Nos. 19-368 and 19-369

In the Supreme Court of the United States

FORD MOTOR COMPANY, PETITIONER

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, ET AL.,

FORD MOTOR COMPANY, PETITIONER

v.

ADAM BANDEMER

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF MONTANA AND MINNESOTA

BRIEF FOR MINNESOTA, TEXAS, 37 OTHER STATES, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The States of Minnesota, Texas, Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawai‘i, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and West Virginia, and the District of Columbia (the "Amici States") have an interest in ensuring that their citizens may bring suits in their courts for injuries sustained within their borders. The Amici States also have an interest in ensuring their own access to their courts for suits based on injuries to them by nonresident defendants and to ensure that nonresident defendants abide by state law.

The Amici States support the challenged judgments of the Supreme Courts of Montana and Minnesota. Those judgments comport with the precedents of this Court and properly account for both the due process interests of nonresident defendants and the sovereign interests of States in providing forums for their injured citizens.

SUMMARY OF ARGUMENT

I. The lower courts' judgments are consistent with this Court's precedents, which recognize States' strong sovereign and constitutional interests in ensuring that their own courts remain open to citizens injured within their borders. Those interests play a key role in any

analysis of personal jurisdiction in a state court over a nonresident defendant. And while other States may sometimes have competing interests in such analyses, an injury within the forum to a forum resident makes the forum State's interest particularly strong.

This Court's precedents on personal jurisdiction delineate several distinct analytical inquiries. The first is whether the nonresident defendant purposefully availed itself of the privilege of conducting activities within the forum State. A second, and separate, inquiry is whether the plaintiff's claim either arises out of or relates to the defendant's forum conduct. And third, the exercise of jurisdiction must comport with traditional notions of fair play and substantial justice.

Here, only the second of those inquiries is at issue. Yet Ford and the United States draw on decisions discussing both purposeful availment and relatedness to essentially collapse the two. That approach is results-driven and erroneous. The Court should confirm that the purposeful availment and relatedness inquiries are distinct. It should also confirm that the relatedness inquiry accounts for a State's interest in providing a forum for its citizens injured within its borders and whose claims relate to the defendant's in-forum conduct.

In these cases, the Supreme Courts of Montana and Minnesota correctly analyzed relatedness and concluded that Ford was amenable to suit in those forums. Ford argues otherwise but fails to explain where the suits could have been properly filed. And in asserting that the relatedness requirement was not satisfied, the United States overlooks the ongoing relationship between Ford and its Montana and Minnesota customers.

The United States is right to oppose Ford's proposed test for relatedness based on proximate cause. But the Court should not adopt the United States' proposal to locate personal jurisdiction in cases of this variety in the place that an injurious product was manufactured or first sold. Once again, this Court's precedents support the conclusions that the state high courts reached here.

II. Adopting Ford's proximate cause test would undermine the core interests that have animated this Court's precedents on personal jurisdiction. It would also produce undesirable consequences for States—even, in some cases, making it impossible for States to bring suits to enforce their laws and protect their citizens.

Like many manufacturers, Ford chooses to sell mass-produced products throughout the country. It knows that those products might have design defects that could cause injuries in the States in which the products are sold. When such injuries happen, Ford cannot plausibly claim either burden or surprise by having to litigate in the forum of the injury.

Ford's proposed proximate cause test would undermine predictability and fairness, and it would also raise practical concerns. The purposeful availment component of personal jurisdiction analysis allows defendants in Ford's position to predict where they may be subject to suit. But Ford's proposed relatedness test would unjustly allow nonresident defendants to skirt the natural and foreseeable consequences of their business decisions to tap into particular markets. Ford fails to explain how it is unfairly burdened by litigating in Montana or Minnesota or how its proposed test is necessary to ensure due pro-

cess. And Ford fails to explain how its proposed test would operate in other common litigation contexts.

