S183365

IN THE

SUPREME COURT OF CALIFORNIA

WALTER GREB, et al.,

Plaintiffs, Appellants, and Petitioners,

v.

DIAMOND INTERNATIONAL CORPORATION,

Defendant and Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION ONE, NO. A125472;
ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO,
HONORABLE PETER J. BUSCH, JUDGE, NO. CGC-08-274989

PETITIONERS' OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

1. Can a foreign (Delaware) corporation, whose defective product that it marketed in California causes and will continue to cause injuries to California citizens, escape liability for those yet-to-manifest injuries by dissolving itself and relying on a Delaware law that cuts off post-dissolution suits after three years—or does California law (Corporations Code section 2010) apply to this California case, allowing post-dissolution suits without time limitation?

INTRODUCTION AND REASONS TO REVERSE

This Court has granted review of the Opinion below to address a simple issue: whether California Corporations Code section 2010, which provides that "corporation[s]" that dissolve can still be sued for pre-dissolution misconduct, without temporal limitation, applies not only to domestic California corporations but also to foreign corporations that transacted business in California.

Defendant Diamond International Corporation ("Diamond") was a "foreign" corporation, incorporated in Delaware in the 1930s. Joint Appendix on Appeal ("JA") 35:13, 46-48; *see* Corps. Code § 171. For almost 50 years, Diamond manufactured products, including asbestos products, and sold them in California pursuant to a state Certificate of Qualification to transact repeated business here. *See* Petitioner's Request for Judicial Notice in Support of Opening Brief on the Merits ("RJN 2"),[1] Exhs. A, B at 3:14-15, 4:1-7; Corps. Code §§ 2100, 2105-2106. During this time, numerous Californians including plaintiff Walter Greb were exposed to Diamond's defective asbestos products—but would not develop diseases for decades.

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[1] For clarity, because the accompanying RJN is petitioners' second RJN in this Court, we refer to it in this brief as "RJN 2."

In the 1980s, Diamond effectively ceased business operations but remained incorporated in Delaware. *See* RJN 2, Exh. B at 3:25-27. For the next two decades, workers exposed to Diamond's asbestos products began to get sick and to sue Diamond, with increasing frequency. *See* RJN 2, Exh. C. As these suits increased, Diamond in 2005 suddenly dissolved itself in Delaware (effective July 1, 2005). JA 46-48.

Just over three years later, Walter developed terminal mesothelioma. In December 2008, Walter and his wife Karen Greb sued Diamond for its past misconduct in exposing Walter to asbestos.[2] JA 1. Although Diamond is "dissolved," plaintiffs seek compensation from Diamond's multi-million dollar insurance policies that admittedly cover plaintiffs' claims. *See* RJN 2, Exh. B at 17:24-18:27; Corps. Code § 2011 (claims against "a dissolved corporation" may seek compensation from "any insurance assets held by the corporation").

Diamond demurred to plaintiffs' complaint on the ground that Diamond cannot be sued under Delaware law, which provides that, after dissolution, corporations may be sued for only three years. JA 36-37 (*citing* 8 Del. C. § 278).

But California law is different. Here, dissolving a corporation does not cut off liability for past corporate misconduct. *See* Corps. Code § 2010, subd. (a) (dissolved corporation "continues to exist for the purpose of . . . defending actions").

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[2] Walter died in September 2009, while the appeal below was pending. By order of the Court of Appeal, his wife Karen in October 2009 was "substituted as personal representative/successor in interest of Walter Greb." For brevity and consistency with the Opinion below, we continue to refer to petitioners as Walter and Karen.

Diamond contends—and the trial and appellate courts below ruled—that California's section 2010 applies only to "domestic" (California) corporations and not to any "foreign" corporations. JA 37-40, 114-116; Opinion at 1, 12-15. Thus, the Opinion below rules, Delaware law governs and now cuts off Diamond's liability for all pre-dissolution misconduct. Opinion at 1.

By contrast, plaintiffs contend that section 2010 does apply to those foreign corporations, like Diamond, that transact intrastate business in California.[3]

And that conclusion—that section 2010 applies to Diamond—is compelled by analysis of the Corporations Code, the California Constitution, and policy considerations:

1. The Corporations Code: Section 2010 expressly applies to "corporation[s]," without specifying "foreign" or "domestic" corporations or limiting its application to either type. But the Opinion below holds that "corporation" in section 2010 means only domestic corporations, based on the appellate court's construction of two other definitional provisions in the same Division of the Code—sections 102 and 162. Opinion at 12-15. According to the Opinion, those sections dictate that "the provisions of the Corporations Code apply to domestic corporations only." Opinion at 12, 13-14.

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[3] Thus, plaintiffs contend that this case requires a choice-of-law analysis to determine whether Delaware law (three-year limit) or California law (no time limit) governs—and that California law prevails under the governmental-interest analysis. *See* Appellant's Opening Brief on Appeal ("AOB") at 21-25. Although this issue was fully briefed, the courts below did not rule on it. This Court should either rule that California law governs or remand this action for an initial ruling on the choice-of-law issue. *See* Argument Part II below.

But the Opinion is wrong. The relevant language of sections 102 and 162 limits the term "corporation" to "corporations organized under this division" (*i.e.*, Division 1, California's "General Corporation Law," Corps. Code §§ 100-2319). But that language is not synonymous with a "domestic" corporation, which the Code defines as a corporation "formed under the laws of this state" (not one "organized under this division"). Corps Code § 167 (emphasis added). And section 102 effectively provides that the phrase "corporations organized under this division" does not mean "domestic" corporations, applying the Code to both "corporations organized under this division" and specified "domestic corporations"—an additional designation that would be unnecessary if "organized under this division" meant "domestic." *See* Corps Code § 102, subd. (a).

