Nos. 19-368, 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 Writs of Certiorari to
the Montana and Minnesota Supreme Courts

Brief of *Amicus Curiae* Product Liability Advisory Council, Inc. in Support of Petitioner

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INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers and others in the supply chain.

PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining, *i.e.*, non-voting, members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, on behalf of its members, presenting the broad perspective of product manufacturers seeking fairness and balance in the

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[1] Petitioner in both cases has submitted to the Clerk a letter granting blanket consent to the filing of *amicus* briefs, and *amicus* obtained written consent from respondents in both cases. Pursuant to S. Ct. Rule 37.6, PLAC states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than PLAC, its members or its counsel, has made a monetary contribution toward preparation or submission of this Brief of *Amicus Curiae*.

[2] PLAC's current corporate membership is listed at https://plac.com/PLAC/About_Us/Amicus/PLAC/Amicus.aspx.

law as it affects the development and sale of products of value to businesses and consumers.

SUMMARY OF ARGUMENT

This Court has made clear in its personal jurisdiction jurisprudence, including most recently in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), that a state may exercise personal jurisdiction over a non-resident defendant consistent with due process only when plaintiff's claim "aris[es] out of or relat[es] to" defendant's in-state conduct. *Id.* at 1780. Although the actual holdings of the Court's cases should have made the meaning of this phrase clear, the lower courts, as evidenced by the decisions now before the Court, unfortunately continue to interpret it incorrectly.

In addition to the actual holdings of its cases, three distinct aspects of this Court's personal jurisdiction case law make clear that due process permits a state to exercise specific jurisdiction over a foreign defendant only when *its in-state conduct forms an essential element of its alleged liability to plaintiff*.

First, regardless of the sometimes varying verbiage employed by the Court's specific jurisdiction cases, the ineluctable fact is that they have all ultimately cited and relied on the seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). There the Court noted that non-residents who exercise the privilege of performing conduct in-state obtain the benefit of the state's protections for that conduct. Correspondingly, however, that conduct "may give rise to obligations," *id.* at 319, in which case it is consistent with "fair play and substantial justice," *id.* at 320, to "require[] the

corporation to respond to a suit brought to enforce" those "obligations," *id.* at 319. At bottom, the Court adopted a principle of reciprocity between a non-resident defendant's in-state rights and responsibilities, under which the state may hold defendant liable for all, but only, its in-state conduct. Since a foreign defendant creates "obligations" to a plaintiff by in-state conduct only when that conduct is an essential element of plaintiff's claims, due process permits personal jurisdiction only in that instance.

Moreover, the Court's decisions make clear that a defendant's right to predictability of the jurisdictional consequences of its conduct, so defendant can structure its affairs accordingly, is at the core of due process. Clarifying that "arises out of or relates to" requires the in-state performance of an essential element of plaintiff's claim supplies such predictability, while an uncabined interpretation of the nearly infinitely elastic "related to" phrase does not.

In addition, the Court has made clear that due process incorporates fundamental principles of federalism that impose territorial limitations on the power of a state's courts, and prevent them from infringing on the sovereignty of sister states. These principles likewise require restricting a state's jurisdiction over a non-resident to instances in which it has engaged in in-state conduct that actually gives rise to a legal obligation to plaintiff, *i.e.*, is an essential element of his claim.

Finally, and not incidentally, clarifying that this is indeed what due process requires will yield significant benefits for both businesses and consumers. Businesses could structure their affairs

to reduce costs, which would benefit consumers either through lower prices or new or improved products. And because businesses' liability-related costs would be roughly proportionate to their sales or other activity in the different states, pricing in each state would more accurately reflect the costs of businesses' conduct there as opposed to in other locales.

Under the "essential element" standard, the Court must reverse the decisions of the Minnesota and Montana Supreme Courts, since in neither case did petitioner design, manufacture or sell the product that allegedly injured plaintiff in-state. And both decisions violate the reciprocity, predictability and respect for federalism that due process requires.

