FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATT YAMASHITA, *Plaintiff-Appellant*, v. LG CHEM, LTD.; LG CHEM AMERICA, INC., *Defendants-Appellees*, and COILART; GEARBEST.COM; WA FA LA INC.; DOES, Doe LG Entities 1–10; John Does 1–10; Jane Does 1–10; Doe Corporations 1–10; Doe Partnerships 1–10; Doe Limited Liability Companies 1–10; Doe Business Entities 1–10; Doe Governmental Entities 1–10; Doe Unincorporated Associations 1–10, *Defendants.*	No. 20-17512 D.C. No. 1:20-cv-00129-DKW-RT ORDER CERTIFYING QUESTION TO THE HAWAII SUPREME COURT

Appeal from the United States District Court
for the District of Hawaii
Derrick Kahala Watson, District Judge, Presiding

Argued and Submitted January 21, 2022
Honolulu, Hawaii

Filed September 8, 2022

Before: Diarmuid F. O'Scannlain, Eric D. Miller, and Kenneth K. Lee, Circuit Judges.

Order by Judge O'Scannlain;
Dissent by Judge Miller

SUMMARY*

Hawaii Law

The panel certified the following questions to the Hawaii Supreme Court:

> 1. May a Hawaii court assert personal jurisdiction over an out-of-state corporate defendant if the plaintiff's injury "relates to," but does not "arise from," the defendant's in-state acts enumerated in Hawaii's general long-arm statute? *Compare Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), *with* Haw. Rev. Stat. § 634-35.
>
> 2. In light of *Ford Motor Co. v. Montana Eighth Judicial District Court*, does Hawaii's general long-arm statute, Haw. Rev. Stat. § 634-35, permit a Hawaii court to assert personal jurisdiction to the full extent

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

> permitted by the Due Process Clause of the Fourteenth Amendment?

Judge Miller dissented. He would not certify the questions to the state court because the questions are of the panel's own devising and not raised by the parties, they are already answered by state-court precedent, and they will make no difference to the outcome of the case. He would instead affirm the district court's judgment dismissing the case for lack of personal jurisdiction.

ORDER

O'SCANNLAIN, Circuit Judge:

We certify to the Hawaii Supreme Court the questions of Hawaii law set forth in Part I of this order, pursuant to Hawaii Rule of Appellate Procedure 13. The answers to these questions are determinative of the cause pending before this court and there appears to be no clear controlling precedent in the Hawaii judicial decisions.

I

The questions to be answered are:

> 1. May a Hawaii court assert personal jurisdiction over an out-of-state corporate defendant if the plaintiff's injury "relates to," but does not "arise from," the defendant's in-state acts enumerated in Hawaii's general long-arm statute? *Compare Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), *with* Haw. Rev. Stat. § 634-35.
>
> 2. In light of *Ford Motor Co. v. Montana Eighth Judicial District Court*, does Hawaii's general long-arm statute, Haw. Rev. Stat. § 634-35, permit a Hawaii court to assert personal jurisdiction to the full extent permitted by the Due Process Clause of the Fourteenth Amendment?

The Hawaii Supreme Court may rephrase the questions as it deems necessary.

II

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III

A

This products liability suit arises from an injury allegedly suffered by Matt Yamashita, a Hawaii Resident. Yamashita claims that an electronic cigarette and its lithium-ion battery exploded in his mouth, causing severe and permanent injury. Yamashita alleges that the battery was designed, manufactured, and distributed by two corporations: defendants LG Chem, Ltd. ("LG Chem"), and LG Chem America, Inc. ("LG Chem America"). He claims that LG

Chem and LG Chem America mislabeled their battery with incorrect specifications and distributed it to an unidentified third party, who then sold it to Yamashita.

Yamashita filed this action against LG Chem and LG Chem America in Hawaii state court, on grounds of strict products liability, negligence, unjust enrichment, negligent misrepresentation, fraudulent misrepresentation, and violation of Hawaii's state unfair competition statute, Haw. Rev. State. § 480-2. Among other things, Yamashita in his complaint alleged that LG Chem and LG Chem America negligently designed and manufactured the subject battery to be unsafe; he alleged that LG Chem and LG Chem America failed adequately to test the subject battery to ensure its safety; and he alleged that LG Chem and LG Chem America negligently labeled, advertised, and distributed the subject battery by failing to warn consumers it was unsafe. The subject battery was alleged to be an 18650 lithium-ion battery.

LG Chem timely removed from Hawaii state court to the District Court for the District of Hawaii, where LG Chem and LG Chem America timely moved to dismiss Yamashita's complaint for lack of personal jurisdiction. Yamashita opposed the motions and moved for jurisdictional discovery. Based on the allegations, as well as exhibits and declarations submitted by the parties, the district court denied Yamashita's motion for jurisdictional discovery and dismissed Yamashita's claims for lack of personal jurisdiction over LG Chem or LG Chem America. Yamashita timely appealed to this court.

