14(3)(b).); **Nevada**: *Levin v. Second Jud. Dist. Ct. in & for Cnty. of Washoe*, 133 Nev. 1043, 403 P.3d 685 (2017) (unpublished decision) (on an interlocutory appeal to the Nevada Supreme Court, affirming the trial court's decision that it did not have personal jurisdiction over appellant); **New Hampshire:** *Mosier v. Kinley*, 702 A.2d 803, 809 (N.H. 1997) (holding that appeals from denial of a motion to dismiss for lack of personal jurisdiction are governed by a New Hampshire Supreme Court Rule, while retaining discretion to decline appeal); **New Jersey:** *Crespi v. Zeppy*, No. A-2044-20, 2022 WL 815429 (N.J. Super. Ct. App. Div. Mar. 18, 2022) (with leave granted, reviewing interlocutory appeal of an order denying foreign defendant's motion to dismiss for insufficient service of process and lack of personal jurisdiction); **New Mexico:** *Chavez v. Bridgestone Americas Tire Operations, LLC*, 2022-NMSC-006, ¶ 9, 503 P.3d 332, 338 (reversing lower court denials to challenges of personal jurisdiction when the lower court certified the issues for interlocutory appeal); **New York:** *OneWest Bank FSB v. Perla*, 161 N.Y.S.3d 193 (N.Y. App. Div. 2021) ("Rather, our jurisdiction is premised upon CPLR 5501(c), which directs that this Court 'shall review questions of law and questions of fact on an appeal from a[n] ... order of a court of original instance,' as well as the consistent line of cases from this Court holding that an appeal from an order granting a motion to dismiss based upon lack of personal jurisdiction—issued after a hearing—also brings up for review the issue of

whether a hearing was necessary to determine the motion."); **Oregon:** *North Pacific S.S. Co. v. Guarisco*, 647 P.2d 920, 924 n.3 (Or. 1982) ("Where a trial court holds that it has personal jurisdiction over a defendant, we have permitted the defendant to challenge such a ruling either through petition for mandamus or through appeal."); **Pennsylvania:** *Merino v. Repak, B.V.*, 286 A.3d 1249, 1255 (Pa. Super. Ct. 2022) (citing Pa. R. App. P. 311(b) and concluding that appeal from interlocutory order overruling defendant's preliminary objections to personal jurisdiction was proper) (quoting Rule 311(b)(2) of Pennsylvania Rules of Appellate Procedure); **South Dakota:** *Kustom Cycles, Inc. v. Bowyer*, 857 N.W.2d 401, 405 (S.D. 2014) (granting discretionary appeal of a circuit court's denial of motion to dismiss for personal jurisdiction and reversing the lower court's denial); **Tennessee:** *Davis Kidd Booksellers, Inc. v. Day-Impex, Ltd.*, 832 S.W.2d 572, 574 (Tenn. Ct. App. 1992) (finding that interlocutory appeal is warranted and reversing trial court's order denying two foreign defendants' motion to dismiss for personal jurisdiction in products liability matter); **Utah:** *Starways Inc., v. Curry*, 980 P.2d 204 (Utah 1999) (affirming Court of Appeals' decision that upheld district court's denial of defendant's motion to dismiss for personal jurisdiction heard on interlocutory appeal) (Rule 5 of the Utah Appellate Court Rules); **Vermont:** *State v. Atl. Richfield Co.*, 142 A.3d 215 (Vt. 2016) (affirming superior court's decision on an interlocutory appeal by defendant for decision to deny motion to dismiss for lack of personal jurisdiction); **Washington:** *Downing v. Losvar*, 507 P.3d 894 (Wash. Ct. App. 2022) (granting discretionary review over appeal of trial court decision to deny defendant's motion to dismiss for lack of personal jurisdiction); **West Virginia:** *State ex rel. Health Plans v. Nines*, 852 S.E.2d 251, 258 (W.Va. Sup. Ct. App. 2020) ("Where a court lacks jurisdiction over a nonresident defendant, [writ of] prohibition is the appropriate remedy to prevent further prosecution of the suit."); **Wisconsin:** *Paula M.S. v. Neal A.R. (In re Carlin L.S.)*, 593 N.W.2d 486 (Wis. Ct. App. 1999)

(granting leave to appeal from a non-final order of the circuit court denying motion to dismiss action for lack of personal jurisdiction, reversing and remanding); **Wyoming:** *Hopeful v. Etchepare*, LLC, 528 P.3d 414 (Wyo. 2023) (granting defendant's Writ of Review seeking interlocutory review of the district court's orders denying their motion to dismiss for lack of personal jurisdiction, subject matter jurisdiction, and motion to set aside default).

V. The lack of appellate remedies has led to a dearth of precedent to South Carolina lower courts on minimum contacts issues in this lawsuit.

Although Respondent correctly notes that there are many cases involving minimum contacts in general, there has not been another South Carolina appellate decision that addressed the stream-of-commerce doctrine as applied to minimum contacts since *State v. NV Sumatra Tobacco Trading Co.*, 379 S.C. 81, 666, S.E.2d 218 (2008) was decided fifteen years ago. Since *Sumatra* was decided, this one issue has been the basis of six separate lawsuits in South Carolina against LG Chem defendants alone,[5] and has been given significant attention from the United States Supreme Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Daimler AG v. Bauman*, 571 U.S. 117 (2014), and numerous other state and federal courts' decisions. The South Carolina Supreme Court, however, has not had the opportunity to weigh in on this critical issue involving significant due process rights since 2008, leaving the lower courts without guidance.

CONCLUSION

[5] *See Reid Fleming v. LG Chem, Ltd.*, Appellate Case No. 2022-000346); *Joshua Holtzendorff v. LG Chem, Ltd et al.*, Case No. 2018-CP-0201518 (Ct. Comm. Pleas, Aiken Cnty, 2020); *Moore v. Planet Vapor, Inc. et al.*, No. 2018-CP-02884 (Ct. Comm. Pleas, Florence Cnty, 2019); *Nicholas Keith Roberts v. LG Chem, Ltd. et al.*, Case No. Civil Action No. 2020-CP-100912 (Ct. Comm. Pleas, Charleston Cnty, 2020); *Williamson v. Pirates Cove Vapor Lounge, LLC, et al.*, Case No. 2019-CP-07-02270 (Ct. Comm. Pleas, Beaufort Cnty, 2019).

For the foregoing reasons, this Court should deny Respondent's Motion to Dismiss, order Respondent to file his response brief on the merits within 10 days of the denial of the motion, reverse the Court of Appeals' orders dismissing Petitioner LG Chem's and Petitioner LGCAI's appeal based on lack of immediate appealability, and remand for an order dismissing the claims against both Petitioners based on lack of service (as to Petitioner LG Chem only) and lack of personal jurisdiction (as to both Petitioners).

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