ARGUMENT

I. DUE PROCESS PROHIBITS THE EXERCISE OF SPECIFIC JURISDICTION OVER A NON-RESIDENT DEFENDANT UNLESS IT ENGAGED IN IN-STATE CONDUCT THAT FORMS AN ESSENTIAL ELEMENT OF ITS ALLEGED LIABILITY TO PLAINTIFF

This Court made clear in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) ("*BMS*"), and *Daimler AG v. Bauman*, 571 U.S. 117 (2014), that due process prohibits the exercise of specific jurisdiction over a non-resident defendant unless "the suit . . . aris[es] out of or relat[es] to the defendant's contacts with the forum." *BMS*, 137 S. Ct. at 1780 (*quoting Daimler*, 571 U.S. at 118). Unfortunately, although the combination of the Court's actual holdings in *BMS* and *Walden v. Fiore*,

571 U.S. 277 (2014), would seem to have made the meaning of "aris[e] out of or relat[e] to" fairly clear, many lower state and federal courts, including in the decisions now before the Court, have interpreted it incorrectly.

As set forth below, beyond the holdings of *BMS* and *Walden,* three fundamental principles adumbrated in this Court's case law teach that due process allows a state to exercise specific jurisdiction over a non-resident defendant only where its *in-state conduct forms an essential element of its alleged liability to plaintiff.* The Court's clear pronouncement that this is indeed the law will not only effectuate due process, it will benefit businesses and consumers alike.

A. The Reciprocity And Proportionality Of A Non-Resident's In-State Rights And Obligations That Are At The Heart Of *International Shoe* Require This Result

1. At the core of personal jurisdiction is an implied agreement between defendant and sovereign. In exchange for obtaining rights or benefits from a state's protections, the defendant undertakes to submit to the jurisdiction of its courts. In some circumstances, a defendant's conduct, such as a corporation's choice to incorporate in a state or an individual's choice to be physically present there at the time of service, constitutes an agreement to be subject to the state's *general* jurisdiction. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality) ("Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and

thus an intention to submit to the laws of the forum State.").

But *specific* jurisdiction also results from such an implicit agreement. When an out-of-state defendant "'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,' . . . it submits to the judicial power of an otherwise foreign sovereign *to the extent* that power is exercised *in connection with the defendant's activities touching on the State*." *Id.* (*quoting Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (emphasis added).

The terms of a non-resident defendant's implicit agreement to submit to jurisdiction as a result of in-state conduct were originally described in the seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). There the Court noted that "to the extent that a [foreign] corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state." *Id.* at 319. Correspondingly, however, those activities "may give rise to *obligations*, and so far as those obligations *arise out of or are connected with the activities within the state*," it comports with the "traditional conception of fair play and substantial justice," *id.* at 320, or is not "undue," to "require[]the corporation to respond to a suit brought to *enforce*" those "obligations," *id* at 319. (emphases added). In other words, the implicit foreign defendant-sovereign agreement is defined by a principle of reciprocity and proportionality: if defendant engages in in-state conduct that affords it rights or protections under state law, then the state

equally may hold defendant to account for claims to enforce obligations founded on that same conduct.

By the same token, under these reciprocity principles, when a foreign defendant has *not* obtained forum state benefits from its conduct forming the basis for a plaintiff's claim, the state may *not* exercise jurisdiction over defendant with respect to those claims. For example, in *Hanson,* beneficiaries of a Florida decedent who were entitled to any property over which she had an unexercised power of appointment brought suit in Florida against the Delaware trustee of decedent's trust, arguing she had not effectively exercised her appointment power. Because the trustee had not acted with respect to the trust (or indeed done any business) in Florida, the Court held the state lacked personal jurisdiction, as the "suit cannot be said to be one to enforce an *obligation* that arose from a privilege the *defendant exercised in Florida*." *Hanson*, 357 U.S. at 252 (emphasis added).

It follows from this principle of reciprocity and proportionality of rights and obligations that a state may hold a foreign defendant to account for in-state conduct only where that conduct *forms an essential element of defendant's alleged liability to plaintiff*. After all, a defendant's in-state conduct can only create "obligations" that may be "enforced" by a plaintiff when the conduct is essential to defendant's claimed liability to plaintiff.

By way of examples, this standard fully explains the holdings of both *BMS* and *Walden*, the Court's two most recent specific jurisdiction decisions, and indeed those decisions effectively adopt an "essential element" standard without explicitly using that term. Thus in *Walden*, the Court held due process

forbade the Nevada courts to exercise jurisdiction over a Georgia drug enforcement agent on Nevada plaintiffs' claims that defendant had unlawfully seized plaintiffs' cash at a Georgia airport and filed a false affidavit there to sustain the seizure. The Court held that plaintiffs' claim to have suffered injury in Nevada "does not evince a connection between [*defendant*] and [the forum]," 571 U.S. at 290 (emphasis added),[3] and the "*relevant conduct* occurred entirely in Georgia," *id.* at 291 (emphasis added).

