

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
Supreme Courts of Montana and Minnesota**

**BRIEF OF AMICUS CURIAE
CIVIL PROCEDURE PROFESSORS
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE AMICI¹

The amici are law professors who teach civil procedure, including personal jurisdiction, which is the subject of this petition. Helen Hershkoff, Arthur Miller, and John Sexton teach at New York University Law School; Alan Morrison teaches at George Washington University Law School. Law schools are listed for identification purposes only. The amici have no pecuniary or other interest in the outcome of these cases.

They are filing this brief in support of respondents because they believe that the Court's recent creation of a rigid division of personal jurisdiction cases into general and specific jurisdiction, with an increasingly narrow understanding of the specific prong, has given large business defendants an unjustified forum-shopping advantage over plaintiffs. According to petitioner, major manufacturers that sell their products throughout the United States can only be sued in a few states, which do not include where the plaintiff's injury occurred or in which all other potentially responsible defendants can be joined.

Because of the way that defendants are seeking to apply this Court's specific jurisdiction

¹ No person other than the amici has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission. Petitioners have filed a blanket consent and respondents have consented to the filing of this brief.

decisions, the law of personal jurisdiction is becoming divorced from its purpose, which is to prevent plaintiffs from dragging out-of-state parties into a forum with which they have no connection. Instead, these rulings have created a situation in which it is now major businesses, like petitioner, that are able to force plaintiffs to sue them in states that have little or no connection to the claim at issue and thereby turn the doctrine of personal jurisdiction on its head. Amici are filing this brief to propose an approach covering companies that regularly sell thousands of their products annually to consumers in every state, which is easy to administer, predictable, and fair to all parties.

INTRODUCTION & SUMMARY OF ARGUMENT

The plaintiffs in these routine personal injury cases sued where they were injured. The defendants in 19-369 included parties from the jurisdiction where the accident occurred and petitioner Ford Motor Company (“Ford”). The claim against Ford is that the vehicle in which plaintiff was riding was defectively designed and/or manufactured. Ford argues that the state courts have no personal jurisdiction over these claims because the wrongful conduct on which plaintiffs rely, as well as the original sale of the vehicle, took place in a state other than the forum state (and in this case the sale was to a person other than the plaintiff).

Ford is an international manufacturer of motor vehicles, including the make and model involved in both of these accidents. Ford currently sells thousands of vehicles annually in both Montana and Minnesota, and it sold thousands of the make and model of the vehicle involved in each accident in the relevant state, but it did not sell the actual vehicle in that state to this plaintiff. The notion that Ford may avoid defending these claims in these states is at odds with the principles of *International Shoe Co v. Washington*, 326 U.S. 310 (1945), which first brought the law of personal jurisdiction into the world of 20th century commerce. More significantly, it cannot be squared with the fact that the manufacturer in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), did not even contest personal jurisdiction in Oklahoma, even though the Audi at issue was made in Germany and sold in New York.

The source of what is becoming a dramatic reduction in the scope of personal jurisdiction over major companies is the Court's recent decisions in which it adopted and gave significant legal consequences to the difference between general and specific jurisdiction. In those rulings, the Court also created the rigid and narrow definitions of both categories that has enabled Ford to present what would have been an unthinkable argument just a decade ago for avoiding personal jurisdiction in states in which it regularly engages in major business and sells the very make and model of the products at issue in these cases.

Neither the Due Process Clause nor any other portion of the Constitution provides for those

two categories of personal jurisdiction, let alone requires that each be defined in a way that gives undue advantage to large businesses at the expense of individuals whom their products injure. Amici agree that there is utility in limiting specific jurisdiction to cases in which the defendant's conduct bears a reasonable relationship to the forum state, but disagree that the connection should be anywhere near as narrow as Ford and its amici contend. Indeed, as we demonstrate below, none of the holdings in this Court's recent personal jurisdiction cases would be changed if the position of amici is adopted. In our view, it is only an undue expansion of the dictum in those recent decisions that has given Ford a basis to assert that the state courts here lack personal jurisdiction over these claims against it.

Amici have no objection to the use of specific and general jurisdiction to describe the basic difference between the former – for which the claim must be related to the forum – and the latter, which includes unrelated claims. This case presents the question of how close that relationship must be for Ford and other national manufacturers of products that, if defectively designed or manufactured, or significantly mislabeled, can cause serious physical injuries or death. Ford insists that such claims may be brought only where the design or manufacturing defect took place, or at its Michigan headquarters or in Delaware where it is incorporated – or perhaps, if the car is still owned by the first purchaser, where the injury happened, provided that the injury occurred in the state of the first purchase.