Instead, "organized under this division" is correctly and reasonably interpreted to mean any corporation, domestic or foreign, that follows the organizational procedures set forth in Division 1. And among those organizational procedures in Division 1 are the provisions of Chapter 21, "Foreign Corporations" (sections 2100-2117.1), which specify requirements for foreign corporations to transact repeated business in California. Specifically, to "transact" business in California (*i.e.*, "repeated and successive" California business, Corps. Code § 191), a foreign corporation must organize itself to comply with California law by, *inter alia*, (1) obtaining a "Certificate of Qualification" to transact business in California (Corps. Code § 2105(a)), (2) naming an agent for California service of process (§ 2105(a)(4)), (3) giving its "irrevocable consent to service of process" in California (§ 2105(a) (5)(A)), (4) paying "fees required by law" to transact business here (§ 2106(a), (5) using a corporate name that does not conflict with another California business (§ 2106(b)), and (6) continually

updating and amending its California filings to reflect any change in its name, principal office, agent for service of process, etc. (§ 2107).[4]

This is the only reasonable construction of sections 102 and 162: that the provisions of the Code apply to all "corporations," domestic or foreign, that are "organized under" Division 1—including by following the requirements of Chapter 21 for a foreign corporation to "transact intrastate business" in California. *See* Argument Part I.B below.

2. The California Constitution: Next, even if foreign corporations that transact intrastate business here are not "organized under" Division 1 (and thus subject to the Division per sections 102 and 162), this Court should still hold that section 2010 applies to such corporations under the California constitutional analysis set forth in the 1986 appellate-court decision in *North American Asbestos Corp. v. Superior Court (Young)* (1986) 180 Cal.App.3d 902 ("*North American II*").

In short, *North American II* holds that section 2010 must apply to foreign corporations that transact business here under the California Constitution, which guarantees that foreign corporations cannot "transact business" here under "more favorable conditions" than apply to domestic corporations. *See id.* at 907-909; Corps. Code § 191 ("transact business" = "repeated and successive" business here). Under section 2010, domestic corporations cannot limit their liability by dissolving. But if section 2010 does not apply to foreign corporations transacting business here, then such foreign corporations can (if their state of incorporation provides for it)

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[4] Here, Diamond for decades followed these procedures to obtain and maintain a certificate of qualification to transact business in California. *See* RJN 2, Exhs. A, B at 3-4; Factual and Procedural History, Part A, below.

escape liability by dissolving—without question a more "favorable" condition. *See* Argument Part I.C below.

3. Policy considerations: Finally, section 2010 should be construed to apply to both domestic and foreign corporations to promote California's policy of protecting its citizens injured by defective products.

Other states may place a premium on the protection of corporate interests. Indeed, Delaware has adopted a corporate-dissolution law that allows a manufacturer of a defective product, instead of taking steps to prevent any future injuries (such as by a product recall), to choose reasonably choose to dissolve, knowing that it will soon cut off any future liability.

But that is not the policy of California. Our Legislature has instead placed a premium on protecting its citizens, including by placing no temporal limits on post-dissolution suits against culpable corporate actors. That policy is advanced only by applying section 2010 to all corporations who choose to transact business here. And the policy concern is particularly acute in cases, like this one, where the defect in the manufacturer's product causes injuries decades later. Under the Delaware approach, a manufacturer who knows that its product will likely injure dozens or hundreds or even thousands of people in the future can escape all liability for its past misconduct by simply dissolving itself long before any injuries occur (here, before any diseases manifest).

That is not the policy of California. Here, where the governing California statute is at most ambiguous about whether it applies to foreign corporations, California policy demands that the statute be interpreted to apply to all foreign corporations who choose to transact intrastate business by selling their defective products here. *See* Argument Part I.D below.

FACTUAL AND PROCEDURAL HISTORY

A. Factual background: Delaware corporation Diamond transacted business in California, exposed plaintiff and others to its asbestos, left California, and then later dissolved itself as lawsuits mounted—all before plaintiff's disease manifested.

In this action that was dismissed on demurrer, plaintiffs Walter and Karen Greb allege that defendant Diamond manufactured asbestos-containing products to which Walter was exposed while working at U.C. Davis from the 1950s to the 1970s. JA 3:20-21, 4:15, 7:22-9:1, 29:5-6.

Although Diamond was incorporated in Delaware (JA 46-48), Diamond exposed Walter to its defective product at U.C. Davis because Diamond for almost 50 years actively transacted business in California—*i.e.*, Diamond came here to do "repeated and successive" business. *See* Corps. Code § 191. To do so, Diamond followed the statutory procedures of Division 1 of the California Corporations Code, obtaining the required Certificate of Qualification to "transact intrastate business" here. *See* RJN 2, Exh. A, B at 3:14-15, 4:1-7; *see also* Corps. Code §§ 2105-2106.

In the 1980s—after Greb was allegedly exposed to Diamond's asbestos but long before his latent asbestos disease was to manifest—Diamond ceased doing business. In 1983, Diamond stopped doing business in California, officially "surrendering" its qualification to transact business here pursuant to Corporations Code section 2112. *See* RJN 2, Exh. A (last page). And by 1987, Diamond was completely out of business, with no operating assets or employees anywhere. *See* RJN 2, Exh. B at 3:25-27 (Diamond's admission in General Order interrogatory answers).

But Diamond did not then dissolve itself, remaining incorporated in Delaware for two more decades. *See* JA 46-48.

As the years passed, however, people who had been exposed to Diamond's asbestos products began to get sick—and to file suit. In San Francisco alone (reflecting Diamond's past business activity in Northern California), suits against Diamond climbed from one in 2001 to four in 2003 and 2005 to six in 2007. *See* RJN 2, Exh. C (S.F. Superior Court docket).

Diamond has insurance to cover these asbestos claims. In responses to General Order interrogatories in San Francisco, Diamond has admitted to at least $10 million in insurance coverage for asbestos claims like plaintiffs' claims here. RJN 2, Exh. B at 17-18 (Response to Interrogatory No. 26).