Finally, the likely consequences of Ford's proposed test further counsel against adopting it. A proximate cause test for relatedness could undermine efforts by attorneys general to protect their States and citizens through lawsuits, unfairly shift risk in multi-defendant tort actions, limit interstate mobility, negatively affect secondary markets for goods, alter the operation of States' innocent-seller statutes, and impede access to justice.

ARGUMENT

I. Under This Court's Precedents, the Lower Courts' Judgments Are Correct.

This Court's decisions confirm two points central to proper analysis of the question presented. First, the States have strong sovereign and constitutional interests in protecting their citizens within their borders. And second, purposeful availment and relatedness are independent inquiries, each of which does different work. The challenged judgments align with those decisions and properly account for the differing interests of the several States.

A. The States have strong interests in providing forums to adjudicate claims of injuries to their citizens within their borders.

Under their traditional police powers, States have authority to protect their citizens from dangerous products within their borders. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). They do so largely through common law

and statutory protections vindicated through individual lawsuits brought in their courts.

Despite continuous advances in business, communication, and technology, this Court "ha[s] never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could [it], and remain faithful to the principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). The Framers "provided that the Nation was to be a common market." *Id.* But they "also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts." *Id.*

Moreover, this Court has long recognized the States' "manifest interest" in providing judicial forums for their injured citizens, preventing them from having to follow defendants to distant locales. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957). Consistent with this Court's precedents, a state court must account for that interest along with a nonresident defendant's interests when determining whether personal jurisdiction exists. *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017); *cf. South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096-97 (2018) (recognizing, in the Commerce Clause context, strong state interests in regulating the conduct of out-of-state actors); Allan Erbsen, Wayfair *Undermines* Nicastro*: The Constitutional Connection Between State Tax Authority and Personal Jurisdiction*, 128 Yale L.J. Forum 724, 734 (2019).

Of course, because "restrictions on personal jurisdiction . . . are a consequence of territorial limitations on the power of the respective States," *Bristol-Myers Squibb*,

137 S. Ct. at 1780, one State's interest must be considered alongside potentially relevant interests of other States. But when a State's own citizens are injured within its borders, the State's police-power interest in providing redress is at its zenith.

B. Purposeful availment and relatedness are, and should remain, distinct inquiries.

This Court's precedents on specific (as opposed to general) personal jurisdiction principally focus on two questions. The first is whether the nonresident defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The second is whether the plaintiff's claims "arise out of or relate to" the defendant's forum conduct. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). A negative answer to either question pretermits analysis of the other. *See, e.g.*, *Bristol-Myers Squibb*, 137 S. Ct. at 1781-84 (addressing only relatedness); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (further requiring consideration of whether the exercise of personal jurisdiction "would comport with 'fair play and substantial justice'" (quoting *International Shoe v. Washington*, 326 U.S. 310, 320 (1945)).

Purposeful availment exclusively concerns the relationship between the defendant and the forum. The Court has found it "essential . . . that there be some act by which *the defendant* purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253 (emphasis added).

Relatedness, by contrast, necessarily concerns the forum and the nature of the plaintiff's claim. As the Court explained in *Bristol-Myers Squibb*, "the *suit* must arise out of or relate to the defendant's contacts with the *forum*." 137 S. Ct. at 1780 (quotation marks and brackets omitted). A court assessing personal jurisdiction must consider both the "affiliation between the forum and the underlying controversy" and whether the court will adjudicate "issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Id.* (quotation marks omitted).

Early in their briefs, Ford and the United States recognize that purposeful availment and relatedness are distinct inquires. Ford Br. 2; U.S. Br. 2-3. But in several ways, they each go on to conflate the two analyses, threatening an unwarranted limitation of the latter's scope.

1. Analyses of specific personal jurisdiction often begin and end with findings of no purposeful availment, so the Court has had relatively little occasion to explain the meaning of "arise out of or relate to." *Helicopteros*, 466 U.S. at 414. Some discussions of purposeful availment include brief, sidelong references to relatedness, perhaps because the relatedness requirement was plainly met. *See Burger King*, 471 U.S. at 479 (observing that the plaintiff's contract suit "grew directly out of 'a contract which had a *substantial* connection with that State'" (quoting *McGee*, 355 U.S. at 223, with emphasis added)); *Calder v. Jones*, 465 U.S. 783, 790 (1984) (noting that the plaintiff's libel suit arose from publishing an article about the plaintiff in the forum State).