By contrast, amici submit that specific jurisdiction in the forum state is met if the defendant is a national manufacturer and seller of a potentially dangerous product, which it regularly sells in the forum state, and the injury occurred in that state, regardless of whether the product at issue was sold to this plaintiff in that state. That test is easy to apply and produces results that are predictable for everyone. That test also recognizes that injuries from such products will inevitably occur and that where they occur is happenstance. Moreover, it recognizes that, for major companies like Ford, the forum in which they must defend such claims does not change its need to procure insurance, hire counsel, provide discovery, and have a trial. Those considerations are largely if not entirely irrelevant to them, but very significant to a plaintiff who must secure witnesses to the accident and in most cases join other defendants who can only be sued where the accident occurred.

Amici further urge the Court to limit its ruling to cases, like this, in which the defendant is a manufacturer of a potentially dangerous consumer product, which it regularly sells in every state, and it is being sued in tort for a defect in design and/or manufacture of the product in the state in which the plaintiff's injury occurred. There is no need to attempt to set forth a test that includes cases in which the claim is in contract, or the product is a component part and/or is sold only to a business entity. Nor should the Court attempt in this case to resolve specific jurisdiction questions for claims of copyright or trademark or cases involving the Internet.

Rather, the Court should do what it did in another Due Process case last term, which involved state taxation of accumulated trust income – limit its “holding to the specific facts presented.” *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 2221 (2019); *id.* at 2222 & note 8 (taxability will depend “on whether the resident is a settlor, beneficiary, or trustee . . . [and whether] the resident ha[s] some degree of possession, control, or enjoyment of the trust property or a right to receive that property” but declining to “decide what degree of possession, control, or enjoyment would be sufficient to support taxation;” *id.* at 2226 (“we address only the circumstances in which a beneficiary receives no trust income, has no right to demand that income, and is uncertain necessarily to receive a specific share of that income”).

ARGUMENT

THE JUDGMENTS BELOW SHOULD BE AFFIRMED.

The Battleground

The Constitution protects the liberty interests of parties not to be forced to litigate in a forum with which they have no connection. But on a practical level, personal jurisdiction litigation is all about forum shopping, for both plaintiffs and defendants.

Thus, plaintiff may, as they did in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), want to avoid suing in a non-US court,

or, as in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), they want to sue where the claim arose because the witnesses are there. In other cases like *Bandemer* (No. 19-369), the plaintiffs choose the forum because that is the court where they maximize the chance that all potential defendants can be sued. Sometimes, as appears to be the case in *Burnham v. Superior Court*, 495 U.S. 604 (1990), a plaintiff may choose the forum because it will inconvenience the defendant, thereby giving the plaintiff a tactical advantage. Or, as in *Walden v. Fiore*, 571 U.S. 277 (2014), they may choose a particular forum because they believe that the local jury will be especially understanding of their situation – in that case, Las Vegas, where carrying \$97,000 in cash would not be seen as aberrational, as it would in Atlanta where the incident giving rise to their claim took place. In some cases, there are multiple reasons why the plaintiff, or more accurately, the plaintiff’s lawyer, picks a forum.

Although the charge of forum shopping is frequently leveled against plaintiffs,² it is no less prevalent on the defense side. It may be an overstatement, but only a small one, that the

² Brief Amicus Curiae of Chamber of Commerce of the United States in Support of the Petition for a Writ of Certiorari, 19-368 at 5 (“despite this Court’s recent decisions, plaintiffs’ forum-shopping remains rampant”); Merits Brief Amicus Curiae of PHARMA at 3 (despite *BMS*, plaintiffs have continued “to engage in extensive forum shopping, channeling plaintiffs from all over the country into a few preferred fora that they perceive as unusually hospitable to product liability suits”).

defense mentality is that, if plaintiff has selected a given forum, that choice must have been made to give the plaintiff an advantage, and so counsel for the defendant should try to find a way to have the case heard someplace else. At one time, defendants may have wanted to move a case because it would be more convenient for them, meaning for their witnesses and counsel, and that rationale might apply to individual defendants like Mr. Burnham. But in cases involving large national corporate defendants, those considerations are almost irrelevant when the claims are for many million dollars and where national counsel are hired for the defense.