But faced with the growing wave of suits, Diamond—or, likely, Diamond's insurers—moved under Delaware law to "dissolve" Diamond effective July 1, 2005. JA 46-48. Under Delaware law, this dissolution cut off lawsuits against Diamond three years later—*i.e.*, on July 1, 2008.

Walter was then diagnosed with terminal mesothelioma, filing suit by the end of 2008, as discussed below. JA 1-17.

B. The trial court sustained Diamond's demurrer to plaintiffs' complaint on the ground that Diamond, having dissolved itself, cannot be sued under Delaware law.

On December 22, 2008, plaintiffs filed their complaint against Diamond (and other defendants), alleging against Diamond causes of action for negligence and strict product liability. JA 1-17. Plaintiffs' accompanying Preliminary Fact Sheet stated that Walter was exposed to asbestos at four locations, including from 1953 to 1983 at U.C. Davis. JA 29:3-6.

Although Diamond is dissolved, plaintiffs seek compensation from Diamond's multi-million insurance coverage, as authorized by Corporations Code section 2011. *See* RJN 2, Exh. B at 17-18; Corps. Code § 2011.

On February 13, 2009, Diamond demurred to the complaint on the ground that Diamond "lacks the capacity to be sued." JA 31:25-28. According to Diamond, (1) Delaware Corporations Code section 278 allows a corporation to be sued after dissolution for only three years, and (2) California's post-dissolution law (Corporations Code section 2010) does not apply to foreign corporations like Diamond, so that no conflict between California and Delaware law exists, so that (3) Delaware law alone governs and bars any suit against Diamond. JA 36-39. Diamond also argued that, if the state laws conflict, Delaware law should be applied over California law (under governmental-interest analysis). JA 40-41.

Plaintiffs opposed the demurrer, arguing that (1) section 2010 applies to foreign corporations like Diamond, and (2) choice of law analysis favors applying California law. JA 73-76.

On May 1, 2009, the trial court sustained Diamond's demurrer without leave to amend, ruling that "section 2010 does not apply to Diamond," so that "there is no conflict" of law and Delaware law applies and bars the action. JA 116:19-22. The court therefore did not address the choice-of-law issue. *Id.* The court then dismissed the action with prejudice. JA 118.

C. The appellate court affirmed, ruling that the Corporations Code generally applies only to "domestic" corporations.

Plaintiffs timely appealed, arguing again that (1) section 2010 applies to foreign corporations like Diamond, and (2) choice-of-law analysis requires application of California law. JA 129; AOB at 13-26.

The appellate court affirmed, ruling that "section 2010 does not apply to foreign corporations" (Opinion at 12-15) for the following stated reasons:

1. Corporations Code sections 102 and 162, applying the Code generally to "corporations organized under this division" (Division 1, sections 100-2319), "evince a clear intent to limit the Corporations Code's general application to domestic corporations." Opinion at 12-14 (emphasis added). According to the court, applying section 2010 to any foreign corporations "would render" sections 102 and 162 "meaningless." Opinion at 15.

2. Section 2115 "identifies" specific Corporations Code chapters that "apply to foreign corporations meeting certain threshold requirements" but "does not mention section 2010." Opinion at 14. According to the court, that provision shows that if the Legislature had intended section 2010 to apply to foreign corporations, "it would have stated so explicitly." Opinion at 14.

Because the appellate court held that section 2010 does not apply to Diamond, the court did not address plaintiffs' choice-of-law arguments.

D. The Opinion presents a conflict among the Courts of Appeal.

As plaintiffs noted in their petition for review here, the Opinion below adds to an extant conflict in the appellate courts on whether section 2010 applies to foreign corporations like Diamond:

1. *North American II* holds that section 2010 "conflicts with, and prevails over, foreign corporation laws that limit survival periods of dissolved corporations." Opinion at 8; *see North American II*, 180 Cal.App.3d at 909-910.

2. *Riley v. Fitzgerald* (1986) 178 Cal.App.3d 871 (*"Riley"*) holds that section 2010 "does not apply to foreign dissolved corporations." Opinion at 8; *see Riley*, 178 Cal.App.3d at 876-877.

3. The Opinion below follows *Riley*, and rejects *North American II*, holding that section 2010 applies only to California corporations and thus provides no protection to California citizens injured by dissolved foreign corporations.[5]

In light of this conflict, this Court granted review.

[5] We discuss the reasoning of the Opinion, *North American II*, and *Riley* in context in the Argument section below.

ARGUMENT

I.

This Court should hold that Corporations Code section 2010 applies to foreign corporations, like Diamond, that "transact intrastate business" in California.

This Court should reverse the Opinion below by holding that Corporations Code section 2010 applies to foreign corporations, like Diamond, that choose to actively "transact intrastate business" in California. A holding that section 2010 applies to such foreign corporations is compelled by (1) the provisions of the Corporations Code, (2) the protections and guarantees of the California Constitution, and (3) California's strong public policy considerations.

A. Standard of review: *de novo.*

The issue presented is whether section 2010 applies to Diamond, a dissolved Delaware corporation that transacted intrastate business in California. This is a pure question of law, asking this Court to determine the proper interpretation of a statute. Hence, as the Opinion below correctly notes, the standard of review is *de novo*. *See* Opinion at 2 (*citing Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089 n.10).

B. The Statute: The Corporations Code, properly construed, applies section 2010 to foreign corporations that "transact intrastate business" here.

Analysis of whether section 2010 applies to dissolved foreign corporations like Diamond begins with analysis of the statute itself.

As the Opinion below correctly notes, if the "words of the statute" have a "well-established meaning," those words control without resort to any

further "construction" of the statute. Opinion at 10 (*citing Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 24).

We therefore begin by analyzing section 2010 and any other applicable Corporations Code provisions that give meaning or limitation to section 2010. And that analysis shows that (1) section 2010 is not clear on its face, (2) other definitional provisions indicate that section 2010 applies to foreign corporations that transact intrastate business in California, and (3) none of the provisions cited by the Opinion below preclude or hinder a ruling that section 2010 applies to Diamond.