For the *Walden* plaintiffs' claim, the essential elements were a seizure or affidavit without adequate grounds, and that conduct occurred outside the forum. Moreover, in reaching its result the Court explicitly characterized the "crux" of its earlier decision in *Calder v. Jones*, 465 U.S. 783 (1984), which affirmed California courts' jurisdiction over a libel claim based on a newspaper article that was written in Florida but widely published in California, as being based on the fact of California publication, since "publication to third persons is a *necessary element* of libel." 571 U.S. at 287-88 (emphasis supplied). Thus, "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 290.

Similarly, in *BMS* the Court held due process forbade the California courts to exercise jurisdiction

[3] Logically, since specific jurisdiction is a reciprocal burden imposed on defendant's in-state conduct in exchange for benefits obtained through that conduct, the fact that causation or damages occur in the forum is not a basis for jurisdiction, as those elements of a plaintiff's claim do not represent a defendant's conduct but rather the *results* of such conduct.

over a non-resident pharmaceutical manufacturer on non-residents' claims for injury from defendant's prescription drug. Even though defendant had sold more than $900 million of the drug in California over a six-year period, 137 U.S. at 1778, and had contracted with a company in California to distribute the drug nationally, *id.* at 1783, defendant did not develop, manufacture or create its labeling or marketing for the drug in California, *id.* at 1778, nor could plaintiffs "track [their own medication] particularly to [the California distributor]," *id.* at 1783. Accordingly, as "all the *conduct giving rise to the nonresidents' claims* occurred elsewhere," the state courts "cannot claim specific jurisdiction." *Id.* at 1782 (emphasis added).

For the *BMS* plaintiffs' product liability claims, the essential elements would have included designing, drafting the warnings for or manufacturing the product, and selling it. *See* Restatement (Third) of Torts: Products Liability, § 1 ("One engaged in the business of selling or otherwise distributing products who *sells or distributes* a *defective product* is subject to liability for harm to persons or property caused by the defect.") (emphasis added); *id.* § 2 ("A product is defective when, at the time of sale or distribution, it . . . is defective in *design*, or is defective because of inadequate *instructions or warning*.") (emphasis added). The Court's reference to defendant's "conduct giving rise to the [plaintiffs'] claims" makes clear it was focused precisely on those elements.

2. In addition, defining specific jurisdiction in this "essential element" fashion would both properly ground the Court's "arises out of or relates to" standard in its original jurisprudential roots and

eliminate, or at least substantially ameliorate, lower courts' confusion surrounding its meaning.

Some of the confusion may have stemmed from linguistic variations in the Court's opinions. For example, the Court has used different subjects in sentences that contain the "arises out of or relates to" verb clause. In *BMS* and *Daimler*, the subject was "the suit," *BMS*, 137 S. Ct. at 1780 (*quoting Daimler*, 571 U.S. at 118), and in *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408 (1984), the similar "controversy" and "cause of action," *id.* at 414. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), it was the potentially different "alleged injuries," *id.* at 472. And in *Walden*, the subject (in that instance only of the phrase "arise out of," shorn of "relates to") was even more abstract: the relationship "among the defendant, the forum, and the litigation." *Walden*, 571 U.S. at 284. But as originated by this Court in *International Shoe*, the actual subject of the clause was that the "obligations" that plaintiff seeks to "enforce" must arise out of defendant's forum activities. *Int'l Shoe*, 326 U.S. at 319-20.

At least equally conducive to confusion, however, is the very presence of the words "or relates to" in the governing "arises out of or relates to" clause, as the words pose two obvious problems. For one thing, they inevitably raise the questions whether and to what extent they enlarge upon the meaning of

"arises out of." For another, they are inherently nearly infinitely elastic in meaning.[4]

Regardless of the precise verbiage of the Court's specific jurisdiction decisions, however, the ineluctable fact is that they *all ultimately cited and relied on the fairness-based reciprocity and proportionality logic of International Shoe*, under which the state may exercise jurisdiction only over claims that seek to "enforce" "obligations" that result from the non-resident defendant's "privilege of conducting activities within [the] state." *Int'l Shoe*, 326 U.S. at 319-20. Accordingly, returning to those fundamental moorings would both be entirely proper, *and* would do much to eliminate, or at least minimize, any confusion among the lower courts.