This does not mean that it is improper for defendants to try to move cases to a favorable, or at least more neutral, forum, which seems to have been the motive in *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), where the Montana state courts had a reputation for favoring plaintiffs in cases brought by railroad employees.³ So, too, in both *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 571 U.S. 117 (2014), the defendants had a very strong argument that the claims at issue had no connection with the United States at all, and so had to be brought in another country where the injuries

³ See Brief for Petitioner in *BNSF*, 2017 WL 818312, at *4 (noting plaintiffs chose Montana because “the Montana Supreme Court has repeatedly subjected railroads to plaintiff-friendly procedural rules and unfavorable substantive FELA standards” and argued that *Daimler* intended to “put a stop to this type of flagrant forum shopping”).

occurred and the witnesses were located. In none of these cases did the defendants have an objection based on lack of notice or a meaningful opportunity to be heard; they simply wanted their cases heard elsewhere.

Then there are cases in the middle, like *Bristol-Myers-Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1778 (2017), where there were already 86 claims involving BMS's drug Plavix brought by California residents, in California state court. In that situation, BMS's decision to take its personal jurisdiction case to the Supreme Court and to insist that another 592 of the same claims must be filed elsewhere, cannot have been about convenience or fairness. On the other hand, the lawyers for the non-California plaintiffs were not merely seeking aggregation, which they could have obtained in their home states, but sued in California because they believed that they could get further advantages from being in that forum.

The initial reaction of many students to forum shopping is that it is somehow wrong, even if not unlawful or unprofessional, until they realize that it is practiced by both sides and that lawyers who refuse to engage in the practice are doing their clients a disservice. Not only is forum shopping not improper, but it is blessed by Article III of Constitution, which provides for diversity jurisdiction in the federal courts so that eligible plaintiffs can chose a federal forum if they believe that it will better serve their clients. Similarly, subject to some restrictions, defendants in diversity cases can exercise their right to forum

shop by removing the case to federal court. 28 U.S.C. §§1441, 1453.

For these reasons, the debate over personal jurisdiction defenses in cases involving major business entities such as Ford should focus on the legitimacy of the defense objection to the forum and the legitimate needs of the plaintiff to have the case heard there. Applying that analysis to these cases makes clear that Ford's motions were properly denied. And, as we now demonstrate, a proper analysis of the Court's personal jurisdiction cases supports that conclusion as well.

The Prior Common Understanding

The decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), was a recognition that the law of personal jurisdiction, as applied to multi-state businesses, could no longer be bound by its prior strict territorial limits. The concern that state courts might reach too broadly was no longer the sole or even dominant consideration in whether a Washington state court would be permitted to exercise personal jurisdiction over an out-of-state defendant, in that case for a claim that the defendant was required to pay unemployment taxes for its employees who actually worked there. The alternative would have been to require the State to sue for those taxes in St Louis, where the company was headquartered, or Delaware, where it was incorporated. In upholding jurisdiction there, the Court observed that International Shoe was engaged in the systematic conduct of business within the state and hence could be sued there.

Because the claim was based on conduct that took place in the forum state, there was no need to decide whether jurisdiction extended to claims that did not arise there.

In the course of its opinion, the Court enunciated the broad principles for which the decision is known and from which subsequent rulings received their guidance. Thus, the Court observed that a defendant must “have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” 326 U.S. at 316 (citations omitted). The Court then continued that the demands of due process generally “may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.” *Id.* at 317.

For those corporations that exercise the privilege of conducting business within the forum state, that may give rise to certain obligations and if those obligations “arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.” *Id.* at 319. To be sure, the Court made clear that a defendant’s “casual presence” in the state or “even his conduct of single or isolated items of activities in a state in the

corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." *Id.* at 317. However, there is no hint in *International Shoe* that a company whose business within a state is, as Ford's is in both states here, "continuous and systematic," *id.* at 317, could nonetheless escape suit because the connection with the plaintiff's claim was not as closely tied to the forum as Ford insists is required here. As the brief of the Products Liability Advisory Council (PLAC) observed (at 11), "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*" (emphasis in original).

This understanding that *International Shoe* permitted states to exercise personal jurisdiction over companies regularly doing business that broadly relates to their activities within the state is most clearly illustrated by what the manufacturer of the allegedly defective Audi did *not* do in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The plaintiffs had purchased the car in New York and the accident occurred in Oklahoma. Plaintiffs sued the New York dealer, the regional distributor for New York, the importer, and the German manufacturer. Only the dealer and the distributor, who were independent of the other defendants, moved to dismiss for want of personal jurisdiction, and eventually prevailed in the Supreme Court, over

the dissent of three Justices. The other two defendants never made such a motion despite the fact that none of their Oklahoma activities had any relation to the vehicle sale or accident in question. If such a motion had succeeded, it would surely have created a significant disadvantage for the plaintiffs, and so the only explanation of why a major company would have foregone that motion was because it believed that *International Shoe* made it a certain loser.