1. The relevant provisions of the Corporations Code.

The Corporations Code is divided into several "Titles," which are themselves divided into "Divisions" and "Chapters." This appeal concerns Title 1 ("Corporations"), Division 1 ("General Corporation Law").[6]

Division 1 is codified as Corporations Code sections 100-2319 and is divided into 23 Chapters.

We now discuss the pertinent provisions of Division 1.

a. Section 2010: Post-dissolution rules for "corporations."

California's post-dissolution law at issue here is section 2010, which is part of Division 1's Chapter 20 ("General Provisions Relating to Dissolution," sections 2000-2011).

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[6] Other Titles govern other entities such as "Partnerships" (Title 2) and "Limited Liability Companies" (Title 2.5). Within Title 1 ("Corporations"), other Divisions govern "Nonprofit Corporation[s]" (Div. 2) and "Corporations for Specific Purposes" (Div. 3).

Section 2010 provides that "corporation[s]," after dissolution, "continue to exist" indefinitely for the purpose of "defending actions":

> A corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations . . . .

Corps. Code § 2010, subd. (a) (emphasis added).

Section 2010 does not define the term "corporation" or limit the term in that section to either domestic or foreign corporations.

b. Definitional sections.

The General Corporation Law (Division 1) is governed by various general provisions and definitions, which are found in Chapter 1 (sections 100-195). These provisions and definitions "govern the construction of this division," *i.e.* all provisions within Division 1—thus including section 2010. Corps. Code § 101.

Several of these general provisions are relevant here:

First, "domestic" and "foreign" corporations are mutually exclusive. "'Domestic corporation' means a corporation formed under the laws of this state." Corps. Code § 167. "'Foreign corporation' means any corporation other than a domestic corporation." *Id.*, § 171.

Second, in Division 1, the term "[c]orporation," "unless otherwise expressly provided, refers only to a corporation organized under this division or a corporation subject to this division under the provisions of subdivision (a) of Section 102." *Id.*, § 162.

And third, section 102 provides that Division 1 (the General Corporation Law) "applies to" two types of corporations:

1. "corporations organized under this division" (echoing section 162); "and"

2. "domestic corporations" that (a) "are not" one of various specified types (*e.g.*, "Nonprofit Corporations" (Div. 2) and "Small Businesses" (Div. 3, Part 5)) and (b) are organized under the Corporations Code, not under any other "statute of this state." Corps. Code § 102, subd. (a).

Besides these two groups, under section 102 the provisions of Division 1 do not apply to any "other corporation"—except "to the extent expressly included in a particular provision of this division." *Id.*

c. Chapter 21: Foreign corporations.

Division 1 also contains a chapter devoted to "Foreign Corporations"—Chapter 21 (sections 2100-2117.1).

The provisions of Chapter 21 expressly apply to all foreign corporations "transacting intrastate business" in California (Corps. Code § 2100), defined as "entering into repeated and successive transactions of its business in this state, other than interstate or foreign commerce." Corps. Code § 191 (emphasis added).

For all such corporations that come to California to "transact intrastate business," Chapter 21 imposes various organizational requirements, including (1) obtaining a "Certificate of Qualification" to transact business in California (Corps. Code § 2105(a)), (2) naming an agent for California service of process (§ 2105(a)(4)), (3) giving "irrevocable consent to service of process" in California (§ 2105(a)(5)(A)), (4) paying "fees required by law" to transact business here (§ 2106(a)), (5) using a corporate name that does not conflict with another California business (§ 2106(b)), and (6)

continually updating and amending the corporation's California filings to reflect any change in name, principal office, agent for service of process, etc. (§ 2107).

These organizational requirements apply to every foreign corporation that "transacts intrastate business"—*i.e.*, does "repeated and successive transactions of its business in this state." Corps. Code §§ 191, 2100.

Moroever, of those corporations, for the subset that do a majority of their overall business in California, section 2115 imposes additional requirements. Section 2115 expressly applies only to those foreign corporations that conduct "more than 50 percent" of their business here, such that (1) "more than 50 percent" of their combined property, payroll, and sales occur here, and (2) "more than one-half" of their "outstanding voting securities" are owned by Californians. Corps. Code § 2115, subd. (a). Section 2115 requires any such corporation to follow numerous California laws in operating the corporation[7]—"to the exclusion of the law of the jurisdiction of in which it is incorporated." *Id.*, subd. (b).

The various Code sections discussed above, read together, show that section 2010 applies to foreign corporations (like Diamond) that actively transact business in California, as discussed in the following section.

2. The Code's provisions, read together, apply section 2010's post-dissolution laws to foreign corporations that (like Diamond) transact intrastate business here.

The Opinion below holds that the various provisions of Division 1 of the Code, particularly sections 102, 162, and 2115, "evince a clear intent to

[7] These operational requirements, listed fully in subdivision (b) of section 2115, govern such corporate operations as election and removal of directors, shareholder and director liability, voting requirements, and limitations on mergers and asset sales.

limit the Corporations Code's general application"—and thus the application of section 2010—"to domestic corporations." Opinion at 13-14.

But the Opinion is wrong.

First, sections 102 and 162 apply Division 1 not to "domestic corporations" but to all corporations "organized under" Division 1—which includes foreign corporations like Diamond that transact intrastate business and thus follow the organizational mandates of Chapter 21. *See* Part a below.

Second, section 2115 applies only to those foreign corporations that not only transact intrastate business but do a majority of their business in California. Section 2115 applies specific Code sections to such California-based foreign corporations "to the exclusion of" the law of the state of incorporation. But other Code sections still apply to other foreign corporations with less than a majority of California business—subject to choice-of-law principles. *See* Part b below.

a. Sections 102 and 162 extend the Code to all corporations "organized under" Division 1—they do not limit it to "domestic" corporations.