Taking aim at the second analytical prong, Ford invites the Court to read "arise out of" and "relate to" as

"flesh[ing] out one standard." Ford Br. 37 (citing *Helicopteros*, 466 U.S. at 415 n.10). But the Court has consistently cast those two distinct phrases in the disjunctive. *E.g.*, *Bristol-Myers Squibb*, 137 S. Ct. at 1780; *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014); *Burger King*, 471 U.S. at 472; *Helicopteros*, 466 U.S. at 414. There is a strong presumption that they have different meanings. *Cf. Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016) (discussing the distinct meanings of "concrete" and "particularized" in the Court's longstanding description of the first essential element of Article III standing).

Indeed, as the Court has recognized in interpreting statutes, "relate to" and similar phrases are capacious. *E.g.*, *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018). There is no indication that "relate to" has a less expansive meaning when the Court says it than when Congress does. The Court should reject any effort to artificially limit the reach of that phrase in the personal jurisdiction context.

2. The United States fails to acknowledge either that purposeful availment focuses on ensuring a defendant-initiated link to the forum or that relatedness properly accounts for the relationships among a State, its citizens, and the nature of the claim. Its analysis relies almost entirely on cases that turn on the presence or absence of purposeful availment. *See* U.S. Br. 14-19. But when it does discuss cases that analyze (or at least touch on) relatedness, the United States overreads them.

a. In *Bristol-Myers Squibb*, the Court's decision turned on the fact that the relevant plaintiffs were nonresidents injured outside of the forum. The Court found no "adequate link" between the defendant's California

contacts and the *nonresidents*' claims: "The relevant plaintiffs are not California residents and do not claim to have suffered harm in that [forum] State"; plus, "all the conduct giving rise to the nonresidents' claims occurred elsewhere." 137 S. Ct. at 1781, 1782. Plavix, the pharmaceutical on trial in that case, was developed, marketed, manufactured, and approved by regulators in New York and New Jersey. *Id.* at 1777-78. And there was no showing that the defendant and the distributor "engaged in relevant acts together" in California, that the defendant was derivatively liable for the distributor's California conduct, or that the California distributor provided the Plavix that was ingested by the nonresidents or dispensed by their pharmacies. *Id.* at 1783.

Accordingly, the defendant's forum contacts were insufficiently related to the operative facts of the claims made by plaintiffs who were *not residing in or injured in* the forum. *Id.* at 1782. The Court did not hold that the defendant's forum contacts were insufficiently related to the operative facts of the claims made by plaintiffs residing or injured in the forum.

In fact, the Court specifically discussed the facts of forum residency and forum injury, and the absence of such facts made a difference. The Court confirmed that "the nonresidents . . . were not injured by Plavix in California"; distinguished *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), based on in-state injury and forum residency; and observed that "the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States." *Bristol-Myers Squibb*, 137 S. Ct. at 1781, 1782, 1783; *cf. id.* at 1788 n.3 (Sotomayor, J.,

dissenting) (observing that the Court had not addressed specific jurisdiction over claims regarding forum injuries and that *World-Wide Volkswagen* supports jurisdiction in such cases).

Moreover, nothing in the Court's opinion suggests that the manufacturer's efforts to market and sell the drug in a plaintiff's home State would be irrelevant if it turned out that the plaintiff had purchased the drug in a neighboring State. *See* Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 Vand. L. Rev. 1401, 1443-44 (2018). The Montana and Minnesota decisions similarly recognize that citizens can sue in their home States when they suffer injuries there from products that defendant manufacturers market and sell throughout the country. 19-368 Pet. App. 21a-22a; 19-369 Pet. App. 20a.