In *Asahi Metal Industry Co., Ltd v. Superior Court*, 480 U.S. 102 (1987), the claims arose out of a motorcycle accident in California in which one of the defendants was a Taiwanese manufacturer of the tube used in the motorcycle's tire. That company, as well as all of the other defendants except the company that made the tube's assembly valve, settled with the plaintiff. However, under Ford's approach, all of the defendants would have moved to dismiss for want of personal jurisdiction. But that only happened when the tube maker tried to use the California state courts to seek indemnity from the maker of the assembly valve, which the *Asahi* Court turned aside for lack of personal jurisdiction, in a case bearing no similarity to these.

Just like the dog that did not bark for Sherlock Holmes,⁴ the two cases that started the

⁴ Arthur Conan Doyle, *The Adventure of Silver Blaze*, in THE COMPLETE ADVENTURES AND MEMOIRS OF SHERLOCK HOLMES 1, 26 (Harper Bros. ed. 1894).

narrowing of personal jurisdiction have aspects that confirm that, until recently, major companies accepted that doing substantial business in a state, as Ford does here, gave rise to being sued there, if not for everything, at least for most claims. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), two North Carolina residents were killed in a bus crash in France, in which the tires were made by non-US subsidiaries of the defendant Goodyear USA, an Ohio corporation. This Court ruled that there was no personal jurisdiction over the non-US companies, which would be the result under the test urged by amici. But for these purposes what stands out is that “Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it.” *Id.* at 918.

Similarly, in *Daimler A.G. v. Bauman*, 571 U.S. 117 (2014), this Court held that there was no personal jurisdiction in California over a German parent company for the activities of an Argentina subsidiary for harms that took place in that country. Again, that ruling is plainly correct, but what did *not* happen further confirms the understanding that major companies and their lawyers had regarding suits against them where they were regularly doing business. This time the dog that did not bark was the wholly owned subsidiary of the defendant (MBUSA), which regularly carried on business in California and whose activities the plaintiff sought to attribute to

the parent in order to obtain personal jurisdiction over that parent. And, like Goodyear USA, MBUSA never suggested that it was not subject to personal jurisdiction there although, as the Court observed, the parent's brief contained a "suggestion that in light of *Goodyear*, MBUSA may not be amenable to general jurisdiction in California." *Id.* at 134.⁵

In both Ford's petitions and its merits brief, the company cited a number of appellate decisions that it claims created the problem that it asks this Court to resolve by a further narrowing of specific jurisdiction. Of them, only two involve product liability claims, and in neither did a national manufacturer assert a personal jurisdiction defense. In *Hinrichs v. General Motors of Canada, Ltd.*, 222 So. 3d 1114 (Ala. 2016), a Pennsylvania buyer of a General Motors car, made in Canada, drove the car to Alabama where the accident that injured his passenger-plaintiff happened. Plaintiff sued General Motors, which defended on the merits, until it went into bankruptcy and later settled with the plaintiff. The reported opinion involved a subsequent effort to sue GM Canada, which was rejected because that company did no business in the US and sold all its cars to GM US,

⁵ In addition, it was not until after *Goodyear* that BNSF first raised a personal jurisdiction objection to suits in Montana, even though it had been regularly sued there by residents of other states, for non-Montana injuries, doubtless because of its extensive operations there. See Brief for Respondents in *BNSF*, 2017 WL 1192088, at *5-6.

with title transferred in Canada. Under amici's approach, but not Ford's, GM, which sells cars regularly in the forum state, would have to defend the claim there, despite the fact that the car was driven there from the state where it was purchased. However, GM Canada could not be sued in Alabama or Pennsylvania because it did no business in either state.

The only other products case cited by Ford is *Montgomery v. Airbus Helicopters, Inc.*, 414 P.3d 824 (Okla. 2018). The most relevant fact is that Honeywell, the maker of a helicopter replacement engine that was sold and picked up by the Kansas owner in Texas, never objected to personal jurisdiction in Oklahoma where the accident that was allegedly caused by the defective engine took place. By contrast, both the Texas seller of the helicopter and the Washington company that assisted in the installation of the replacement engine in Kansas, successfully moved to dismiss for want of personal jurisdiction because neither did business in Oklahoma. Once again, both results are consistent with the standard offered by amici, but under Ford's approach, Honeywell would be dismissed because it did not sell the engine at issue in Oklahoma.