B

According to declarations filed by LG Chem and LG Chem America, both corporations are foreign to Hawaii.

One declaration states that LG Chem is a South Korean company headquartered in Seoul, South Korea. Another declaration indicates that LG Chem America is a subsidiary of LG Chem, incorporated in Delaware, with its principal place of business in Georgia. And LG Chem America's web site lists locations in New Jersey, Illinois, Texas, and California, but not Hawaii.

Yamashita alleges that LG Chem and LG Chem America have conducted a variety of activities in Hawaii related to lithium-ion batteries. For example, Yamashita claims that LG Chem and LG Chem America targeted the Hawaii market by advertising and selling lithium-ion batteries to Hawaii residents for installation in their homes. He also alleges that LG Chem and LG Chem America sold other lithium-ion batteries in Hawaii through big-box retailers. And he claims that Hawaii-based companies sell electric bicycles containing lithium-ion batteries produced by LG Chem. Yamashita also submitted reams of informal evidence that LG Chem and LG Chem America have other miscellaneous connections to Hawaii.

But LG Chem and LG Chem America deny distributing the lithium-ion battery in question to Hawaii, and Yamashita has not produced any evidence to the contrary. The district court concluded that Yamashita's claims did not "arise out of" LG Chem's or LG Chem America's in-state activities because the in-state activities were not the "but for" cause of Yamashita's injury. On the record before us, we tentatively agree that, although the defendants' in-state activities may have *some* relationship to Yamashita's injuries, the relationship is likely not one of causation.

IV

To dispose of Yamashita's appeal, we must decide whether Hawaii courts may exercise personal jurisdiction over LG Chem or LG Chem America. This personal jurisdiction inquiry normally involves two questions, one of state law and one of federal law: first, whether state law permits exercise of jurisdiction; and second, whether the exercise of jurisdiction complies with the Due Process Clause of the Fourteenth Amendment. *See Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003). Where a state's law incorporates the federal Due Clause, the answer to the federal law question may dictate the answer to the state law question. *Id.* (reasoning that, because "California's long-arm statute allows courts to exercise personal jurisdiction over defendants to the extent permitted by the Due Process Clause," the Court "need only determine whether personal jurisdiction . . . would meet the requirements of due process.").

But two factors prevent us from answering these questions in this appeal. First, it is unclear whether Hawaii's general long-arm statute incorporates the federal Due Process Clause. *See* Haw. Rev. Stat. § 634-35. Second, the Supreme Court's interpretation of the Due Process Clause expanded after Hawaii passed its long-arm statute. *See Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021). Therefore, if Hawaii's general long-arm statute incorporates the Due Process Clause, the Supreme Court's evolving interpretations of such Clause necessarily expand the reach of Hawaii's general long-arm statute. However, if Hawaii's general long-arm statute merely borrows from federal law, but does not incorporate it, then the meaning of Hawaii's general long-arm statute is fixed as

it was before *Ford Motor Co.*, notwithstanding the Supreme Court's increasingly permissive understanding of the Due Process Clause. Thus, to resolve this case, we invite the Supreme Court of Hawaii to interpret Hawaii's general long-arm statute, Haw. Rev. Stat. § 634-35, in light of recent Supreme Court precedent.

A

1

"Where, as here, there is no applicable federal statute governing personal jurisdiction, the law of the state in which the district court sits applies." *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1484 (9th Cir. 1993). This case was brought in the District of Hawaii; thus, our exercise of personal jurisdiction is governed by Hawaii law. Hawaii uses a two-step inquiry. A court in Hawaii has personal jurisdiction only "when (1) the defendant's activity falls under the State's long-arm statute, and (2) the application of the statute complies with constitutional due process." *Norris v. Six Flags Theme Parks, Inc.*, 74 P.3d 26, 30 (Haw. 2003), *as corrected* (Aug. 12, 2003) (quoting *Shaw v. North Am. Title Co.*, 876 P.2d 1291, 1295 (1994)). Before analyzing whether exercise of personal jurisdiction violates the federal Due Process Clause, a court "must first determine whether Defendant's activities satisfy the requirements under" Hawaii's general long-arm statute, Haw. Rev. Stat. § 634-35 ("Acts submitting to jurisdiction"). *Norris*, 74 P.3d at 30.

To reiterate the point: the Hawaii state-law inquiry necessarily precedes the constitutional Due Process Clause analysis. If the activity from which the litigation arose does not fall within Hawaii's general long-arm statute, the general long-arm statute does not apply; and it is therefore unnecessary to reach the question of whether "the

application of the statute complies with constitutional due process." *Norris*, 74 P.3d at 30. In other words, when Hawaii's general long-arm statute does not permit the exercise of personal jurisdiction, Hawaii courts decide the personal jurisdiction question on state-law grounds. *See Norris*, 74 P.3d at 32.