Bristol-Myers Squibb confirms that the relationship between the forum and the nature of a plaintiff's claim is a crucial component of the relatedness inquiry—and that relatedness serves a function different from purposeful availment. Again, the purposeful availment requirement ensures that a defendant has a sufficiently strong relationship with the forum; the inquiry therefore turns on the defendant's own conduct, not the conduct of the plaintiff or third parties. *See Hanson*, 357 U.S. at 253-54. For the relatedness inquiry, however, the defendant's relationship with the forum is not, and cannot properly be, the *sole* focus. *See Bristol-Myers Squibb*, 137 S. Ct. at 1780.

b. With respect to *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and throughout its brief, the United States assumes its conclusion that relatedness requires the specific product that caused harm

to have been sold in the forum State. U.S. Br. 11, 19, 24, 29. That approach is erroneous.

In *Goodyear*, the record demonstrated that the defendant's foreign subsidiaries had not *purposefully availed* themselves of the North Carolina forum. 564 U.S. at 921-22. And the opinion, which principally discussed general jurisdiction, said nothing about the situation presented in each of the cases at issue here: an injury to a forum resident in the forum, caused by a product that the defendant sells in the forum. *See id.* at 918 (reflecting that the lawsuit filed in North Carolina arose from an injury in France).

Goodyear's prohibition of specific jurisdiction "with respect to matters unrelated to the forum connections" was based on "the type of tire involved in the accident," which "was never distributed in North Carolina." 564 U.S. at 921, 923. The defendants did not "solicit business in North Carolina or themselves sell or ship tires to North Carolina customers." *Id.* at 921. And again, *Goodyear* did not involve an injury in the forum State. *Id.* at 918.

c. The United States notes (at 10) that *International Shoe* "thrice cited" *Old Wayne Mutual Life Association v. McDonough*, 204 U.S. 8 (1907), a case it reads as contrary to the judgments challenged here. But *International Shoe* cited another case of the same vintage, *Commercial Mutual Accident Company v. Davis*, 213 U.S. 245 (1909), one time more. *Commercial Mutual* reflects that the location of a contract's execution does not control the issue of specific jurisdiction. Without mentioning where the contract at issue was signed, the Court found that Missouri had personal jurisdiction based on the defendant's "other insurance policies outstanding in the state" and its

Missouri-based agents' maintenance of ongoing business relationships with Missouri policyholders. *Id.* at 255.

Moreover, *International Shoe* cited (six times) *International Harvester Company of America v. Kentucky*, a case involving continuous sales of a product that caused harm in the forum State. 234 U.S. 579, 585-86 (1914). The defendant in *International Harvester* was required to defend antitrust charges in Kentucky even though the sale contracts were signed in other States. *Id.* at 582, 584-85. The Court relied on "a continuous course of business in the solicitation of orders" for the defendant's machines, which were delivered and paid for in Kentucky. *Id.* at 585-86. And it rejected the "novel proposition" that a business could avoid answering for harms it allegedly caused in the forum by doing the same business nationwide. *Id.* at 587-88.

3. In arguing (at 14-19) that the entire specific jurisdiction inquiry focuses solely on the conduct of the defendant, the United States again erroneously blends purposeful availment and relatedness. Under this Court's precedents, the relatedness inquiry looks to the connection between the *plaintiff's claims* and the defendant's forum-related conduct. *E.g.*, *Bristol-Myers Squibb*, 137 S. Ct. at 1780. That analysis necessarily and appropriately includes evaluating where the plaintiff lives and how she was injured. *Id.*; *cf. U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018) (discussing, in another context, the "who[,] . . . what, when or where, how [and] why" of the claims).

The United States argues (at 13) that relatedness "provides the main check on the scope of specific jurisdiction" and (at 14, 20) that the specific jurisdiction

evaluation as a whole, as opposed to its purposeful availment component, focuses myopically on the relationship between the defendant and the forum. But relatedness is not so limited. It encompasses the vital consideration of a State's sovereign obligation to provide redress to forum residents injured in the forum. *See supra* Part I.A.