3. In addition, although the Court has made clear that the "primary concern" of due process is protecting defendants against undue burden in being involuntarily haled into court, not plaintiffs' election of where to sue, *BMS*, 137 S. Ct. at 1780 (*citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S.

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[4] The same can be said for the "or connected with" phrase that the Court has also sometimes used, including in *International Shoe* itself. *E.g., Int'l Shoe,* 326 U.S. at 319 (providing for jurisdiction over "obligations [that] arise out of or are connected with the activities within the state"). Perhaps it is for these reasons that the Court has sometimes entirely *deleted* these secondary phrases from its jurisdictional formulation, and rested entirely on "arises out of." *E.g.*, *Hanson*, 357 U.S. at 251 ("The cause of action in this case is not one that *arises out of* an act done or transaction consummated in the forum State.") (emphasis added); *Walden*, 571 U.S. at 284 ("[T]he relationship [among defendant, the forum and litigation] must *arise out of* contacts that the defendant himself creates with the forum State.") (emphasis added, and emphasis, citation and internal quotation marks omitted).

286, 292 (1980))[5], the "essential element" standard would not leave plaintiffs who claim harm from a defective product remediless. For one thing, plaintiffs who purchased the product at issue in their home state, whether directly from the ultimate manufacturer or from an intermediate seller or retailer, would always have a home-state remedy against the immediate selling entity. *See* Restatement (Third) of Torts: Product Liability, § 1 cmt. e ("The rule stated in this Section provides that all commercial sellers and distributors of products, including nonmanufacturing sellers and distributors such as wholesalers and retailers, are subject to liability for selling products that are defective. Liability attaches even when such nonmanufacturing sellers or distributors do not themselves render the products defective and regardless of whether they are in a position to prevent defects from occurring.").

Indeed, in most circumstances, such plaintiffs would have several other states in which they could sue. Under *Daimler*, they can always sue any ultimate manufacturer entity that is "essentially at home" in any U.S. state in that forum. *Daimler*, 571 U.S. at 122 (*quoting Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). Moreover, under the "essential element" standard they could likely sue even a foreign manufacturer in the U.S. state in which it initially sold its product, such as to a nationwide U.S. distributor. *Compare BMS*, 137 S. Ct. at 1783 (no jurisdiction where

[5] *Accord Walden*, 571 U.S. at 284 ("Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties.").

plaintiffs could not "track" their product to in-state national distributor).[6]

Furthermore, the "essential element" test applies in all cases, not just those involving allegedly defective products, and in many of these cases defendants will have performed essential claim elements in plaintiff's home state. For example, a resident who slips and falls in a negligently maintained local branch store of a non-resident corporation could sue the corporation in her home state. Similarly, a local company that a non-resident corporation engaged to render services in the area but then refused to pay could sue the corporation for breach of contract in the local forum.

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[6] Where defendant's liability-creating conduct did not occur in the forum, this Court has not hesitated to find personal jurisdiction lacking despite the fact that plaintiff resided or was injured there, or both. *See, e.g.*, *Walden*, 571 U.S. at 279-280 (Nevada lacked personal jurisdiction over civil rights claims against Georgia defendant even though plaintiffs lived in Nevada); *Nicastro*, 564 U.S. at 878 (New Jersey lacked personal jurisdiction over product liability claims against British corporation even though plaintiff was New Jersey resident and was injured there); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289-290, 298 (1980), (Oklahoma lacked personal jurisdiction over product liability claims against two New York corporations even though plaintiffs' automobile accident occurred in Oklahoma); *Hanson*, 357 U.S. at 251 (Florida lacked personal jurisdiction over trust-related declaratory judgment action against Delaware trustee even though plaintiffs were Florida residents).

B. A Defendant's Due Process Right To Predictability Of The Jurisdictional Consequences Of Its Conduct Requires The Same Result

1. Beyond the fundamental concept of reciprocity of a defendant's in-state rights and obligations that underlies *International Shoe*, the Court has also repeatedly made clear that a defendant's right to predictability of the jurisdictional consequences of its conduct is a core aspect of due process. *See Burger King*, 471 U.S. at 472 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in the judgment)) (holding that due process requires defendants to have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign"). *See also Daimler*, 571 U.S. at 137 (*quoting Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Simple jurisdictional rules . . . promote greater predictability.").