The Opinion below erroneously holds that sections 102 and 162 apply the provisions of Division 1, including section 2010 on dissolution, "to domestic corporations only." Opinion at 12, 13-14 ("clear intent to limit the Corporations Code's general application to domestic corporations"); *accord Riley*, 178 Cal.App.3d at 877 ("[S]ection 102 provides that with certain exceptions not applicable here the provisions of the Corporations Code apply only to domestic corporations").

Those sections do no such thing. As discussed above, sections 102 and 162 both provide that the provisions of Division 1 apply to "corpora-

tions organized under this division" (Division 1). Corps. Code §§ 102, subd. (a), 162 (emphasis added). But neither section limits Division 1's application to "domestic" corporations.

Nor can the phrase "corporations organized under this Division" reasonably be construed to mean "domestic corporations."

First, the Code's express definition of a "domestic corporation" differs. Section 167 defines "domestic corporations" as corporations "formed under the laws of this state." Corps. Code § 167 (emphasis added). This is clearly different from "organized under this division." A domestic corporation is "formed under" California law—*i.e.*, it is incorporated here. But a corporation need not necessarily be incorporated here to be in some way "organized under" the provisions of Division 1.

Under basic rules of statutory construction, we must give meaning to the Legislature's clear distinction in word choice. As this Court recently reiterated, "courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous." *Klein v. United States* (2010) 50 Cal.4th 68, 80. Under this principle, it cannot be concluded that "organized under" California law means "formed under" California law. The Legislature used a different word for a reason.

Second, section 102 shows that the phrase "organized under this division" does not mean "domestic." Section 102 applies Division 1's provisions to two classes of corporations: (1) all "corporations organized under this division"; "and to" (2) all "domestic corporations which are not" of a specified type (*e.g.*, nonprofit, small business). Corps. Code § 102, subd. (a) (emphasis added). The Legislature's use of "and to" makes clear that the two groups are different types of corporations. If all corporations "organized under" Division 1 is construed to mean "domestic" corporations,

then listing the second class of "domestic" corporations would be superfluous—an improper construction of the statute. *See Klein*, 50 Cal.4th at 80. Indeed, if this was the Legislature's intent, it would have conflated the two groups, applying Division 1 to "all corporations organized under this division which are not subject to" the other Divisions governing nonprofits, etc. But it did not do that. The Legislature stated clearly that "corporations organized under this division" and "domestic corporations" are not synonymous. Thus, the group of "corporations organized under this division" includes both domestic and foreign corporations.

That is the only reasonable construction of sections 102 and 162: that Division 1's provisions, including section 2010, apply to all corporations, domestic or foreign, that are "organized under" Division 1.

Which leaves the following question: which foreign corporations are "organized under" Division 1? And the provisions of Division 1 provide the answer. Under Chapter 21 of Division 1, it is those foreign corporations that "transact intrastate business" in California and thus follow the required organizational mandates of Chapter 21: obtaining a "Certificate of Qualification" to transact business in California; using a non-conflicting corporate name; providing for service of process in California; paying required fees; and continually updating and amending its California filings to reflect relevant organizational changes. *See* Corps. Code §§ 2105(a), 2106(a), § 2106(b)), 2107.

That is the cost of "transacting business" here. Foreign corporations can conduct occasional business here without submitting to California corporate law. But if a foreign corporation wants to transact "repeated and successive" business here (§ 191), it must organize itself under Chapter 21—

and thus submit to California's general corporate laws (subject to choice-of-law principles in the case of any material conflict).[8]

And that is precisely what Diamond did, obtaining in 1937 a Certificate of Qualification to transact business here—thus establishing that Diamond followed Chapter 21's organizational mandates. *See* RJN 2, Exhs. A, B at 3-4; Corps. Code §§ 2105-2107. Diamond maintained that "qualified" status in California for almost 50 years, until Diamond in 1983 finally ceased business operations and "surrendered" its right to transact intrastate business here. *See* RJN 2, Exh. A (last page); Corps. Code § 2112.

The Opinion provides no reasoned response to this showing. (Nor does *Riley*, on which the Opinion relies. *See Riley*, 178 Cal.App.3d at 877.) Instead, the Opinion merely deems it "a substantial stretch to conclude that a corporation from another state can fairly be characterized as one 'organized' under the California Corporations Code"—without any supporting analysis. Opinion at 13.

But that is precisely what the Code provides, as shown above. Those foreign corporations that transact repeated and successive business here are required to follow Chapter 21's organizational procedures—they are thus "organized under" Division 1 of the Code. The Opinion simply fails to analyze the Code or the issue.

And, most importantly, the Opinion's unreasoned conclusion that the phrase "organized under this division" in section 102 simply means "domestic" is defeated by section 102 itself, which clearly describes two

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[8] Moreover, as discussed in the following section, if a foreign corporation chooses to transact more than half of its business in California, it must submit to even more California corporate law, "to the exclusion" of the law of its state of incorporation. *See* Corps. Code § 2115.

classes of corporations—(1) "corporations organized under" Division 1, "and" (2) specific "domestic corporations." This language makes clear that "organized under" is not synonymous with "domestic"—so that, necessarily, there are foreign corporations that are "organized under" the Code.

Because Diamond was one of those foreign corporations organized under Division 1, it is subject to the provisions of Division 1, including section 2010.

Hence, the Opinion is wrong to conclude that applying section 2010 to foreign corporations "would render . . . sections 102 and 162 . . . meaningless." Opinion at 15. To the contrary, that conclusion gives meaning to those sections' language that Division 1 applies to "corporations organized under this division"—language clearly not synonymous with "domestic corporations," as the Opinion (like *Riley*) erroneously holds.

Moreover, the Opinion's holding that Division 1 does not apply to any foreign corporations (unless expressly specified) would create absurd results. Division 1 contains various provisions that no doubt apply to both domestic and foreign corporations. *See North American II*, 180 Cal.App.3d at 910 ("There are a myriad of statutory provisions that apply to foreign corporations . . . ."); *e.g.*, Corps. Code § 105 (A "corporation or association may be sued as provided in the Code of Civil Procedure."); § 107 ("No corporation, association or individual shall issue or put in circulation, as money, anything but the lawful money of the United States."); § 114 (defining general "accounting" terms like the "financial statements" of a "corporation"). But under the Opinion below, none of these provisions apply to foreign corporations. That cannot be the case.

