Nos. 19-368 and 19-369

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY, *Petitioner,*

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, *et al.*, *Respondents*.

FORD MOTOR COMPANY, *Petitioner,*

v.

ADAM BANDEMER, *Respondent*.

On Petitions for Writs of Certiorari to the Supreme Court of Montana and the Supreme Court of Minnesota

BRIEF FOR THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Alliance of Automobile Manufacturers, Inc. (the "Alliance") is a nonprofit trade association of car and light truck manufacturers that represent 70% of all car and light truck sales in the United States.[1] The Alliance's members include BMW Group, FCA US LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen Group of America, and Volvo Car USA.

The Alliance aims to protect and promote the legal and policy interests of its members and frequently files *amicus curiae* briefs in cases such as this one that are important to the automobile industry. *See, e.g.*, *FCA US LLC v. Flynn*, No. 18-398 (U.S.); *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018); *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

The Alliance's members include global companies that design, manufacture, and sell vehicles in various parts of the country—indeed, the world—through distributorship agreements and independent automobile dealerships. Because vehicles are easily portable, the Alliance's members frequently face product litigation in forums throughout the country, far from where they have manufactured vehicles and hundreds or even thousands of miles from where the vehicle at issue in a particular case was sold. The jurisdictional issues in

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[1] The parties consented to the filing of this brief. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

this case are therefore of significant importance to the Alliance's member companies, who are uniquely positioned to provide guidance to this Court as it considers Ford Motor Company's petitions for certiorari.

SUMMARY OF THE ARGUMENT

This Court has twice granted certiorari to address whether there must be a causal connection between an out-of-state defendant's forum contacts and a plaintiff's claims for specific personal jurisdiction to exist over the defendant, *see Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) (*BMS*); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), and the Court itself has acknowledged the uncertainty that exists regarding this issue, *see Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984). This Court has thus far refrained from answering this question, however, resulting in a clear division of authority that state and federal courts have acknowledged while noting the need for guidance from this Court on the question. *See, e.g.*, *Felland v. Clifton*, 682 F.3d 665, 676 (7th Cir. 2012); *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 912 (8th Cir. 2012); *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 318 (3d Cir. 2007); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 579 (Tex. 2007).

This Court should refrain no longer. The issue is squarely presented by the two petitions filed by Ford Motor Company. The supreme courts of Montana and Minnesota have held that these States may assert specific personal jurisdiction to adjudicate design-defect claims against Ford, even though the plaintiffs' vehicles were not designed, manufactured, or sold in these States, and even though the only reason the vehicles

ended up in these States was through the unilateral decision of individuals who had purchased the vehicles "used" a decade or more after the vehicles were initially manufactured and sold. Both courts acknowledged that the plaintiffs' claims against Ford are based on *out-of-state* conduct, but they concluded that Montana and Minnesota courts could exercise jurisdiction over Ford as a result of *other* contacts Ford had with those States, such as advertising activities and the existence of independent Ford-franchised dealerships that sold other vehicles in those States. In doing so, the Montana and Minnesota Supreme Courts deepened a clear division of authority among federal and state courts about whether the Due Process Clause permits the exercise of specific personal jurisdiction over defendants who have many forum contacts that bear no causal relationship to the underlying lawsuit.

The approach taken by Montana and Minnesota exposes automobile manufacturers, and other companies that manufacture easily movable objects, to nationwide specific personal jurisdiction on the basis of generalized connections they share with each and every State in the country. These decisions erase the clear line that this Court has maintained between general and specific personal jurisdiction. And although a core principle driving specific personal jurisdiction is that *defendants' own actions* relating to the forum and the lawsuit are supposed to be what render them liable to suit, the approach adopted by Montana and Minnesota puts the power to create jurisdiction in plaintiffs' hands.

The question presented by these petitions has lingered unanswered for decades, and the lack of consensus among state and federal courts has only worsened over time. Divisions of authority even within a single

jurisdiction (with the relevant state high court adopting one test and the relevant federal appellate court adopting a completely different test) encourage forum shopping and result in widespread motion practice over procedural issues that are collateral to the merits of product-liability lawsuits—sometimes *multiple* rounds of briefing and argument in federal *and* state trial and appellate courts. This causes considerable inefficiency for the parties and for state and federal judicial systems.