Predictability in the application of jurisdictional rules is essential for "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Among other things, such predictability enables defendants to prepare themselves for potential liability in a given state, including by "procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing [their] connection with the State." *Id.*

This predictability requirement of due process also requires that a state be permitted to exercise specific jurisdiction only where defendant's in-state conduct forms an essential element of its alleged liability to plaintiff. Under that rule, a defendant

could reliably predict whether its conduct would subject it to personal jurisdiction in a given state. For example, a manufacturer that designs or sells a particular product in a state could expect to be subject to jurisdiction there for claims alleging that specific product was defectively designed. *See* Restatement (Third) of Torts: Products Liability, § 1 (providing liability for one "who *sells or distributes a defective product*") (emphasis added); *id.* § 2 (providing products may be "*defective in design*, or . . . because of inadequate instructions or warning.") (emphasis added). Based on this predictability, the manufacturer would be able to choose where to locate its product design and sales operations.

By contrast, subjecting a non-resident defendant to jurisdiction whenever it has engaged in any forum conduct that is in some undefined way "related to" plaintiff's claims would abnegate the predictability that due process requires. As noted earlier, the words "related to," without a definition tied to the essential elements of plaintiff's claims, can be nearly infinitely elastic, and at least two aspects of this elasticity would eviscerate predictability under such a standard.

For one thing, it would be nearly impossible to predict what conduct a court would consider sufficiently "related to" plaintiff's claims to count in the jurisdictional analysis. For example, although defendant in *BMS* had five research and laboratory facilities in California, 137 S. Ct. at 1778, the Court characterized defendant's research there as being "on matters unrelated to" the drug at issue, *id.* at 1781. But where the drug was a blood-thinner that prevented clotting and was promoted to reduce the risk of heart attacks and strokes, *id.* at 1784

(Sotomayor, J., dissenting), what sort of in-state research would be sufficiently "related" under an uncabined "related to" standard to supply jurisdiction? Would it be research on any therapy, whether blood-thinner or otherwise, intended to reduce the risk of either heart attack or stroke, or only any such therapy aimed at both conditions, or only blood-thinners meeting one or the other of these criteria, or only on the drug actually at issue, or only relating to its risks that were the subject of plaintiffs' claims?

Further, it would be nearly impossible to predict how a court would weigh whatever different conduct the court did deem jurisdictionally relevant. For example, even if a defendant such as in *BMS* could know that its in-state research activities on other drugs were sufficiently "related" to count in the jurisdictional analysis, how would a court weigh that conduct against the fact that indisputably relevant conduct like defendant's design, manufacturing, labeling and sale of plaintiff's product did *not* occur in the state?

Nor is it an answer to suggest that predictability would be achieved, and hence due process satisfied, by a rule that any kind of conduct that is even in the slightest bit "related to" plaintiff's claims suffices to supply jurisdiction. For one thing, such an interpretation would violate both the reciprocity of in-state rights and obligations that is required by due process, *see* pp. 5-13, above, and the federalism and territoriality limitations on jurisdiction that due process imposes, *see* pp. 17-19, below. In any event, since in the modern era most businesses have some significant degree of contact with all or virtually all states, "related" conduct, and hence jurisdiction,

could be conjured up virtually everywhere. This would be but another form of the "loose and spurious form of general jurisdiction" that the Court rejected in *BMS*. *BMS*, 137 S. Ct. at 1781.

C. Principles of Federalism And Territorial Sovereignty Inherent In Due Process Also Require This Result

In addition to recognizing that due process requires reciprocity of a defendant's in-state benefits and burdens, as well as predictability of the jurisdictional consequences of its conduct, the Court has emphasized that due process, "acting as an instrument of interstate federalism," *BMS*, 137 S. Ct. at 1781, also imposes limits on state court jurisdiction.

For one thing, these restrictions "are a consequence of territorial limitations on the power of the respective States." *Id.* at 1780 (*quoting Hanson*, 357 U.S. at 251). For another, "[t]he sovereignty of each State," including "the sovereign power to try causes in their courts[,] . . . implie[s] a [corresponding] limitation on the sovereignty of all its sister States." *Id.* (*quoting World-Wide Volkswagen*, 444 U.S. at 293). These limitations are "express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *World-Wide Volkswagen*, *supra* at 293.