***The Pro-Defendant Revolution and
the Proper Response to It***

Ford's personal jurisdiction argument in these cases is not based on the holdings of either *Goodyear* or *Daimler*, because the claims there had no arguable relation to the forum, no matter how

broadly “relation” is defined. What has caused these defenses to mushroom is the combination of the Court’s hard line division of personal jurisdiction into general and specific, and the so far successful efforts of the defendant in *BMS* and its amici to narrow the circumstances in which specific jurisdiction is available.

The origins of this Court’s placing personal jurisdiction into those two categories are footnotes 8 and 9 in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). The plaintiffs there “concede[d] that respondents’ claims against Helicol did not ‘arise out of,’ and are not related to, Helicol’s activities within Texas,” so that only general jurisdiction was available. *Id.* at 415. It was in that connection, and relying solely on a law review article, that the Court observed in note 8 (at 414, emphasis added): “*It has been said* that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum, the State is exercising ‘specific jurisdiction’ over the defendant.” Similarly, in note 9, the Court remarked “When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum, *the State has been said* to be exercising ‘general jurisdiction’ over the defendant.” *Id.* (emphasis added).

There was no amplification of those categories or any hint that they were more than a shorthand description of the differences between

them, let alone that they in any way altered the common understanding following *International Shoe*. And they certainly did not portend a world in which specific jurisdiction would be so narrow that it would undermine the prior regime under which defendants that had engaged in substantial business in the forum state could be sued over matters generally related to their activities there. Nonetheless, this Court in *Goodyear* transformed a description into a prescription, with no explanation of the basis for doing so and no recognition that nothing in *Helicopteros* supported that result, let alone compelled it.

In their briefs, Ford and its amici focus on the “arising out of or related to the defendant's contacts with the forum” language as if it were a quote from a statute or a part of the Constitution. It is not. The phrases were an effort by authors of a law review article to describe in general terms how the two types of personal jurisdiction differed, and they are useful for that limited purpose. But that does not help decide cases like this, or the many others cited in the briefs, where the “related to” language can lead to wildly different outcomes depending on the level of generality at which the “relation to” question is asked.

Indeed, Ford’s brief rarely discusses the facts of any of the cases, but typically argues based on quotes offered without context, let alone with an acknowledgement that none of them, other than those identified by amici in the prior section, were products cases against national manufacturers.

The most extreme examples are the multiple citations to *Walden v. Fiore*, 571 U.S. 277 (2014), which was brought in Nevada against a policeman who, plaintiffs alleged, wrongly refused to return their \$97,000 in cash, taken from them in Georgia. Plaintiffs sued for the temporary loss of the use of their money which they needed to fund their professional gambling. That case plainly did not belong in Nevada, but its holding has nothing to say about the right of these respondents to sue Ford where their injuries from a defective car took place.⁶

In one sense, everything is related to everything else, but that surely is not the right way of looking at the question. Nor does it help to include adjectives like “close,” or “relevant” or “direct” or “material,” because that is simply another form of question begging. Rather, the proper way to think about this question is to put on the *International Shoe* lens and consider whether the claim by the plaintiff is one on which there is a reasonable basis for having it tried in the forum state, or is the plaintiff trying to gain an unfair advantage over an out-of-state defendant.

⁶ Despite its heavy reliance on quotes from cases dissimilar to these, Ford recognized that language from opinions should not be treated like a statute, when it encountered a quote that cut against its position. Pet Br. 36-37. Similarly, the quotes from *International Shoe supra* at 11, refer to contacts of a “corporation,” but no one would suggest that the test did not apply to a partnership or a sole proprietorship.

Seen that way, these cases are not difficult. The accidents that gave rise to these claims occurred in the forum states and the plaintiffs reside there, as do the other potential defendants that are not a national business that made the consumer product involved in the accident. Ford surely does substantial amounts of business in the forum states on a regular and consistent basis, and although the vehicles at issue were not originally sold in the forum states, thousands of cars like them were. Thus, it is only happenstance that these vehicles, rather than one sold initially in the forum state, were involved in these accidents. Under these circumstances, “the maintenance of the suit [in these states] does not offend ‘traditional notions of fair play and substantial justice’ and any burden on Ford to defend these cases here as opposed to somewhere else surely cannot be considered “undue.” 326 U.S. at 316, 319.