The only reasonable construction of sections 102 and 162 is that they apply the provisions of Division 1 to all those corporations that are

appropriately within the reach of California law: (1) domestic corporations; and (2) those foreign corporations that choose to transact intrastate business (*i.e.*, repeated and successive business) here.

b. Section 2115 does not purport to list the only Code provisions that apply to foreign corporations.

The Opinion, following *Riley*, also rests its holding that section 2010 does not apply to any foreign corporations on Corporations Code section 2115. Opinion at 14. The Opinion finds it "significant" that "section 2115, which identifies all of the chapters and sections of the California Corporations Code that apply to foreign corporations meeting certain threshold requirements, does not mention section 2010." *Id.* (*citing Riley*, 178 Cal.App.3d at 876).

But the Opinion is again wrong. Section 2115, by its terms, does not purport to list the only Corporations Code provisions that apply to any foreign corporations. Instead, section 2115 provides stringent operational requirements that apply only to those foreign corporations that transact more than half of their business in California. *See* Corps. Code § 2115, subd. (a). Section 2115 requires such corporations to follow numerous Code provisions in operating their business—provisions governing such various corporate operations as election and removal of directors, shareholder and director liability, voting requirements, mergers, and asset sales. *See id.*, subd. (b). But nothing shows or suggests a legislative intent that the provisions listed in section 2115 are the only provisions of Division 1 that apply to any foreign corporations.[9]

[9] This was well articulated in *North American II*: "There is no indication that in enacting section 2115 the Legislature even considered the question of whether a foreign

And, most importantly, section 2115 imposes these provisions without limitation—"to the exclusion of the law of the jurisdiction in which [the corporation] is incorporated." *Id.*, subd. (b) (emphasis added). Thus, by legislative declaration, no "choice of law" analysis applies. If a foreign corporation wants to transact more than half of its business here, it must forego its home-state law and submit to California law in the enumerated areas.

Therefore, the Corporations Code provides for three classes of foreign corporations that do business in California:

1. Occasional business in California: Some corporations do business in California, but only occasionally—not "repeated and successive" business. Because these corporations thus do not "transact intrastate business" (§ 191), the provisions of Chapter 21 do not apply (§ 2100), and thus such corporations do not need to organize themselves under Division 1. Because these foreign corporations are not organized under Division 1, Division 1's provisions do not apply (under sections 102 and 162), and thus the corporations are governed wholly by the law of their state of incorporation.

2. "Repeated and successive" business in California: Next, some foreign corporations choose to "transact intrastate business" here—*i.e.*, "ente[r] into repeated and successive transactions of its business in this

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corporation should survive for purposes of suit. It is apparent that the Legislature felt that the provisions encompassed in section 2115 should only apply to foreign corporations if the specified percentages for business and share holdings in our state were reached, but this does not indicate any intention on the part of our lawmakers that other provisions of the law may not be applicable to foreign corporations. There are a myriad of statutory provisions that apply to foreign corporations that are not included in section 2115. And the absence of these statutory provisions from section 2115 is for a good reason, because they apply to all foreign corporations, not just to corporations which meet the percentage figures prescribed in section 2115." *North American II*, 180 Cal.App.3d at 910.

state." Corps. Code § 191. For these corporations, the organizational provisions of Chapter 21 apply (§ 2100), requiring the corporation to, *inter alia*, submit to service of process, obtain a "Certificate of Qualification" to transact business here, pay required fees, and continually update its California filings to reflect any change in name, principal office, agent for service of process, etc. Corps. Code §§ 2105-2107. And because these corporations are "organized under" Division 1 (Chapter 21), under sections 102 and 162, the provisions of Division 1 (including section 2010) apply. But these general provisions do not apply automatically—if they conflict with the laws of the corporation's home state, choice-of-law analysis determines which state's law to apply.

3. Majority of business in California: Finally, some corporations' California business is not just "repeated and successive" but is more than half of their business. For these corporations, section 2115 imposes additional requirements of the Code that apply automatically—"to the exclusion of the law of" the corporation's home state. Corps. Code § 2115, subd. (b).

This is the only reasonable construction of the Code's various provisions applying to foreign corporations. Such corporations can choose the extent of their business in California, and the more active their business here, the more California corporate law to which they must submit.

Here, without dispute, Diamond was in the middle category, transacting "repeated and successive" intrastate business. Diamond acknowledged this fact by following Chapter 21's organizational procedures for 50 years, maintaining a Certificate of Qualification to business here—a requirement imposed only on foreign corporations "transacting intrastate business." Corps. Code § 2100.

Because Diamond chose to conduct such repeated and successive business here, Diamond was required to organize itself under Chapter 21 of Division 1 of the Code. Therefore, because Diamond was "organized under" Division 1, pursuant to sections 102 and 162, Diamond is subject to the general provisions of the Division—including section 2010.

And this is wholly appropriate because Diamond, in choosing to sek and accept the benefits of transacting repeated business in California, has placed itself with the reach of California corporate law.

In sum, petitioners submit that this is the only reasonable construction of section 2010 and Division 1 of the Corporations Code, giving meaning to all of the Division's various provisions. Accordingly, this Court should hold that section 2010 applies to any corporations "organized under" Division 1, including foreign corporations (like Diamond) who choose to transact intrastate business here and thus follow Chapter 21's organizational provisions.

C. The Constitution: Construing section 2010 as not applying to foreign corporations that transact intrastate business would violate the guarantees of the California Constitution.

Next, if this Court does not accept petitioners' argument that foreign corporations that transact intrastate business here are "organized under" Division 1 (and thus subject to the Division), this Court should still hold that section 2010 applies to such corporations under the California constitutional analysis set forth in the 1986 appellate-court decision in *North American II*, 180 Cal.App.3d at 902.