2

We cannot determine whether Hawaii's general long-arm statute permits the exercise of personal jurisdiction over LG Chem in this case. As the district court concluded, Yamashita's claims did not "arise out of" LG Chem's or LG Chem America's in-state activities because their in-state activities were not the "but for" cause of Yamashita's injury. ER 28. Hawaii's general long-arm statute indicates by its text that a claim must "arise out of" the in-state activities of the defendant. Haw. Rev. Stat. § 634-35. And Hawaii's cases exclusively apply causal tests. *See Norris.*, 74 P.3d at 32 (asking whether the defendant's in-state activities "led to" or "gave rise to" the cause of action); *Shaw*, 876 P.2d at 1295–97 (contrasting transactions "incidental" to the cause of action with transactions "resulting in" injury to the plaintiff); *Cowan v. First Ins. Co. of Hawaii*, 608 P.2d 394, 400–01 (Haw. 1980) (asking what activities "gave rise to" the cause of action or "led to" the plaintiff's injury, and what the plaintiff did "in response to" the defendant's in-state activity). But the Supreme Court of Hawaii has also reviewed legislative history to find that "Hawaii's long-arm statute . . . was adopted to expand the jurisdiction of the State's courts to the extent permitted by the due process clause of the Fourteenth Amendment." *Cowan*, 608 P.2d at 399 (Haw. 1980).

Hawaii's causal statutory test used to match the test used by the Supreme Court to analyze personal jurisdiction under

the Due Process Clause. Prior to the Supreme Court's 2021 decision in *Ford Motor Co*, each interpretation of Hawaii's long-arm statute would have led this panel to the same conclusion: for a Hawaii court to exercise jurisdiction over a defendant, there must be "at least a but-for causal link between the defendant's local activities and the plaintiff's injuries." *Ford Motor Co.*, 141 S. Ct. at 1034 (Gorsuch, J., concurring); *see also id.* at 1033–34 (Alito, J., concurring) (suggesting that, before *Ford Motor Co.*, Supreme Court precedent required at least some "causal link" or "rough causal connection"). Now, though, the Supreme Court has explained that "some relationships will support jurisdiction without a causal showing." *Id.* at 1026. Indeed, contrary to past practice, the Court observed that it has "never framed the specific jurisdiction inquiry as always requiring proof of causation . . . ." *Id.*; *but see id.* at 1034–1035 (characterizing the test in *Ford Motor Co.* as a "new test"). The Supreme Court made clear in *Ford Motor Co.* that the Due Process Clause does not require a suit to "arise out of" the defendant's forum contacts; it requires only that the suit "*relate to* the defendant's contacts with the forum." *Id.* at 1026 (quoting *Bristol-Meyers Squibb v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017)). This development is in apparent tension with the causal focus of Hawaii's general long-arm statute. *See, e.g.*, *Norris*, 74 P.3d at 32. But it poses no problem if, as the Supreme Court of Hawaii has suggested, the long-arm statute expanded jurisdiction to the full extent permitted by the Due Process Clause. *See Cowan*, 608 P.2d at 644.

It is unclear from Hawaii's cases how the Hawaii Supreme Court would resolve these divergent standards. We cannot determine whether the Hawaii legislature expanded the state's long-arm statute on a one-time basis—to match its understanding of the Due Process Clause at the time,

employing the then-current causal test—or whether the legislature intended indefinitely to tie the long-arm statute to the U.S. Supreme Court's evolving interpretation of the Due Process Clause, effectively "incorporating" any future developments in case law. It is also conceivable that the legislature *intended* to reach the latter result, but that it used language insufficient to succeed in its intent.

We are therefore left with the following questions: May a Hawaii court assert personal jurisdiction over an out-of-state corporate defendant if the plaintiff's injury "relates to," but does not "arise from," the defendant's in-state acts enumerated in Hawaii's general long-arm statute? *Compare Ford Motor Co.*, 141 S. Ct. at 1017, *with* Haw. Rev. Stat. § 634-35. That is, in light of *Ford Motor Co.*, does Hawaii's general long-arm statute, Haw. Rev. Stat. § 634-35, permit a Hawaii court to assert personal jurisdiction to the full extent permitted by the Due Process Clause of the Fourteenth Amendment? Hawaii courts have had no occasion yet to answer these questions, and we cannot discern an answer from their precedents.

B

Hawaii's general long-arm statute provides that:

> Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, the person's personal representative, to the jurisdiction of the courts of this State as to any cause of

> action *arising from* the doing of any of the acts[.]