Another useful way to examine whether there is a reasonable relation between the claim here and Ford’s presence in the forum states (as Ford seems to agree, Br. 24) is by asking whether Minnesota and Montana could have constitutionally regulated Ford’s design or manufacturing practices to comply with their laws. *Accord*, PLAC Br. at 18; PHARMA Br. at 21. In that situation the objection would be that the Dormant Commerce Clause prohibited the state from, for example, imposing a fine, or ordering a recall, for failure to comply with a state’s standards.

However, under the test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), Ford would lose unless it could show that “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” As long as the state’s standards were applied on a non-discriminatory basis, as the tort principles on which the plaintiffs will rely in these cases must be, Ford would be subject to that regulation because selling hundreds of thousands of automobiles throughout the United States makes it entirely reasonable for every state to be able to assure its residents that Ford’s vehicles are safely designed and manufactured.

It is possible that a state could not regulate the product because of federal preemption. That possibility, however, provides further support for amici’s test for two reasons. First, preemption is a merits issue. Because the airbag that did not open in *Bandemer* was subject to a federal standard issued by the National Highway Traffic Administration, the outcome in the case will be subject to that standard no matter where the case will be tried. Second, to the extent that Ford is arguing that the law in Minnesota or Montana is less favorable to it than where Ford would prefer to be sued, federal preemption should largely eliminate that contention. Therefore, just as in *International Shoe*, where the state was permitted to both impose unemployment taxes and collect them in that state, Minnesota and Montana surely have regulatory jurisdiction over Ford’s products and can compel Ford to respond in their courts if

they contend that Ford has not lived up to its obligations.⁷

Coming Subtractions

The petition in this case is just the latest in a series of efforts by major businesses to reduce the number of jurisdictions in which they can be sued over defects in products that they distribute across the country. The question before this Court is whether this goal, to subtract additional jurisdictions from reasonable forums where individual consumers would want to sue, will succeed so that there are none left except those favorable to defendants.⁸

Two conclusions are clear from the briefs of Ford and most of its amici: plaintiffs cannot sue over defects in these Ford vehicles in the location where their injuries occurred, unless the first sale and the accident took place in the forum state. Instead, they can sue where Ford is “at home,” in Michigan where it has its headquarters, and Delaware, where it is incorporated. In effect, Ford

⁷ The concept of using the Dormant Commerce Clause, instead of the Due Process Clause to resolve issues of personal jurisdiction where defendants are commercial actors like Ford is explored in depth in Alan B. Morrison, *Safe at Home: The Supreme Court’s Personal Jurisdiction Gift to Business*, 68 De Paul L. Rev. 517, 539-555 (2019).

⁸ Because these cases involve automobiles, this brief will maintain that focus. However, many of the same kinds of problems for plaintiffs will also exist whether the product is mobile, like a drug, a lawnmower, or infant crib, or stationary, like a hot water heater or an air conditioning system.

would receive a “jurisdictional windfall” whenever one of its cars was resold or the original owner had an accident outside the state where the car was purchased. Limiting suit to those narrow venues is unfair enough, but what if the cars at issue were made by non-US companies, such as Daimler or Toyota? Their homes are in Germany and Japan: does that mean that plaintiffs could only sue them there? Naturally, Ford and its amici refuse to acknowledge that consequence.⁹

At various places in the briefs, Ford and its amici point out that the vehicles in these cases were not designed or manufactured in the forum states, which suggests that there might be specific jurisdiction where either had occurred. On closer examination, those possibilities do not offer much benefit for these or most other plaintiffs for several reasons. Starting with foreign auto makers, the design and, in many cases, some or all of the manufacture will be done outside this country. But even if one or both occurred in the United States, that is unlikely to have been where the accident took place, which means that it will generally be impossible to join other potentially liable defendants. The result will be to multiply the number of lawsuits, duplicate discovery and trials,

⁹ Citing to *BMS*, which had nothing to do with the issue, the PLAC Br (at 12) blithely asserts that plaintiffs “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.” Which is like telling plaintiffs here they can go to Delaware to sue over an accident in their home state.

make settlements more complicated, and create issue preclusion claims.