North American II holds that section 2010 must apply to foreign corporations "licensed to transact business in California" (*id.* at 908)

pursuant to the guarantees of the California Constitution.[10] Because section 2010 itself does not define the word "corporation," the appellate court construed the section in light of the entire Corporations Code and California constitutional law. *Id.* at 907-908.

For the *North American II* court, the "key to interpreting section 2010" was former Article XII, section 15 of the California Constitution, which provided that foreign corporations shall not "transact business" in California under "more favorable conditions" than those applied to domestic corporations:

> No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State.

Cal. Const., Art. XII, § 15 (emphasis added); *see North American II*, 180 Cal.App.3d at 908.

This constitutional provision, adopted in 1879, was in effect when the original version of section 2010 was enacted in 1929 to apply to "[a]ll corporations." *North American II*, 180 Cal.App.3d at 908. At the time, nothing even arguably limited the application of section 2010 to "domestic" corporations: sections 102 and 162 did not yet exist; former Civil Code section 283 applied to "every private corporation"; and other code sections specified "domestic" or "foreign" when "such a limitation was intended." *Id.* Moreover, the constitutional provision of Article XII, section 15, dictated that "corporation" in section 2010 had to mean both domestic corporations and foreign corporations transacting intrastate business. *Id.*

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[10] *North American II* provides an extensive discussion of the appellate court's constitutional analysis. *See North American II*, 180 CalApp.3d at 908-910. Appellants summarize that analysis here.

Otherwise, such foreign corporations would operate in more "favorable conditions," able to escape liability for past conduct by dissolving. "Thus, in 1929 it was clear that [section 2010] applied to both foreign and domestic corporations." *Id.*

Although Article XII, section 15, was later repealed (in 1972), the "circumstances of the repeal" show that "corporation" as "used in section 2010" retained its "original meaning, covering both domestic and foreign corporations" transacting intrastate business "to the extent that [such] foreign corporations will not receive more favorable treatment." *Id.* at 908-909. The section was repealed in 1972 (by ballot initiative) as "obsolete and unnecessary," because other constitutional and statutory provisions assured "[e]qual treatment of foreign and domestic corporations," so that the repeal was a mere "housekeeping measure" that effected "no change in law or policy." *Id.* at 909.

Therefore, *North American II* concluded, "in accordance with the intentions of both the Legislature and the electorate," section 2010 continues to apply to both domestic corporations and foreign corporations that choose to transact intrastate business here.[11] *Id.*

The Opinion below fails to analyze, let alone refute, *North American II*'s constitutional analysis. The Opinion notes the *North American II* rationale. Opinion at 9-10. But the Opinion does not attempt to show that that rationale is incorrect. Instead, the Opinion merely discards *North American II*'s constitutional analysis as irrelevant because section 2010 is supposedly "clear on its face," obviating the need to analyze any "legislative

[11] As with Diamond here, the foreign corporation in *North American II* "was licensed for the transaction of intrastate business in California under a certificate of qualification" (pursuant to Chapter 21 of Division 1). *North American II*, 180 Cal.App.3d at 907.

intent." Opinion at 10. But section 2010 is not "clear on its face"—and neither is Division 1 as a whole (as discussed above). We submit that the only reasonable construction of Division 1 is that it applies to both domestic corporations and foreign corporations transacting business here. But at most, the statute is ambiguous—warranting review of "legislative intent" and supporting the *North American II* analysis.[12]

This Court has cited the holding of *North American II* with at least tacit approval. In *Peñasquitos, Inc. v. Superior Court (Barbee)* (1991) 53 Cal.3d 1180, this Court held that section 2010 allows suits against dissolved corporations whether the suits are filed before or after dissolution. In reaching that conclusion, this Court discussed *North American II* at length, specifically reciting that case's holding that section 2010 "is not limited to dissolved California corporations, but also applies to dissolved foreign corporations." *Id.* at 1187-1188. And again this year, this Court cited *North American II* as the governing law in California, "holding" that "California law [is] applicable when the plaintiff was exposed to asbestos in California by a company incorporated in another state, where plaintiff's action against the company would have been barred as untimely under the other state's law." *McCann v. Foster Wheeler LLC* (2010) 48 Cal.4th 68, 101.

This Court here, as it did tacitly in *Peñasquitos* and *McCann*, should expressly approve the *North American II* constitutional analysis. If Division 1 of the Corporations Code does not expressly extend the dissolution

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[12] Moreover, even if section 2010 "on its face" can somehow be said to apply "clearly" to domestic corporations, the section would to that extent be constitutionally invalid because it would provide preferential treatment to foreign corporations that "transact business within this state," in violation of former Article XII, section 15, which was repealed only as "obsolete and unnecessary" by a ballot provision expressly effecting "no change in law or policy." *See North American II*, 180 Cal.App.3d at 909.

provisions of section 2010 to foreign corporations licensed to transact business here, that construction of section 2010 is mandated by the continued protections of the California Constitution.

D. Policy: To promote California's sound policy objective of protecting innocent citizens from injuries caused by defective products, this Court should construe section 2010 as applying to dissolved foreign corporations.

Finally, this Court should construe section 2010 as applying to foreign corporations that transact business here also to advance California's sound policy objectives of protecting California citizens from injuries caused by those corporations' defective products.

As *North American II* appropriately notes:

> When a person suffers injury in California as a result of business conducted by a foreign corporation then qualified to do business within the state, California has a legitimate interest that the foreign corporation not be permitted to avoid responsibility for its wrongful act by withdrawing from the state.

North American II, 180 Cal.App.3d at 907.