This conflict will not resolve itself. This Court should grant certiorari to finally resolve this conflict, provide much-needed guidance to state and federal courts, and restore the predictability that the Due Process Clause's jurisdictional limitations are supposed to provide.

ARGUMENT

I. The Decisions of the Minnesota and Montana Supreme Courts Expose Automobile Manufacturers to Nationwide Personal Jurisdiction.

A. These Decisions Erase the Clear Line Between General and Specific Personal Jurisdiction.

The Due Process Clause "sets the outer boundaries of a state tribunal's authority to proceed against a defendant," permitting States to exercise personal jurisdiction only where the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The relationship between a defendant and a State

"must arise out of contacts that the 'defendant *himself*' creates with the forum," as "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

This Court has recognized two varieties of personal jurisdiction: "'general' (sometimes called 'all-purpose') jurisdiction and 'specific' (sometimes called 'case-linked') jurisdiction." *BMS*, 137 S. Ct. at 1780 (citation omitted). General jurisdiction derives from the nature of the overall relationship between the defendant and the State based on "continuous and systematic" connections; it enables a State to exercise jurisdiction over a defendant independent of any connection between the defendant's forum-related contacts and the suit at issue. *Int'l Shoe*, 326 U.S. at 317.

Specific jurisdiction, however, is predicated on an "affiliatio[n] between the forum and the underlying controversy," and it primarily relies on suit-related conduct that occurred in or was directed toward the forum State. *Goodyear*, 564 U.S. at 919 (citation omitted). Specific jurisdiction "focuses on the 'relationship among the defendant, the forum, and the litigation,'" with particular attention paid to "the defendant's suit-related conduct." *Walden*, 571 U.S. at 284 (citation omitted).

Although these bases for personal jurisdiction follow different doctrines, courts occasionally blend them into a hybrid analysis that allows them to exercise jurisdiction over a defendant when neither the general nor specific jurisdictional requirements are satisfied. Just as often, this Court has rejected these attempts, insisting on a clear demarcation between general and specific ju-

risdiction. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), for example, this Court rejected a North Carolina court's approach that "[c]onfus[ed] or blend[ed] general and specific jurisdictional inquiries." *Id.* at 919-20. Even more recently, in *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017), this Court considered the California Supreme Court's application of a "sliding scale approach" to specific jurisdiction whereby "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Id.* at 1778 (citation omitted). This Court categorically rejected such an approach, calling it "a loose and spurious form of general jurisdiction" with "no support" in the Court's cases. *Id.* at 1781. Similarly, this Court has expressed serious concern with any personal-jurisdiction test that would create "all-purpose jurisdiction" in any State in which a defendant sells a significant number of products. *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014).

In short, the Court has consistently maintained a clear line between general and specific bases for personal jurisdiction. For general jurisdiction, a defendant's general contacts with a forum State are relevant, but they must be so continuous and systematic that the defendant can be deemed "at home" there. *Daimler*, 571 U.S. at 137. For specific jurisdiction, a defendant's activities within the forum State are relevant, but only if the causes of action asserted in the complaint arise out of or relate to those activities. *Goodyear*, 564 U.S. at 923 (specific personal jurisdiction exists "where the corporation's in-state activity is 'continuous and systematic' and *that activity gave rise to the episode-in-suit*" (citation omitted)); *Daimler*, 571 U.S. at 127 (in-state activities "may sometimes be enough to subject

the corporation to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity" (citation omitted)); *Int'l Shoe*, 326 U.S. at 320 (holding that personal jurisdiction existed because the defendant engaged in in-state activities, and "[t]he obligation which is here sued upon arose out of those very activities"). Thus, as this Court has explained, "even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated *to those sales*." *Goodyear*, 564 U.S. at 930 n.6 (emphasis added); *Helicopteros*, 466 U.S. at 418 ("mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related *to those purchase transactions*" (emphasis added)).