In addition, in most cases, plaintiff's counsel will be uncertain whether the defect that caused the accident was in design or manufacture. Defendants will not provide pre-filing discovery, even as to where either or both occurred, let alone regarding the nature of the problem. Thus, plaintiffs may file in what turns out, under Ford's approach, to be a place without specific jurisdiction because the tortious conduct occurred elsewhere. At the very least the parties will be guaranteed to spend time and money determining a non-merits issue – which is one of the objections of Ford and its supporters to the current rules on personal jurisdiction. Brief of Alliance of Automobile Manufacturers in Support of Certiorari at 4 (decrying “widespread motion practice over procedural issues that are collateral to the merits of product-liability lawsuits”). Furthermore, if the cause of the plaintiff's injury is a design defect, that is likely to have occurred at the manufacturer's headquarters or some other location with no relation to the accident, thereby providing no forum selection help to the plaintiff.

Ford makes much of the fact that the initial purchasers of the cars in these cases were not residents of the forum states. But it never concedes (as the United States does, Br. 26-27) that, if the first sale to the current owner had been there,

specific jurisdiction would be proper in these states.¹⁰

Reading between the lines, and noting the focus on where the alleged wrongful conduct took place as the basis for specific jurisdiction, it is virtually certain that, in the next round of defense personal jurisdiction motions, car manufacturers will argue that, simply because the first sale occurred in the forum state, is not sufficient to establish personal jurisdiction. That, they will argue, is because the company “merely” sold the car there, which is not a basis for tort liability and hence personal jurisdiction. Instead, they will argue that they can only be sued at home, or where the design or manufacture took place, producing the same burdens for plaintiffs described in the previous paragraphs.

But that is not the end of the devices that auto makers are ready to use to avoid being sued where the injury to the plaintiff took place, even if the first sale took place in the state where the accident happened. Even for the initial purchase, the actual seller is not the Ford Motor Company, but a Ford dealer, with an independent legal ownership and control, as was the case in *World-Wide Volkswagen*. Indeed, in that case, and in many others, there were two layers between the manufacturer and the company that sold the car to

¹⁰ Even that concession by the United States does not apply to cars that are re-sold or when a driver ventures out of her home state, which is one of the main reasons why people buy cars.

the plaintiffs: an importer and a regional distributor.¹¹ And they take this position despite Justice Connor's statement for the plurality in *Asahi*, 480 U.S. at 112, that "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" may subject the manufacturer to personal jurisdiction.

To strengthen this argument, Ford's lawyers will advise it to be sure to transfer title to all its vehicles either where the car is made or at Ford's headquarters, as GM did in *Hinrichs, supra* at 16, so that Ford will never have even that presence in any of the other states where its cars are sold. If this argument seems far-fetched, it is only a slight extension of the result in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), where a supposedly independent distributor insulated a United Kingdom manufacturer from being sued in New Jersey where one of its massive and dangerous machines seriously injured the plaintiff.

¹¹ The Chamber's brief (9, n. 2) makes clear by its quote from *Walden*, and the assertion that the relevant forum conduct must be by the defendant "himself," that the defendants will surely take the next personal jurisdiction step and insist that only the independent dealer can be sued where the sale was made. ¹² See A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 Florida Law Rev. 979 (2019) (argument by member of Civil Rules Committee for expanding personal jurisdiction of federal courts to protect plaintiffs). The Brief of the United States (at 32-33) recognizes that the federal courts are not bound by the same due process limits as are state courts.

One final point about the briefs of Ford and its business amici must be noted. The briefs are very specific on where cases may **not** be brought, but very short on where personal jurisdiction is proper. Even in *BMS*, the strongest case for Ford, the Court was clear that the non-California plaintiffs could sue in their home states, where they ingested Plavix and suffered their injuries, as well as where BMS was at home, which is all that respondents seek here. The sensible balance struck in *International Shoe*, as reasonably understood by major automobile manufacturers until very recently, should not be abandoned as Ford and its amici urge. That is because, as amici now show, their alternative satisfies all the reasonable needs of national manufacturers of potentially dangerous consumer products like Ford, while providing a reasonable forum for the victim.

Amici's Test is Reasonable

Amici urge the Court not to follow Ford's suggested path because it would unfairly tilt the scales of personal jurisdiction in cases involving products sold nationwide by major manufacturers. Instead, the Court should hold that a state court may constitutionally exercise personal jurisdiction over a claim that the manufacturer of a potentially dangerous product caused plaintiff's injury in that state, if the manufacturer sells substantial numbers of that type of product in that state. And the state may do so even if the first sale of the product that allegedly caused the injury to the

plaintiff was not to the plaintiff and it did not take place in the forum state. If that test is adopted, none of the holdings of this Court's recent personal jurisdiction cases will be changed and the stated goals of Ford and its amici will be satisfied.