The essence of these territoriality and federalism limitations is to prohibit states from requiring a defendant to "submit[] to the coercive power of a State that may have little *legitimate interest in the claims in question*." *BMS,* 137 S. Ct. at 1780. (emphasis added). And the Court has applied these limitations despite the "increasing nationalization of

commerce." *World-Wide Volkswagen*, 444 U.S. at 293 (*quoting McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

Under these principles, a state has a "legitimate interest" in a "claim" consistent with due process only if it has the right to "regulate" the conduct underlying the claim, *i.e.*, if defendant's conduct that forms an essential element of the claim occurred in the forum. *See Goodyear*, 564 U.S. at 919 ("Specific jurisdiction . . . depends on . . . principally . . . activity or an occurrence that takes place in the forum State and is therefore *subject to the State's regulation*.") (emphasis added). It is only in that instance that affording the forum sovereignty over the claim would both be consistent with "territorial limitations" on the state's power, *BMS*, 137 S. Ct. at 1780, *and* not infringe on the "sovereignty of . . . sister States," *id.*, over the conduct at issue.

By contrast, a finding of jurisdiction whenever defendant engaged in any vaguely "related" in-state conduct would violate these federalism-based limitations. Especially in the modern era, when so many corporations engage in activities in all or most states, all those states could claim jurisdiction over claims when only one or at most a few of them have a

"legitimate interest" in regulating the actual claim-creating conduct.[7]

D. This Result Is Beneficial For Businesses And Consumers Alike

In addition, because the "essential element" test is reasonably predictable, and allocates a business's liability-related costs among the states approximately in proportion to sales or other activities there, the test would result in benefits to businesses and consumers alike.

As the Court has observed, a company's litigation-related costs often are passed on to consumers through product pricing. *See World-Wide Volkswagen*, 444 U.S. at 297 (noting that corporations subject to suit in a state might "pass[]

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[7] Again, the Court has already made clear that the fact that the injured *plaintiff* is a resident of the forum does not give the forum state a legitimate interest in subjecting the defendant to jurisdiction. *Walden*, 571 U.S. at 290 ("The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."). The Court has also made clear, however, that choice of law is a separate question from personal jurisdiction over defendant, *e.g., World-Wide Volkswagen,* 444 U.S. at 294 (even if the forum State has a strong interest in applying its law to the controversy . . . , the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment"); *Hanson,* 357 U.S. at 254 ("The issue is personal jurisdiction, not choice of law."), so plaintiff's residency and locus of injury *could* be relevant factors in the choice-of-law analysis. *See, e.g.,* Restatement (Second) of Conflict of Laws, § 145(2) (choice of law for tort claims to consider multiple factors, including "the place where the injury occurred" and "the domicil, residence, nationality, place of incorporation and place of business of the parties").

the expected costs on to customers"). Under a broad and unpredictable "related to" jurisdictional standard, a plaintiff could choose to sue a defendant that has multi-state sales or other activities in any number of different states, including ones known for low liability thresholds and high liability awards and costs. The resulting increased costs would frequently be passed on to consumers, including those who do not even live in the high-liability states.

On the other hand, as noted above, the relatively predictable "essential element" standard would allow businesses to structure their affairs to avoid or minimize their sales or other activities in high-liability-cost states. *See World-Wide Volkswagen*, 444 U.S. at 297 (observing that businesses with "clear notice . . . can act to alleviate the risk of burdensome litigation"). Under the competitive pressures of the market, the resulting savings in liability costs and insurance premiums would often be passed on to consumers and hence inure to their benefit. Alternatively, businesses might reinvest their cost savings to develop new products, improve existing ones or expand into new markets to reach additional consumers who would like to use their products. Any of these results would be beneficial to the business and to consumers alike.

In addition to lowering product costs and hence prices, the "essential element" standard would also *allocate* product costs more accurately among the states, hence allowing for more accurate pricing and better market efficiency. This is because companies would tend to incur liability costs and insurance premiums only in proportion to their sales or other activities among the different states, so pricing in the different states could take account of the degree of

activity, as well as the liability-related cost structure, there, and consumers in low-cost locales would not be forced to pay prices that incorporate the liability burdens of high-cost locales.

Indeed, explicit adoption of the "essential element" standard could help avoid potentially onerous *international* repercussions for American businesses. Some countries have enacted "retaliatory" jurisdictional provisions, which "empower national courts to exercise jurisdiction over foreign persons in circumstances where the courts of the foreigner's home state would have asserted jurisdiction." Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 15 (1987). Accordingly, domestic application of an uncabined "related to" standard could subject U.S. businesses to broad retaliatory jurisdiction in places where they engage in only limited and unrelated sales or other activities. And, of course, any exorbitant costs thus imposed would likely be borne at least in part by U.S. consumers.