The decisions of the Montana and Minnesota Supreme Courts (and the minority of other jurisdictions they joined in allowing specific personal jurisdiction absent a causal nexus between the defendant's activities and the plaintiff's claims[2]) erase the clear line this Court has drawn. The plaintiffs' lawsuits are based on alleged defects in the design or manufacture of their Ford vehicles. But Ford did not design the plaintiffs' vehicles in Montana or Minnesota, manufacture the plaintiffs' vehicles in Montana or Minnesota, or even sell the plaintiffs' vehicles in Montana or Minnesota. In *Gullett*, Ford assembled the vehicle at issue in Kentucky and sold it to a dealer in Washington. It reached Montana only because a *subsequent owner* purchased the vehicle "used" and unilaterally decided to bring it to Montana more than a decade later. 19-368 Pet. 5. In *Bandemer*, Ford designed the Crown Victoria at issue

[2] *See* 19-368 Pet. 11-12; 19-369 Pet. 12-13.

in Michigan, assembled it in Canada, and sold it to a dealer in North Dakota. It reached Minnesota only because the vehicle's *fourth* owner decided to bring it to Minnesota nearly two decades later. 19-369 Pet. 5.

All parties agree that Ford is not subject to *general* jurisdiction in Montana or Minnesota. Nevertheless, the Montana and Minnesota Supreme Courts held that despite the cases being about design and manufacture, the state courts could exercise *specific* personal jurisdiction over Ford in these lawsuits because Ford sold *other vehicles* in those States (though not the plaintiffs' vehicles), advertised in those States, partnered with dealerships in those States, and offered repair or replacement services in those States. 19-368 Pet. App. 11a-12a, 17a, 19a-20a; 19-369 Pet. App. 9a-10a, 16a-17a. The courts considered those contacts sufficiently related to the subject matter of the litigation to allow the exercise of personal jurisdiction over Ford even though the plaintiffs' lawsuits were not based on Ford's in-state sales, they did not assert claims for fraudulent or misleading marketing, and they did not allege faulty repair services by Ford in the forum States. In short, the state high courts considered Ford's forum activities sufficient even though those activities did not give rise to the plaintiffs' claims and the plaintiffs would have experienced the exact same injuries had Ford not engaged in any of those activities in Montana or Minnesota. This approach is similar to a *general* personal jurisdiction analysis but without the due-process-protecting requirement that the defendant's forum-related contacts be so systematic and continuous that the defendant can reasonably be expected to be haled into court there for *any* dispute that arises.

By basing the exercise of personal jurisdiction on acts for which there is no nexus to the claims, these decisions are akin to the sliding-scale approach that this Court rejected in *BMS*, 137 S. Ct. 1773. There, California residents and nonresidents sued Bristol-Myers Squibb in California, alleging that the company's drug Plavix had injured them. The company had research and laboratory facilities in California, employed hundreds of employees and sales representatives there, and sold 187 *million* Plavix pills in the State. Applying the principle that "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim," the court held that the company's "extensive contacts with California" warranted exercising jurisdiction over all of the plaintiffs' claims. *Id.* at 1778-79 (citations omitted). In particular, the court relied upon the similarity of the residents' and nonresidents' claims, as they were "based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product." *Id.* at 1779 (citation omitted).

This Court rejected the California Supreme Court's approach, calling it a "loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough." *BMS*, 137 S. Ct. at 1781. The Court stated that "[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents"—did not allow plaintiffs whose claims did not arise as a result of the defendant's California-related activities to sue Bristol-Myers Squibb in California because "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." *Id.* (quoting *Walden*, 571 U.S. at 286). The same is true

here. Just as Bristol-Myers Squibb's sales of 187 million Plavix pills in California did not permit *every* plaintiff to sue the company there, Ford's sales of similar—or even identical—vehicles to *other* Montana and Minnesota residents does not mean that Ford can be haled into court there to litigate claims over vehicles that the company sold in Washington and North Dakota.