And the danger of a foreign corporation "avoiding" responsibility for its misconduct by dissolving itself is particularly acute when the past conduct is likely to cause injuries in the future. This is of course particularly true here, where the defendant's misconduct is alleged to have caused latent asbestos-disease injuries. Such defendants, knowing that the diseases caused by their misconduct will not manifest for years, have ample time to make the business decision to avoid such liability by dissolving the corporation. But this problem is not limited to asbestos cases. The same issue will arise with any manufacturer of a defective product that is anticipated to cause injuries in the future—*e.g.*, a product that was widely distributed and that the

defendant learns has a dangerous defect. Under the Opinion below, such a manufacturer (in Delaware, etc.), instead of taking steps to prevent any future injuries (such as by a product recall), could reasonably choose to dissolve, knowing that it would soon cut off any future liability. This result is directly contrary to California's sound policy of protecting its citizens from such product defects.

Moreover, in this specific case, California policy even more firmly demands that Diamond not be allowed to escape liability by dissolving in Delaware. It appears evident here that the only reason that Diamond dissolved itself was to avoid potential liability to asbestos victims. As noted above:

1. From the 1930s to the 1980s, Diamond actively transacted business in California, maintaining its Certificate of Qualification to do business here. *See* RJN 2, Exhs. A, B at 3-4; Factual and Procedural History, Part A above.

2. Plaintiffs allege that Walter was exposed to Diamond's asbestos products in California in this period, from the 1950s to the 1970s. JA 3:20-21, 4:15, 7:22-9:1, 29:5-6.

3. Diamond stopped doing business in the 1980s, in 1983 surrendering its California Certificate of Qualification and by 1987 no longer having any employees or operating assets whatsoever. *See* RJN 2, Exhs. A (last page), B at 3:25-27; Factual and Procedural History, Part A above.

4. During the 1990's into the 2000's, Diamond's threatened legal liability on asbestos claims grew steadily. *See* RJN 2, Exh. C; Factual and Procedural History, Part C above.

5. Diamond admittedly has tens of millions of dollars in insurance to cover asbestos personal-injury claims like plaintiffs' claims here. *See* RJN 2, Exh. B at 17-18; Factual and Procedural History, Part A above.

6. In 2005, after sitting dormant for 18 years, Diamond suddenly filed for dissolution in Delaware. JA 46-48.

Under the circumstances, it appears that Diamond's dissolution was part of a plan to cut off Diamond's liability to its asbestos victims—a plan likely hatched by Diamond's insurers. Indeed, with Diamond dissolved, and lacking any employees for 20 years, it is Diamond's insurers who stand to reap a windfall by sidestepping Diamond's liability to plaintiffs and others like them.

This result directly contravenes California policy. When foreign corporations seek and accept the benefits of transacting business here, California law should not allow them to use their home state's corporate-friendly laws to deprive injured California citizens of their remedies. Certainly, Corporations Code section 2010 was not intended to allow such a result. To the contrary, the Legislature has declared clearly California's policy of allowing culpable corporate defendants to continue to be sued, without temporal limitation, even after dissolution. And the Legislature has provided specifically for plaintiffs to recover from a culpable dissolved corporation's applicable "insurance assets." *See* Corps. Code § 2011 (authorizing recovery from "dissolved" corporation's "insurance assets . . . available to satisfy claims"). These statutory provisions are consistent with California's overarching policy of protecting its citizens from defective products.

To advance these sound policy objectives, this Court should construe section 2010 as applying to both domestic corporations and foreign

corporations, like Diamond, that choose to reap the benefits of transacting repeated and successive intrastate business here.

II.
This Court should rule that California law prevails under choice-of-law analysis—or remand for a ruling on that issue.

If this Court holds that section 2010 applies to Diamond here, then this action presents a conflict between California and Delaware law on whether Diamond may continue to be sued more than three years after dissolution.

This choice-of-law issue was fully presented and briefed in all courts below. *See* JA 40-41, 75-76; AOB at 17-26; Respondent's Brief on Appeal ("RB") at 42-44. But neither court below addressed the issue, each ruling that no conflict exists because California law does not apply to Diamond. *See* JA 114-116; Opinion at 12-15.

This Court may choose to remand this issue to the lower courts for an initial ruling.

But if this Court chooses to rule on this fully briefed question of law, it should rule, under governmental-interest analysis, that California law would be more impaired by not applying and thus prevails and applies here. Plaintiffs have fully briefed this issue below (AOB at 17-26), but we summarize here.

If Delaware law applies, California is prevented from protecting its strong interest in protecting its citizens who allege injury by the defective product of a Delaware corporation who sought and accepted the benefits of transacting business here.

By contrast, if California law applies, Delaware is not prevented from protecting any demonstrable interest. All that would happen if Diamond is held liable is that Diamond's insurance would cover the injuries caused by Diamond's past misconduct in California—as it should. The dissolved "Diamond" would not have to do anything.

Although Delaware may have an interest in giving its dissolved corporations some end date to their existence, that interest pales in comparison to California's interest in protecting its citizens from injury.

If this Court chooses to address this fully briefed legal question, it should rule that California law governs. Otherwise, it should remand for a lower-court ruling on this issue.

CONCLUSION

Analysis of section 2010, Division 1 of the Corporations Code, the state Constitution, and sound public policy objectives shows that the Legislature intends section 2010 to apply to Diamond here. This Court should so hold, ending the bid of Diamond (*i.e.*, its insurers) to escape liability by an otherwise meaningless Delaware dissolution.

Dated: October 1, 2010

CLAPPER, PATTI, SCHWEIZER & MASON

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CERTIFICATION OF WORD COUNT

I Ted W. Pelletier, hereby certify that this brief, exclusive of tables, consists of 7,.822 words, in 14-point Times New Roman type, as counted by my word-processing program.

Ted W. Pelletier

PROOF OF SERVICE BY MAIL
(C.C.P. §1013(a), 2015.5)

I, the undersigned, hereby declare under penalty of perjury as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action; my business address is 22 Skyline Road, San Anselmo, CA 94960.

On this date I served on the interested parties in this action the within document:

PETITIONERS' OPENING BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, in the United States Mail at San Anselmo, California, addressed as follows:

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