Haw. Rev. Stat. § 634-35(a) (emphasis added). The statute also enumerates the acts which submit a party to jurisdiction, including "[t]he transaction of business within" Hawaii and "[t]he commission of a tortious act within" Hawaii. *Id.* And not to mince words, the statute reiterates that "[o]nly causes of action *arising from* acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over the defendant is based upon this section." Haw. Rev. Stat. § 634-35(c) (emphasis added).

Although Hawaii passed its general long-arm statute in 1965, the Hawaii courts did not explain it at length until 1980, in *Cowan*. 608 P.2d at 394. The Supreme Court of Hawaii in *Cowan* considered whether it could extend personal jurisdiction to an out-of-state ship broker in a negligence suit brought by Cowan, a Hawaii resident. *Id.* at 397. The broker was not licensed to do business in Hawaii, did not maintain any offices in Hawaii, did not own any property in Hawaii, did not have any agents in Hawaii, and did not deliberately target Hawaii in advertisements. *Id.* at 398. The broker's contacts with the state consisted of an advertisement in a national magazine that was sold and distributed in Hawaii, in addition to the formation of a contract in Hawaii with a Hawaii resident for the sale of a boat located in Hawaii.

We cannot reach a conclusive interpretation of Hawaii's general long-arm statute from the guidance in *Cowan*. True, the Supreme Court of Hawaii noted that the statute "was adopted to expand the jurisdiction of the State's courts to the extent permitted by the due process clause of the Fourteenth Amendment." *Id.* at 399. And the court ultimately

concluded that the exercise of personal jurisdiction satisfied the requirements of the Due Process Clause of the Fourteenth Amendment. *Id.* at 403. That could have resolved the dispute in *Cowan*—if the general long-arm statute always paralleled the Due Process Clause, there would have been no need to analyze separately whether the requirements of the long-arm statute were satisfied. But the court did not bypass that analysis. Instead, the Supreme Court of Hawaii first undertook to determine whether the broker's activities constituted the "transaction of any business" under the general long-arm statute. *Id.* at 399.

To determine whether the broker transacted business in Hawaii, the Supreme Court of Hawaii "examin[ed] all of the defendant's activities within the forum related to the [relevant] cause of action." *Id.* at 399. And in its examination, the court considered only transactions that were causally related to Cowan's claim. The court observed the location of "the duties and obligations *arising from* the contract"; it surveyed what activities "*gave rise to* the [relevant] cause of action"; it considered what Cowan did "*in response to*" the broker's in-state communications; it asked what "initially *led* the plaintiff to contact" the broker, concluding that the broker's "advertisements for the sale of ships *led to* the plaintiff's initial inquiry and eventually to the formation of the contract." *Id.* at 400–01 (emphasis added). The Supreme Court of Hawaii was wholly occupied with the causal relationship between the broker's in-state transactions and Cowan's cause of action.

So, *Cowan* does not decide the question at issue in this case. On one hand, if Hawaii's long-arm statute actually expanded the jurisdiction of the state courts to the extent permitted by the Due Process Clause, the Hawaii Supreme Court's analysis of the long-arm statute in *Cowan* does not

control the outcome here. On the other hand, if the long-arm statute was only adopted with the *intent* of so expanding the jurisdiction of Hawaii state courts, *Cowan* demonstrates that the long-arm statute places independent limits on the exercise of personal jurisdiction—limits that may not track the federal courts' current understanding of the Due Process Clause.

Subsequent cases do not resolve this open question of Hawaii law. The Supreme Court of Hawaii undertook an inquiry in *Shaw*, 876 P.2d 1291, similar to that in *Cowan*. In *Shaw*, as in *Cowan*, the court considered first whether the defendant had triggered the general long-arm statute, before turning to the due process question. *Id.* at 1295–97. The order and structure of the analysis in *Shaw* again suggested that the long-arm statute did work that the due process clause did not. The court again relied on causation, suggesting that transactions "incidental" to the cause of action were not sufficient to trigger jurisdiction under the long-arm statute, *id.* at 1296, whereas transactions "*resulting in*" injury to the plaintiff cleared the statutory bar, *id.*at 1297 (emphasis added). But the court in *Shaw* did not further explain the relationship between Hawaii's general long-arm statute and the Due Process Clause.

More recently, the Supreme Court of Hawaii has found that failure to satisfy the long-arm statute can independently bar personal jurisdiction without any consideration whatsoever of the Due Process Clause. *See Norris*,74 P.3d at 27. In *Norris*, the Supreme Court of Hawaii weighed whether Norris, a Hawaii resident, could sue a California theme park for injuries caused by a roller coaster in California. *Id.* at 26–27. The court held that the California theme park was not subject to personal jurisdiction pursuant to Hawaii's long-arm statute, regardless of whether such

exercise of jurisdiction would satisfy the requirements of the due process clause. *Id.* at 33.