The Montana and Minnesota Supreme Courts both said that *BMS* was distinguishable because the nonresident plaintiffs in *BMS* neither used nor were injured by Plavix in California, whereas here, the allegedly defective vehicles were used and caused injuries in Montana and Minnesota. 19-368 Pet. App. 18a; 19-369 Pet. App. 17a. But that is a distinction without a difference: this Court has repeatedly stated that "mere injury to a forum resident" is not enough. *Walden*, 571 U.S. at 290. That is because a plaintiff's or third party's "unilateral" actions connecting the dispute to the forum "is not an appropriate consideration" when considering whether personal jurisdiction exists over a defendant, *Helicopteros*, 466 U.S. at 417, because this due-process limitation exists to protect *defendants'* rights, not plaintiffs'. *See Walden*, 571 U.S. at 285 ("Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'" (citation omitted)). The vehicles at issue in this case ended up in Montana and Minnesota not because of any action by Ford but because subsequent owners decided to move to Montana and Minnesota more than a decade after Ford sold the vehicles in Washington and North Dakota. Because third parties, and not Ford, are responsible for the presence of these vehicles in Montana and Minnesota, the fact that the vehicles were used in these States cannot be a jurisdictionally rele-

vant contact with respect to claims based on Ford's *out-of-state* conduct.

The contrary rule embraced by a minority of state high courts and the Federal Circuit exposes manufacturers to jurisdiction based on actions that are entirely out of their control—consumers' unilateral decisions about where to transport products they purchase. It allows plaintiffs whose claims are not based on a defendant's in-state contacts to piggyback off of the personal jurisdiction that *other* plaintiffs have, which is precisely what *BMS* forbids. 137 S. Ct. at 1781. And it creates precisely the type of nationwide "all-purpose" jurisdiction that this Court has repeatedly eschewed, because it does not permit defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Daimler*, 571 U.S. at 139 (quoting *Burger King*, 471 U.S. at 472).

B. These Decisions Will Have a Particularly Pernicious Impact on the Due Process Rights of Automobile Manufacturers.

The Montana and Minnesota Supreme Courts relied heavily upon the foreseeability that the vehicles at issue could have been brought to these States and Ford's expectation that residents of these States will purchase those vehicles. *See* 19-368 Pet. App. 16a ("Irrespective of where a company initially designed, manufactured, or first sold a vehicle, it is fair to say that a company designing, manufacturing, and selling vehicles can reasonably foresee (even expect) its vehicles to cross state lines."); *id.* at 13a & n.4, 17a; 19-369 Pet. App. 9a-10a, 17a. But these vehicles reached Montana and Minnesota through no act of Ford's, and this Court has previ-

ously expressed serious concern with any jurisdictional test that would allow personal jurisdiction in a product-liability case to follow the product itself, rather than hinge on *the defendant's* contacts with the forum State *related to the specific claims at issue*. As the Court put it in *World-Wide Volkswagen Corp. v. Woodson*, "If foreseeability were the criterion, . . . [e]very seller of chattels would in effect appoint the chattel his agent for service of process." 444 U.S. 286, 296 (1980).

This is of particular concern with respect to automobile manufacturers because of the unique nature of vehicles. As this Court has recognized, "the very purpose of an automobile is to travel" and vehicles, which are inherently mobile, frequently cross state lines with no notice given to their manufacturers. *World-Wide Volkswagen*, 444 U.S. at 298. And they do so for decades: the average age of cars and light trucks in this country exceeds 11 years, *Driving an Older Car? You're Not Alone. Average Vehicle Age Sets a Record*, Associated Press (June 27, 2019, 8:30 a.m.), https://www.autoblog.com/2019/06/27/record-average-age-cars-on-road, and if properly maintained, vehicles can easily last 200,000 miles or more, Julie Blackley, *The Longest-Lasting Cars to Reach 200,000 Miles and Beyond*, iSeeCars (2019), https://www.iseecars.com/longest-lasting-cars-study.

Moreover, vehicles are frequently sold second-hand, third-hand, and even fourth-hand by private individuals or used-car dealers unaffiliated with the manufacturer. If personal jurisdiction can be established based on the place of injury, automobile manufacturers can be haled into a forum in which they do not reside based on the unilateral decisions of the second, third, fourth, or even fifth owner of the vehicle. *See* Adrienne Roberts,

Used-Car Sales Boom as New Cars Get Too Pricey for Many, Wall St. J. (Sept. 23, 2018, 7:46 p.m.), https://www.wsj.com/articles/used-car-sales-boom-as-new-cars-get-too-pricey-for-many-1537700401 ("With nearly 40 million in sales last year, the used-car market is more than double the size of the new-car business.").