First, amici's objective test would be simple to apply. There is no dispute that Ford sold thousands of this make and model of cars in these two states at all relevant times and that the accidents occurred in the forum states. There would be no need for discovery, which would respond to a major complaint of DRI (Br. at 15). Indeed, Ford would probably never make a personal jurisdiction motion, just as national product makers did not do until this Court issued its ruling in *Goodyear*. For the same reason, the result would be entirely predictable. And it would not change the outcome in *BMS*, because the 592 non-residents would not satisfy the requirement that their injury occurred in the forum state.

Second, Ford argues that personal jurisdiction protects its liberty interests, but that surely cannot mean at all costs to the interests of others. In any event, Ford's liberties are fully protected: it is free to sell cars anywhere in the US it chooses. But if it does so regularly, the price of exercising that liberty is to have to defend its conduct if one of its cars should injure someone in a state where it sells those cars.

Third, it is fair to Ford. Ford knows that some of its cars will turn out to be defective, but it

does not know which ones or where the defect will be manifested. But for that reason, the happenstance of which car causes an injury, and where that happens, makes the forum irrelevant for Ford, except to the extent that it gains an advantage from burdening the plaintiff. As this Court observed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985), no matter where the case is litigated, the defendant will have to “hire counsel,” “travel to the forum,” “participate in extended and often costly discovery,” and defend itself at trial, including going to the location of the accident even if Ford were sued at home. A ruling in favor of respondents would not, as some amici contend, (Chamber Br. at 15-16) be a green light to sue drug manufacturers wherever a clinical trial is held or where a small group worked on the design of the product, unless that work was done in a state where they sold their products and that state was where the plaintiff was injured.

Fourth. Ford’s reference to the impact of this case on its primary conduct (Br. 27, 29) is difficult to assess, unless Ford claims that it made the allegedly defect parts in these cases differently for different states. Similarly, Ford’s suggestion (Br. 27) that its decisions about insurance coverage will be affected by where it can be sued, cannot be taken seriously. Surely Ford’s insurance coverage extends throughout the United States because it knows that any given car manufactured by it could be sold almost anywhere.

The defendant here sells its products throughout the United States and these suits for a

defective product are brought where the harm took place. Whether personal jurisdiction was proper in these cases is all that the Court must and should decide. As this Court did in *North Carolina Department of Revenue, supra* at 6, it should limit its “holding to the specific facts presented” here. This is not a contracts case, where the parties can settle the appropriate forum by negotiation. Nor does the case involve component parts, sales to business, sales by small businesses, Internet sales, or torts like trademark or copyright infringement.

The end game for the auto makers is clear: reduce the few remaining places where they can be sued and effectively require plaintiffs to sue only where the companies are at “home.” Failing that, they may be able to confine suits against themselves to an inconvenient, and, for the plaintiff’s case, the generally unhelpful location where the design or manufacturing defect arose. The bottom line will be that the doctrine of personal jurisdiction, which developed to prevent plaintiffs from dragging defendants to inconvenient and unfair jurisdictions, will have become a sword by which defendant-manufacturers can put themselves, not plaintiffs, “in the personal-jurisdiction driver’s seat.” Brief of Alliance for Automotive Innovation, at 4, 22.

The Court is still able to prevent this massive injustice and produce a result that is fair to all and quite predictable. It should do that by

affirming the decisions below and holding that a manufacturer of potentially dangerous products that sells them throughout the United States may be sued in any state where the plaintiffs allege that they have been injured as a result of a design or manufacturing defect in the defendant's product (or the failure to warn of them). And if the Court does not halt the march to allow major manufacturers of consumer products to select the forum in most product liability actions, Congress may step in, as it did for class actions, and open up the federal courts so that plaintiffs injured at home can sue Ford and others that seek to avoid being sued where their products cause harm.¹²

CONCLUSION

For all of these reasons, the courts below correctly concluded that the courts of their states had personal jurisdiction over the claims against the defendants in these cases. Accordingly, the judgments should be affirmed, and the cases remanded for further proceedings on the merits.

¹² See A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 Florida Law Rev. 979 (2019) (argument by member of Civil Rules Committee for expanding personal jurisdiction of federal courts to protect plaintiffs). The Brief of the United States (at 32-33) recognizes that the federal courts are not bound by the same due process limits as are state courts.

Respectfully submitted,

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