In so holding, the court in *Norris* again focused on whether the "Plaintiff's causes of action *arose from* th[e] activities of [the] Defendants." *Id.* at 32 (emphasis added). The court considered whether the theme park's in-state "business activities with travel agents, provision of brochure to one travel agency, or offer of discount to members of the HSBA *gave rise to* [Norris's] causes of action." *Id.* (emphasis added). It weighed what "activities of [the] Defendants . . . *led to* [the] Plaintiff's causes of action." *Id.* (emphasis added). And it rejected personal jurisdiction under the long-arm statute because Norris "failed to establish that the causes of action *arose from* the transaction of business within" the state of Hawaii. *Id.* (emphasis added).

In sum: Hawaii's precedents can be read three ways. Read one way, Hawaii enacted a general long-arm statute with a fixed scope, reaching only so far as the legislature understood the Due Process Clause of the Fourteenth Amendment to permit when the long-arm statute was enacted in 1965. Read another way, Hawaii enacted a general long-arm statute indexed to the meaning of the Due Process Clause as interpreted by the Supreme Court of the United States, to be read in lockstep with the Supreme Court's most recent understanding of Due Process. Under the third read, which produces the same practical result as the second, Hawaii enacted a general long-arm statute imposing no limits on jurisdiction, the infinite reach of which is restrained only by the guardrails erected by the Supreme Court. By clarifying Hawaii's precedents, the Supreme Court of Hawaii will inform whether *Ford* has extended the reach of Hawaii's long-arm statute or whether the text of the statute limits its reach to causal connections.

C

The Parties in their briefs assumed that after *Ford*, as before it, the Due Process Clause was not more expansive than Hawaii's general long-arm statute. But we are not content to assume the answer to an antecedent state-law question for the purpose of deciding a novel constitutional question.

The Hawaii Supreme Court's interpretation of Hawaii's general long-arm statute would guide and likely determine our disposition of this case. If Hawaii's general long-arm statute does not reach as far as *Ford* permits, then the district court did not err in denying Yamashita jurisdictional discovery and dismissing Yamashita's complaint for want of personal jurisdiction, regardless of whether the exercise of such jurisdiction would be permitted under *Ford*. However, If Hawaii's general long-arm statute would reach as far as the Due Process Clause permits under *Ford*, or further, we would need to decide whether exercise of jurisdiction would comply with Due Process here—or at the very least, whether the district court abused its discretion by denying Yamashita jurisdictional discovery under an erroneous understanding of the Due Process Clause. *Cf. Lara v. First Natl. Ins. Co. of Am.*, 25 F.4th 1134, 1138 (9th Cir. 2022) ("[T]he district court never has discretion to get the law wrong."). We expressly decline to answer those constitutional questions before seeking guidance from the Hawaii Supreme Court.

Both "the novelty of the question and the great unsettlement" of state law make certification appropriate in this case. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). To our knowledge, no Hawaii court has yet opined on whether its long-arm statute reaches as far as the Due

Process Clause would permit after *Ford Motor Co.*[1] Thus, "there is no clear controlling precedent in the Hawaii judicial decisions." *See* Haw. R. App. P. 13(a). The answer to the question would also settle an important issue of Hawaii state law. Resolution of this issue may dictate the outcome of any case in which a Hawaii plaintiff seeks to hale an out-of-state defendant into a state or federal court in Hawaii. The answer may inform Hawaii legislators who wish to expand or contract the state's general long-arm statute. Just as importantly, each out-of-state corporation will be put on notice as to whether its activities in Hawaii necessarily submit it to jurisdiction in the Hawaii courts.

Hawaii's answer to our certified questions would also be "determinative of the cause" before us because the question is "potentially controlling." *See* Haw. R. App. P. 13(a); *McKesson v. Doe*, 141 S. Ct. 48, 50–51 (2020) (per curiam). A question of law is "determinative," or "dispositive," if at least one answer to the question would completely dictate the result in a case and therefore resolve the dispute. *See McKesson*, 141 S. Ct. at 50–51 (citing La. Sup. Ct. Rule 12, § 1 (2019)). In *McKesson*, the Supreme Court reasoned that a question of Louisiana law was "potentially controlling" depending on the answer to the question; one answer would resolve the case, whereas a different answer would require a federal court to proceed to a question of federal constitutional law. *Id.* at 50–51. Therefore, the Supreme Court admonished the Court of Appeals that it should "first seek[] guidance on potentially controlling [state] law from the [state] Supreme Court." *Id.* at 51. The same is true here: if Hawaii's long-arm statute codifies the 1965 but-for causation standard for personal jurisdiction, this dispute is

[1] As of the filing of this order, it appears that no Hawaii court has yet cited *Ford Motor Co.*

resolved without proceeding to the federal due process question. And Hawaii's certification statute is no narrower than the Louisiana certification statute at issue in *McKesson*. *Compare* La. Sup. Ct. Rule 12, § 1 (2019) (permitting the Supreme Court of Louisiana to answer certified "questions or propositions of law of this state which are determinative of said cause *independently of any other questions involved in said case*) (emphasis added) *with* Haw. R. App. P. 13(a) (permitting the Hawaii Supreme Court to answer a certified "question concerning the law of Hawaii that is determinative of the cause").