These cases are perfect examples. The two vehicles at issue in these cases were 21 and 19 years old, respectively, at the time they were crashed. 19-368 Pet. App. 3a; 19-369 Pet. App. 3a. Both vehicles had been resold—in *Bandemer four times*, 19-369 Pet. App. 25a—and brought into the forum States by individuals who were not the original purchasers of the vehicles and who were not the plaintiffs in either of these actions. 19-368 Pet. App. 24a; 19-369 Pet. App. 25a.

Furthermore, all of the contacts between Ford and the forum States that the Montana and Minnesota Supreme Courts relied upon to support specific personal jurisdiction are present in exactly the same way in virtually every State in the country, which means that the approach taken by these courts would subject automobile manufacturers to "all-purpose" jurisdiction nationwide.

First, the courts noted that Ford sold vehicles and parts in Minnesota and Montana, including *the types* of vehicles at issue in these cases. 19-368 Pet. App. 12a, 17a, 19a; 19-369 Pet. App. 4a, 9a-10a, But there are no local or regional automobile manufacturers in the United States—all sell and distribute their vehicles nationwide. And this Court has already stated that even *millions* of in-state sales do not permit jurisdiction over manufacturers with respect to claims about even *identical* products the manufacturers sold elsewhere. *See BMS*, 137 S. Ct. at 1778, 1781-1782.

Second, the courts emphasized that Ford engaged in regional and national marketing campaigns that reach Minnesota and Montana residents. 19-368 Pet. App. 11a, 17a, 29a-30a; 19-369 Pet. App. 4a, 9a, 10a, 17a. But even putting aside the fact that there the plaintiffs' claims did not arise from nor were related to Ford's advertising, these same facts exist in every other State too. Automobile manufacturers issue nationwide and regional advertisements across the country because they distribute vehicles in every State. And this Court has rejected efforts to premise personal jurisdiction on these types of nationwide advertising efforts—even where the plaintiffs asserted *misleading-advertising claims*. *See BMS*, 137 S. Ct. at 1778; *id.* at 1784, 1786 (Sotomayor, J., dissenting).

Third, the courts focused on the existence of Ford dealerships and certified mechanics in Montana and Minnesota. 19-368 Pet. App. 11a, 12a; 19-369 Pet. App. 4a, 9a, 16a-17a. But the courts' reliance on in-state Ford dealerships ignores that these dealerships are independently owned and operated by franchisees. Virtually every State in America prohibits automobile manufacturers with franchisees from engaging in direct-to-consumer automobile sales. *See* Mark Cooper, *Bringing New Auto Sales and Service into the 21st Century* 3, Consumer Fed'n of Am. (Oct. 2002), https://consumerfed.org/pdfs/InternetAutos102902.pdf; Gerald R. Bodisch, *Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers*, Economic Analysis Group 1 (May 2009), https://www.justice.gov/atr/economic-effects-state-bans-direct-manufacturer-sales-car-buyers; *see also* Joshua B. Arons, *Tesla's Right to Rise*, 44 Transp. L.J. 133 (2017) (detailing Tesla's efforts to sell electric vehicles directly to consumers and the numerous lawsuits these efforts have sparked

under state franchise laws). Ford's franchise relationships with these independent, in-state dealerships, which sell automobiles from their own inventory, is not sufficient to establish specific personal jurisdiction over Ford in a case that does not arise out of or relate to this franchise relationship. *See BMS*, 137 S. Ct. at 1783 (Bristol-Myers Squibb's relationship with an in-state pharmaceutical distributor was not sufficient to establish specific personal jurisdiction in California); *id.* ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." (quoting *Walden*, 571 U.S. at 286) (alterations in original)). Furthermore, these dealerships exist in every State because automobile manufacturers sell their vehicles to dealerships nationwide. If this were sufficient, then any plaintiff anywhere in the country could compel Ford to answer any product-liability complaint even if the lawsuit has nothing to do with Ford's relationship with in-state dealerships and even if the plaintiff did not purchase her vehicle at an in-state dealership.[3]