All of these concerns loom largest for small businesses, which in the modern era can readily engage in at least some activities in all or most states, or even internationally, but lack the resources of large national or international companies to absorb large and unpredictable liability costs. Moreover, such businesses will often lack routine access to legal advice as to where they might be subject to suit. *Cf. Nicastro*, 564 U.S. at 892 (Breyer, J., concurring in judgment) (observing absurdity of rule that would require small businesses to be aware of intricate legal rules). Lacking such resources, the best they can hope for is an intuitive jurisdictional rule. The "essential element" test fits that

description, but a nebulous "related to" standard does not.

II. THE MINNESOTA AND MONTANA SUPREME COURT DECISIONS VIOLATE DUE PROCESS

In both product liability cases before the Court, Ford did not design, manufacture or sell the allegedly defective vehicle in the forum but did perform other conduct there, such as selling similar vehicles, servicing vehicles and advertising. In both cases the vehicle entered the forum through a subsequent sale and plaintiff was eventually injured there. In both cases the state high courts found jurisdiction, concluding plaintiffs' claims were "related to" Ford's in-state conduct. Both decisions violate due process for all the reasons discussed in the preceding section.

A. The Decision In *Bandemer* Violates Due Process

In *Bandemer v. Ford Motor Co.*, 931 N.W.2d 744 (Minn. 2019), the Minnesota Supreme Court employed a five-factor due process standard for specific jurisdiction, but centered its analysis on whether "Ford's contacts with the state" were "substantially connected or related to the litigation," *id.* at 751 (citation omitted), as "a 'relating to' standard . . . is a correct application of Supreme Court precedent," *id.* at 752. The court found this standard satisfied because: (1) plaintiff's car was a 1994 Crown Victoria, and Ford had sold 1994 Crown Victorias to Minnesota dealerships (as well as vehicles of all types from 2013-15), so these "sales . . .

are connected to the claims at issue," *id.* at 754; (2) at unspecified times Ford collected data on how its cars performed through Minnesota dealerships and used those data to inform design improvements and train mechanics, which "relate[d] to" the claim because plaintiff alleged defective design, *id.*; and (3) "Ford directs marketing and advertisements directly to Minnesotans,"[8] and "[a] Minnesotan bought a Ford vehicle." *Id.*

The Minnesota court's decision violates due process for many reasons. For starters, it is squarely inconsistent with the combined holdings of *BMS* and *Walden*. *BMS*, 137 S. Ct. at 1778, 1782 (where defendant did not develop or manufacture product in-state, and plaintiffs could not "track" their products to show defendant sold them in-state, "*all the conduct giving rise to the [plaintiffs'] claims occurred elsewhere*") (emphasis added); *Walden*, 571 U.S. at 290 ("The proper question is not where the *plaintiff* experienced a particular injury or effect but whether the *defendant's conduct* connects him to the forum in a meaningful way.") (emphasis added).[9]

Even if those decisions were not controlling, however, the Minnesota court's decision violated due process because it did not apply the "essential element" standard that due process requires for each of the reasons discussed in the preceding section.

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[8] The record only contained evidence of Ford's current advertising, and no such advertising mentioned the Crown Victoria. *See id.* at 760 (Anderson, J., dissenting).

[9] The Minnesota court attempted to distinguish *BMS* by the fact of plaintiff's in-state accident and injury, *Bandemer*, 931 N.W. 2d at 754, but *Walden* had already made clear that distinction was improper.

While the elements of plaintiff's product liability claims included Ford's designing and selling plaintiff's allegedly defective vehicle, Ford did none of that in Minnesota, and the in-state conduct the court relied on did *not* form an essential claim element.

Accordingly, the court departed from the specific jurisdiction rule established by *International Shoe*, as the court asked whether Ford's in-state conduct was somehow "*relate[d] to* the claim," *Bandemer*, 931 N.W.2d. at 753 (emphasis in original), when the correct standard is whether that conduct created the legal "*obligations*" that plaintiff sought to "enforce," *Int'l Shoe*, 326 U.S. at 319.[10]

The court's reasoning also subjected Ford to the very unpredictability that due process prohibits. Hence the court found it "related" that Ford sold 1994 Crown Victorias in Minnesota, as well as other vehicles from 2013-15, *see Bandemer*, 931 N.W.2d. at 748, 754, but Ford would not be able to predict that its Minnesota sales of Crown Victorias in 1994, rather than of all Ford sedans, or all Ford vehicles, or all Ford vehicles with the particular air bag design challenged by plaintiff, in that year, or one of those