This case is therefore among the "exceptional instances" wherein "certification is advisable before addressing a constitutional issue." *McKesson*, 141 S. Ct. at 51. The Supreme Court in *Ford Motor Co.* announced a general rule. But this case likely presents a question not at issue in *Ford*: what is a product? If Hawaii's long-arm statute would reach LG Chem or LG Chem America, we may need to decide whether all lithium-ion batteries are the same "product" for the purposes of *Ford*; or whether a cell within a larger battery constitutes a product; or whether solar batteries and e-cigarette batteries are sufficiently related. Because they implicate personal jurisdiction, these are not mere technical questions; after *Ford*, they are constitutional questions. And traditionally, "a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *City of Los Angeles v. County of Kern*, 581 F.3d 841, 846 (9th Cir. 2009) (internal citations and quotations omitted). We would thus consider whether Hawaii's long-arm statute permits the

exercise of jurisdiction before venturing into uncharted constitutional territory.

Although only state courts may issue authoritative interpretations of state law, parties and lower courts often heed the Ninth Circuit's state-law musings. By assuming the answer to an important and novel state-law question, our Court would inadvertently infringe the sovereign power of a state in denying the state's courts' an opportunity first to answer the question. And should a future case arise in the Ninth Circuit, it is almost certain that our Court will simply cite back to its first case to consider the issue, without even considering certification. If the question involves jurisdiction, our Court's opinion may even be the last word on the matter, at least for quite some time. Because cases involving personal jurisdiction over nonresidents are almost[2] necessarily cases in diversity, there is a chance that any such cases end up in federal court—thereby indefinitely denying the state an opportunity to pass upon its own law. *Cf. Kremen v. Cohen*, 325 F.3d 1035, 1053 (9th Cir. 2003) (Kozinski, J., dissenting) (arguing that it was unnecessary to certify a question that would certainly "come up in state court soon enough"). (Perhaps this explains why the Hawaii Supreme Court has very few precedents interpreting Hawaii's own long-arm statute in the last fifty-seven years.)

Therefore, we opt not to deprive Hawaii of this opportunity, potentially rare, to interpret its own law of personal jurisdiction. As we have said, "[i]n a case such as

[2] How long will it be before a nonresident plaintiff sues a non-diverse defendant in Hawaii court? We simply don't know, of course. More likely, Hawaii courts will need to wait until a Hawaii plaintiff brings a suit worth $75,000 or less against a nonresident defendant in Hawaii state court.

this one that raises a new and substantial issue of state law in an arena that will have broad application, the spirit of comity and federalism cause us to seek certification." *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003). Out of respect for the sovereignty of the state of Hawaii, we invite the Supreme Court of Hawaii first to decide the scope of its long-arm statute after *Ford*.[3]

For the foregoing reasons, we certify the questions set forth in part I to the Supreme Court of Hawaii.

V

In light of our decision to certify the questions set forth above, submission of this case is withdrawn, and all proceedings in this court are stayed pending the Hawaii Supreme Court's decision whether it will accept review and, if so, receipt of the answer to the certified question. The Clerk is directed administratively to close this docket pending further order. The parties shall notify the Clerk of this court within one week after the Hawaii Supreme Court accepts or rejects the certified questions, and again within one week after the Hawaii Supreme Court renders its opinion if accepted. The panel will resume control and jurisdiction upon receipt of an answer to the certified questions or upon the Hawaii Supreme Court's decision to decline to answer the certified questions. Upon request of the Hawaii Supreme Court, and as the Hawaii Supreme Court deems necessary,

[3] Of course, the Supreme Court of Hawaii may choose to decline our invitation for any number of reasons. If so, we stand ready to do our level best in this case, as in any other.

the Clerk of this court shall also transmit the original or copies of portions of the record.

IT IS SO ORDERED.

/s/ Diarmuid F. O'Scannlain
Diarmuid F. O'Scannlain, Circuit Judge

MILLER, Circuit Judge, dissenting:

Matt Yamashita purchased a battery in Hawaii and was injured when it exploded inside an electronic cigarette. He alleges that the battery at issue, an "18650 lithium-ion cell," was manufactured by LG Chem, Ltd., a South Korean company with no employees in Hawaii. LG Chem sells 18650 lithium-ion cells to manufacturers that incorporate them into other products. It does not sell them to consumers; it has never advertised or sold them in Hawaii; and it has no relationship with any Hawaii distributor related to the sale of lithium-ion cells. Yamashita nevertheless sued LG Chem in Hawaii. (He also sued its subsidiary, LG Chem America, Inc., but nothing in the case turns on the distinction between the two companies, so I will focus on the parent company.) The district court correctly dismissed the complaint for lack of personal jurisdiction, and I would affirm its judgment.