The approach taken by Minnesota and Montana (and the minority of other jurisdictions that take this same approach) thus poses a particular risk to automobile manufacturers, which have *some* pervasive contacts in every State in America. Indeed, many automobile manufacturers are international, and their design and manufacturing facilities could have international and U.S. locations. Yet, most manufacturers' major activities are confined to a few States. For example, Hon-

[3] The plaintiffs' claims in these cases had nothing to do with Ford's relationships with dealers, certified mechanics, or subsidiaries. The plaintiffs did not, for example, allege that their vehicles crashed after they were improperly repaired by certified mechanics at in-state dealerships due to improper training Ford provided to these mechanics.

da makes cars in Japan, but in the United States Honda's largest manufacturing and assembly plant is in Marysville, Ohio, and its design centers and headquarters for U.S. sales are in California. Compelling the company to ship its engineers and staff to Minnesota to defend a design-defect case just because an old Honda Accord moves there with its fourth owner is precisely the situation that the specific-jurisdiction inquiry is meant to guard against. This Court should grant certiorari to restore the clear line between general and specific personal jurisdiction, and to ensure that *all* courts apply the "arise out of or relate to" requirement in the same way.

II. The Court Should Not Wait Any Longer to Finally Resolve the Question Presented.

The issue presented by these petitions arises frequently but has so far escaped determination by this Court. *See* Matthew P. Demartini, *Stepping Back to Move Forward: Expanding Personal Jurisdiction by Reviving Old Practices*, 67 Emory L.J. 809, 822-823 (2018) (describing how courts have "developed conflicting tests for determining the relatedness required to assert specific jurisdiction" in the absence of guidance from this Court). Numerous courts have acknowledged the clear conflict of authority that exists regarding the question presented (including the Montana Supreme Court in *Gullett*, 19-368 Pet. App. 12a), in some instances lamenting the "[u]nfortunate[]" lack of guidance from this Court about the scope of the "arise out of or relate to" standard. *Myers*, 689 F.3d at 912 (citation omitted); *O'Connor*, 496 F.3d at 318; *see also Felland*, 682 F.3d at 676 (noting the conflict); *Moki Mac River Expeditions*, 221 S.W.3d at 579 (same). Despite granting certiorari on this issue twice, however, *see BMS*, 137 S. Ct. 1773;

Carnival Cruise, 499 U.S. 585, the Court has chosen to reserve the issue for another day while resolving *other* questions related to specific personal jurisdiction.

That day has now come. The continued uncertainty around the meaning of the "arise out of or relate to" requirement has increasingly divided state high courts and federal courts of appeals.[4] And while this Court may have believed that its 2017 decision in *BMS* would have provided sufficient guidance to state and federal courts, that has proven not to be the case: the fracture between courts has only continued to deepen since that decision, with different jurisdictions continuing to embrace or newly embracing conflicting standards. *See, e.g.*, 19-368 Pet. App. 14a-15a (rejecting any requirement of direct connection between a defendant's forum-related activities and the plaintiff's claims);19-369 Pet. App. 12a-15a (rejecting any causation requirement); *Tricarichi v. Coop. Rabobank, U.A.*, 440 P.3d 645, 652 (Nev. 2019) (requiring claims to have a "specific and direct relationship" with the forum contacts or be "intimately related" to them (citation omitted)); *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1314 (11th Cir. 2018) (applying but-for causation standard); *Petition of Reddam*, 180 A.3d 683, 691 (N.H. 2018) (requiring a defendant's in-state conduct to "form an important, or at

[4] As detailed in the petitions, federal appellate courts and state high courts have adopted four different approaches to determine whether specific personal jurisdiction exists. On the federal level, the Federal Circuit does not require any causal connection; the Fourth, Ninth, and Eleventh Circuits requires a but-for causal relation; the First, Third, Sixth, and Seventh Circuits require a variety of closer causal connections similar to proximate causation; and the Second, Eighth, and Tenth Circuits require an as-yet unspecified causal connection. *See* 19-368 Pet. 11-17; 19-369 Pet. 12-18.

least material, element of proof in the plaintiff's case" (citation omitted)); *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018) (declining to specify any particular causation requirement and instead stating that the governing standard "depends on the relationship among the defendant, the forum, and the litigation" (quotation marks omitted)).