[10] The court made a nod toward *International Shoe* by asserting that Ford had purposefully availed itself of "the privileges, benefits and protections" of Minnesota through Ford's actions "targeting Minnesota for sales of passenger vehicles, including the type of vehicle at issue in this case." *Bandemer*, 931 N.W. 2d at 749-750, 751. While those were indeed in-state activities by Ford, the "obligations" plaintiff sought to "enforce" were *not* created by those activities—rather, they were created by Ford's designing and selling plaintiff's car decades earlier in other states.

product categories in 2013-15, or both, would be what would count.

The court's decision also violated the territoriality and federalism principles that are incorporated in due process. Holding that Ford's design and sale of plaintiff's vehicle outside of Minnesota was conduct that was "subject to the State's regulation," *Goodyear*, 564 U.S. at 919, extended the state's sovereignty extraterritorially to claims in which it had no "legitimate interest," *BMS*, 137 S. Ct. at 1780, and infringed on "the sovereignty of . . . its sister States," *id.*, that did have such an interest.

B. The Decision In *Gullett* Violates Due Process

In *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 443 P.3d 407, 412 (Mont. 2019) ("*Gullett*"), the Montana Supreme Court adopted a due process standard for personal jurisdiction under which it concluded that "plaintiff's claims 'relate to' the defendant's forum-related activities if a nexus exists between the product and the defendant's in-state activity and if the defendant could have reasonably foreseen its product being used in Montana." *Id.* at 416. The court found that a nexus existed because Ford "makes it convenient for Montana residents to drive Ford vehicles by offering [in-state] maintenance, repair, and recall services," to which decedent's "use of the [Ford] Explorer in Montana is tied," *id.*, and because "Ford could have reasonably foreseen the Explorer—a product specifically built to travel—being used in Montana." *Id.*

Like the decision in *Bandemer*, the Montana court's decision violates due process. Like *Bandemer*, the decision in *Gullett* contradicted the

combined holdings of *BMS* and *Walden*. *See BMS*, 137 S. Ct. at 1778, 1782 (no jurisdiction where defendant was not shown to develop, manufacture or sell plaintiff's product in-state); *Walden*, 571 U.S. at 290 (jurisdictional question is not where plaintiff experienced injury but whether defendant's conduct at issue occurred in forum). Like *Bandemer*, *Gullett*'s attempt to distinguish *BMS* based on the fact of plaintiff's in-state injury, *Gullett*, 433 P.3d at 417, was improper under *Walden*, and *Gullett*'s attempt to distinguish *Walden* on the ground that plaintiff there was "the only connection between the defendant and the forum," *id*, ignores the fact that the Court's actual holding in *Walden* was that Nevada lacked personal jurisdiction because *defendant's* "relevant conduct occurred entirely [out-of-state]," *Walden*, 571 U.S. at 291.

Also as in *Bandemer*, the court in *Gullett* did not apply the "essential element" standard that due process requires, as none of Ford's Montana conduct on which the court relied formed an essential element of plaintiff's design and manufacturing defect claims, and the conduct that did underlie those claims had occurred long before and in other states.

Finally, as in *Bandemer*, *Gullett* violated *International Shoe*'s fundamental reciprocity principle since plaintiff was not seeking to "enforce" an "obligation" that defendant created by its in-state conduct, *Int'l Shoe*, 326 U.S. at 319, flouted the predictability requirement of due process by its

nebulous "nexus" standard,[11] and by seeking to regulate conduct that occurred elsewhere both exceeded the state's territorial bounds and infringed on the sovereignty of sister states that did have a legitimate interest in plaintiff's claims.

CONCLUSION

For all the foregoing reasons, the Court should hold that due process permits a state to exercise specific jurisdiction over a non-resident defendant only when its in-state conduct forms an essential element of its alleged liability to plaintiff, and should reverse the judgments of the Minnesota and Montana Supreme Courts.

Respectfully submitted,

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[11] Certainly, in designing, manufacturing and selling plaintiff's vehicle in Kentucky and Washington in or before 1996, Ford would have been hard-pressed to predict it would be subject to jurisdiction in Montana for alleged defects in that vehicle some nineteen or more years later based on maintenance, repair and recall services it would offer there at that time.