A federal court sitting in diversity may exercise personal jurisdiction only if (1) the state long-arm statute allows the exercise of personal jurisdiction, and (2) the exercise of personal jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment. *Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1065 (9th Cir. 1990). In this case, the parties agree that Hawaii's long-arm statute extends to the limits of the Due Process Clause, which means that the

controlling question is the federal one—that is, whether LG Chem's contacts with Hawaii, such as they are, are sufficient to establish personal jurisdiction. But rather than answer that question, the court has chosen to ask the Hawaii Supreme Court to opine on the state-law question, which neither party has raised. Certification of that question will not promote the efficient resolution of this case, and the certification order does not satisfy the standards of Hawaii law.

As a starting point, it bears emphasizing that no party in this case requested certification—not before the district court and not before this court. Although that is not necessarily determinative of whether certification is appropriate, we have recognized that it is highly relevant. In *Hinojos v. Kohl's Corp.*, for example, we expressed skepticism of belated requests for certification that come from a party who has litigated the state-law question in district court and received an unfavorable result. 718 F.3d 1098, 1108–09 (9th Cir. 2013). We likewise ought to hesitate before sending the parties on a detour to state court when neither one of them has expressed any interest in taking the trip. *See McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) (per curiam) (noting that certification "can prolong the dispute and increase the expenses incurred by the parties," and that it is appropriate only in "exceptional instances").

That is especially true here because these parties had good reason not to seek certification: They do not disagree about the answer to the certified question. To the contrary, LG Chem—the only party that might benefit from a narrower reading of the long-arm statute—affirmatively waived such a reading. In its brief, which was filed after the Supreme Court's decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), LG Chem argued that "Hawaii's long-arm statute . . . authorizes

jurisdiction to the extent permitted by due process." Yamashita agreed, saying that "Hawai'i's long-arm statute is co-extensive with federal due process."

In nevertheless certifying the question, the court disregards the Supreme Court's admonition that "the principle of party presentation" should ordinarily control the scope of the issues we consider. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). "The premise of our adversarial system," the Court has explained, "is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *NASA v. Nelson*, 562 U.S. 134, 147 n.10 (2011) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)). That is not merely an abstract or theoretical concern; it raises a practical problem in this case. In Hawaii, as in most places, an argument that is not timely raised by a party "will be deemed to have been waived on appeal," and a court will not normally consider it. *Tagupa v. VIPDesk*, 353 P.3d 1010, 1016 n.10 (Haw. 2015) (quoting *Kemp v. State of Haw. Child Support Enf't Agency*, 141 P.3d 1014, 1038 (Haw. 2006)). In light of that rule, it is unclear how the Hawaii Supreme Court will be able to answer the certified question. Perhaps the court will allow LG Chem to file a new brief arguing—in direct contradiction to what LG Chem has said so far in this litigation—that the Hawaii long-arm statute does not extend to the limits of the Due Process Clause. Or perhaps the court will appoint an amicus to advance that argument. But if it adheres to its precedent on waiver, it will be forced to conclude that the argument is not properly before it.

Even setting aside that problem, the certification order does not satisfy the requirements of Hawaii law. The Hawaii

Supreme Court may answer a certified question only when "there is no clear controlling precedent in the Hawai'i judicial decisions" and the question at issue "is determinative of the cause." Haw. R. App. P. 13(a). Neither condition is satisfied here.

In a "clear controlling precedent," the Supreme Court of Hawaii has already answered the certified question. (Perhaps that is why the parties do not disagree about the answer.) In *Cowan v. First Insurance Co. of Hawaii*, the Hawaii Supreme Court expressly stated that the long-arm statute "was adopted to expand the jurisdiction of the State's courts to the extent permitted by the due process clause of the Fourteenth Amendment." 608 P.2d 394, 399 (Haw. 1980).