This issue will not resolve itself, and the continued conflict among state and federal courts has serious ramifications for civil litigation across the country. Whether a manufacturer can be subject to suit in a particular jurisdiction will depend not upon a uniform understanding of the text of the Due Process Clause and its applications to the particular facts; instead, it will depend primarily on which "arise from or relate to" test the state or federal appellate court adopts. In jurisdictions in which no binding authority on the issue exists, this unresolved issue will continue to result in expensive and protracted litigation over personal jurisdiction at the outset of many product-liability cases. Plaintiffs will file suits in courts that ultimately determine that they lack jurisdiction, and the briefing and hearings required for a court to resolve the issue (sometimes *multiple* rounds of briefing in federal and state trial and appellate courts in a single case) could be avoided altogether by this Court's clarification of this requirement. And given the lack of nationwide uniformity, the issue will continue to be litigated even in jurisdictions where a higher court *has* picked a side in a binding decision—defendants will be required to continue to contest personal jurisdiction to preserve the issue for review by this Court.

Moreover, the differences in these jurisdictional standards will encourage plaintiffs to file suit based on

whether the state high court or the federal court of appeals has a more sympathetic personal-jurisdiction doctrine. And as the petitions note, in many jurisdictions, the relevant standards are demonstrably disharmonious. 19-368 Pet. 19-20; 19-369 Pet. 20-21. For example, the Ninth Circuit has adopted a but-for causation standard, *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 742 (9th Cir. 2013), while the Montana Supreme Court has rejected that standard, 19-368 Pet. App. 14a-15a. The First Circuit has generally adopted a proximate-causation standard, *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005), while the Massachusetts Supreme Judicial Court has rejected that approach and embraced a but-for causation test, *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 553 (Mass. 1994). The West Virginia Supreme Court has expressly rejected the Fourth Circuit's but-for causation standard, *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 278-279 (4th Cir. 2009), instead adopting a rule similar to the supreme courts of Montana and Minnesota, which do not require any causal nexus between the plaintiff's claims and the defendant's forum contacts, *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 342-43 (W. Va. 2016).

Collateral disputes about personal jurisdiction are not the only burdensome inefficiency created by the continued conflict among federal and state courts. Each side's desire to litigate in the forum with more favorable personal-jurisdiction jurisprudence also encourages dispute about the propriety of the forum altogether, resulting in *even more* collateral battles over fraudulent joinder or misjoinder and the procedural and

substantive propriety of removal to federal court.[5] These types of disputes are already all-too-common in product litigation,[6] and they are only encouraged by the lack of uniformity regarding the test for specific personal jurisdiction. And where a plaintiff successfully

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[5] *See, e.g.*, *James v. Am. Honda Motor Co.*, No. 1:18-CV-01316, 2019 WL 3995977 (W.D. La. July 30, 2019) (addressing disputes about removal and personal jurisdiction), *report and recommendation adopted,* No. 1:18-CV-1316, 2019 WL 3995980 (W.D. La. Aug. 22, 2019); *Hernandez v. Chevron U.S.A., Inc.*, 347 F. Supp. 3d 921 (D.N.M. 2018) (55-page opinion addressing questions of personal jurisdiction, fraudulent joinder, and procedural misjoinder); *Jordan v. Bayer Corp.*, No. 4:17-CV-00865-AGF, 2018 WL 837700 (E.D. Mo. Feb. 13, 2018) (addressing personal jurisdiction and whether a lack of personal jurisdiction destroyed diversity and thus permitted removal); *Pirtle v. Janssen Research & Dev., LLC*, No. 3:17-CV-00755-DRH, 2017 WL 4224036, at *3 (S.D. Ill. Sept. 22, 2017), *appeal dismissed sub nom. Forester v. Janssen Research & Dev., LLC*, No. 17-3203, 2017 WL 8942582 (7th Cir. Nov. 21, 2017) (addressing the propriety of removal, personal jurisdiction, and which of those issues should be addressed first); *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig.*, No. 2:14-MN-02502-RMG, 2016 WL 7335739 (D.S.C. Oct. 26, 2016) (addressing whether a lack of personal jurisdiction resulted in fraudulent joinder, as well as misjoinder); *Brown v. Toyota Motor Sales, U.S.A, Inc.*, No. CV 16-1069, 2016 WL 1161306 (E.D. La. Mar. 24, 2016) (resolving motion to remand and motion to dismiss for lack of personal jurisdiction); *Lafoy v. Volkswagen Grp. of Am., Inc.*, No. 4:16CV00466 ERW, 2016 WL 2733161 (E.D. Mo. May 11, 2016) (noting outstanding issues of fraudulent joinder and personal jurisdiction pending before the court).