The certification order suggests that *Cowan* might not decide the question after all, but it does not identify any case in which a Hawaii court has read the long-arm statute *not* to extend to the limits of the Due Process Clause. The closest it comes is *Norris v. Six Flags Theme Parks, Inc.*, in which the Hawaii Supreme Court resolved the personal jurisdiction question on state-law grounds. 74 P.3d 26 (Haw. 2003). The plaintiff in that case was a Hawaii resident injured in an amusement park in California; the operator of the park had no presence in Hawaii, and it had no contact with that State other than advertising in national publications and maintaining a website. *Id.* at 32. In those circumstances, due process plainly would not allow Hawaii to exercise personal jurisdiction, and indeed the Hawaii Supreme Court supported its conclusion by citing several federal cases in which courts had applied the Due Process Clause. *Id.* (citing *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 337 (5th Cir. 1999); *Coastal Video Commc'ns, Corp. v. Staywell Corp.*, 59 F. Supp. 2d 562, 566 (E.D. Va. 1999); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

Norris thus casts no doubt on the continuing validity of the definitive statement in *Cowan*.

The Hawaii Supreme Court is of course free to change its interpretation of state law, but even if it does so, the answer to the certified question will not be "determinative of the cause." Haw. R. App. P. 13(a). In this case, the exercise of personal jurisdiction would be inconsistent with the Due Process Clause, and therefore the scope of the Hawaii long-arm statute is irrelevant to the outcome. In other words, no matter what the Hawaii Supreme Court says about state law, the district court cannot exercise personal jurisdiction over LG Chem.

For an exercise of specific personal jurisdiction to be consistent with the Due Process Clause, two requirements must be satisfied. First, the defendant "must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.'" *Ford Motor Co.*, 141 S. Ct. at 1024–25 (alteration in original) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Second, the plaintiff's claims "'must arise out of or relate to the defendant's contacts' with the forum." *Id.* at 1025 (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017)).

Even assuming that LG Chem has sufficient contacts with Hawaii to satisfy the first requirement, those contacts in no way relate to Yamashita's claims. *See Ford*, 141 S. Ct. at 1026 (explaining that "relate to" "does not mean anything goes" and still "incorporates real limits"). LG Chem's alleged contacts with Hawaii include sales of batteries for solar-energy systems (not 18650 lithium-ion cells), sales of battery-containing consumer electronics products by other manufacturers (not LG Chem), shipments of batteries and petrochemicals through the Port of Honolulu (not for sale to

Hawaii consumers), and visits to Hawaii by sales representatives and trainers (for solar-energy and industrial products unrelated to 18650 lithium-ion cells). Those contacts have no relationship to Yamashita's claims, and the certification order does not attempt to show that they do.

Instead, it avoids engaging with the due-process issue, asserting that "the Hawaii state-law inquiry necessarily precedes the constitutional Due Process Clause analysis." To the extent the certification order suggests that we are somehow required to resolve issues of state law before we can consider due process, it is reminiscent of the rigid sequencing requirement that once applied to the two-step analysis of qualified immunity, in which courts had to decide whether a right had been violated before they could consider whether the right was clearly established. *See Saucier v. Katz*, 533 U.S. 194, 200–01 (2001), *overruled by Pearson v. Callahan*, 555 U.S. 223 (2009). The Supreme Court abandoned that requirement as unworkable, recognizing that it is generally inappropriate "to mandate the order of decision that . . . courts must follow." *Pearson*, 555 U.S. at 241. So far as I am aware, no court has ever recognized such a requirement in this context.

The canon of constitutional avoidance, which the certification order invokes, should not dictate the sequencing of our analysis here. That canon does not require a federal court to avoid every potential constitutional question, regardless of its merits. Rather, "as the Supreme Court has noted repeatedly when formulating the canon of constitutional avoidance, the rule applies when the constitutional issue at hand is a substantial one." *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1106 (9th Cir. 2001); *see United States v. Davis*, 139 S. Ct. 2319, 2332 n.6 (2019) (describing the rule as requiring courts to "construe ambiguous statutes

to avoid the need even to address *serious* questions about their constitutionality" (emphasis added)). Courts need not avoid deciding an "insubstantial . . . or patently incorrect constitutional argument." *Kim Ho Ma*, 257 F.3d at 1106 n.17. But here, that is what certification would serve to avoid.

Finally, there is no basis for the fear expressed in the certification order that in addressing the state-law issue, we will somehow "infringe the sovereign power of a state in denying the state's courts an opportunity first to answer the question." Never mind that the Hawaii courts have already answered the state-law question; our decision will not prevent the Hawaii courts—or anyone else—from answering it. To return to the point with which I began, the parties in this case do not disagree about Hawaii law. A decision by this court that simply accepts their agreement will not constrain the analysis of the question in a future case in which it is properly presented. *See United States v. Ped*, 943 F.3d 427, 434 (9th Cir. 2019) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (quoting *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004))).

* * *

We have held that the decision to certify should be guided by a "spirit of comity and federalism." *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003). Comity entails mutual respect, and it is hardly respectful to our state-court colleagues to ask them to set aside their own work to answer a question that is entirely of our own devising, that is already answered by state-court precedent, and that will make no difference to the outcome of the case. I would instead affirm the district court's judgment dismissing the complaint.