[6] *See, e.g.*, *Sitafalwalla v. Toyota Motor Sales, U.S.A., Inc.*, No. 15-CV-1807(ADS)(GRB), 2016 WL 740441, at *7 (E.D.N.Y. Feb. 24, 2016) (denying remand because the plaintiff fraudulently joined a resident defendant to destroy diversity); *Selexman v. Ford Motor Co.*, No. CIV.A. H-14-1874, 2014 WL 6610904, at *5 (S.D. Tex. Nov. 20, 2014) (same); *Cty. Comm'n of McDowell Cty. v. McKesson Corp.*, 263 F. Supp. 3d 639, 647 (S.D.W. Va. 2017) (same); *Gentry v. Hyundai Motor Am., Inc.*, No. 3:13-CV-00030, 2017 WL 354251, at *11 (W.D. Va. Jan. 23, 2017) (same).

obtains a remand, that can give rise to yet more collateral litigation about whether removal was sufficiently frivolous to warrant an award of attorneys' fees under 28 U.S.C. § 1447(c),[7] followed by further disputes about the *amount* of fees that should be awarded.[8] All of this collateral litigation takes up an enormous amount of time and resources of courts and parties alike, and much of it can be avoided if this Court finally resolves the entrenched conflict among the courts about what type of connection must exist between a plaintiff's claim and a defendant's forum activities.

Finally, the persistent conflict regarding this issue undermines the "predictability to the legal system" that the Due Process Clause's limitations on personal jurisdiction are intended to provide. *World-Wide Volkswagen*, 444 U.S. at 297. This predictability allows businesses—like the Alliance's members—to make reasonable business decisions in America's vibrant but also highly litigious economy. The due-process limitations on personal jurisdiction are supposed to provide companies "clear notice" where personal jurisdiction exists over them so they can "structure their primary conduct with some minimum assurance as to where that con-

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[7] *See, e.g.*, *Simrell v. Teva Pharm. USA, Inc.*, No. 2:18-CV-00477-KOB, 2018 WL 3657567, at *6 (N.D. Ala. Aug. 2, 2018) (awarding fees); *Averill v. Fiandaca*, No. 2:17-CV-00287-JDL, 2017 WL 5895125, at *1 (D. Me. Nov. 29, 2017), *report and recommendation adopted,* No. 2:17-cv-00287-JDL, 2018 WL 283239 (D. Me. Jan. 3, 2018) (denying fees); *Thermoset Corp. v. Bldg. Materials Corp. of Am.*, No. 14-60268-CIV, 2017 WL 6610893, at *4 (S.D. Fla. Aug. 24, 2017), *report and recommendation adopted,* No. 14-60268-CIV, 2017 WL 6610894 (S.D. Fla. Oct. 12, 2017) (denying fees), *aff'd,* 752 F. App'x 902 (11th Cir. 2018).

[8] *OpenGov, Inc. v. GTY Tech. Holdings Inc.*, No. 18-CV-07198-JSC, 2019 WL 2010707, at *1 (N.D. Cal. May 7, 2019) (addressing the reasonableness of fees sought by plaintiffs).

duct will and will not render them liable to suit." *See id.* But where, as here, different doctrinal tests apply in different jurisdictions, this "minimum assurance" does not exist. And under the standard set by Montana and Minnesota, this predictability could never exist, as specific jurisdiction will not depend on the manufacturer's conduct but rather on the conduct of plaintiffs or third parties who may unilaterally decide to transport their vehicles thousands of miles away a decade or more after a manufacturer designed, manufactured, and sold any particular vehicle. This Court should grant certiorari and restore the nationwide uniformity and predictability that the Due Process Clause is supposed to provide.

CONCLUSION

The petitions for certiorari should be granted.

Respectfully submitted.

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