The cases that the United States cites are not to the contrary.

a. The dispute in *Hanson* arose from a trust executed *outside of* the forum State. 357 U.S. at 238, 252. And the Court's analysis turned on a lack of purposeful availment, not relatedness. *Id.* at 253-54; *see also Rush v. Savchuk*, 444 U.S. 320, 327-28, 332-33 (1980) (case in which the parties agreed that the defendant never had any contacts with the forum State).

b. In *Shaffer v. Heitner*, the Court concluded that Delaware courts lacked jurisdiction to adjudicate shareholder claims of a nonresident plaintiff against nonresident officers and directors of a company. 433 U.S. 186, 189-91 (1977). The company was incorporated in Delaware, but the only Delaware link of the individual defendants was ownership of company stock under certificates legally (but not physically) present in Delaware. *Id.* at 191-92. The defendants "had nothing to do with the State of Delaware" and "had no reason to expect to be haled before a Delaware court." *Id.* at 216. Their alleged acts of mismanagement took place in Oregon and were "completely unrelated" to their stock ownership. *Id.* at 190, 209. In rejecting the plaintiff's argument, the Court made no suggestion that, if the defendants had engaged in the same acts of misconduct in both Delaware and Oregon, injuring Del-

aware residents, there would not have been specific jurisdiction.

c. *Kulko v. California Superior Court*, 436 U.S. 84 (1978), falls into the same category. Addressing a suit brought in California, the Court concluded that a New York defendant "did not purposefully derive benefit from any activities relating to the State of California" or "visit[] physical injury on either property or persons within the State of California." *Id.* at 96-97. *Kulko* is a purposeful availment case; the Court's holding was not based on relatedness. Indeed, the Court alluded to relatedness only twice—once to broadly distinguish a "defendant's commercial transactions in interstate commerce" from "personal, domestic relations," and once to observe that the controversy involved a separation agreement that the plaintiff flew to New York to execute. *Id.* at 97.

d. In *World-Wide Volkswagen*, the car at issue was originally sold in New York, then later involved in an accident in Oklahoma. 444 U.S. at 288. The Court did not focus on where the car was first sold, but rather on the defendants' complete lack of Oklahoma activity. *Id.* at 288-89. Nothing in the decision suggests that the Court should ignore, in its relatedness analysis, all of a defendant's efforts to sell its products in a particular State just because the item at issue was first sold elsewhere. To the contrary, the Court strongly suggested that if the defendants *had* sold cars in the State, its analysis would have been different. *Id.* at 297.

e. *Walden v. Fiore*, 571 U.S. 277 (2014), also fails to help Ford. In that case, the defendant police officer seized cash from the plaintiffs outside of the forum of suit. *Id.* at 288. The defendant allegedly knew that the plaintiffs had

"connections" to the forum, but he had "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to [the forum]." *Id.* at 288-89. That was enough to defeat the plaintiffs' claim of jurisdiction. And in any event, the injury occurred outside of the forum. *See id.* at 288-91.

C. The decisions below properly applied this Court's precedents, in a way that correctly accounts for the interests of the States.

The challenged judgments are consistent with all of the decisions just discussed. The Court should reject Ford's and the United States' contrary assertions. And while it should recognize the flaws that the United States identified in Ford's proposed proximate cause test, the Court should also reject the United States' proposal that the test be based on the place of a product's manufacture or initial sale.

1. The Montana and Minnesota decisions each properly treated the purposeful availment and relatedness questions as distinct. 19-368 Pet. App. 12a-20a; 19-369 Pet. App. 11a-18a. Not only are those decisions consistent with this Court's precedents, but they also properly allow the States with the strongest interests to exercise jurisdiction over the claims. Montana and Minnesota, whose citizens were injured within their borders, have a compelling interest in exercising jurisdiction over claims to redress the injuries at issue here. *See supra* Part I.A.

2. The Court should not embrace Ford's and the United States' reasoning.

a. Accepting Ford's position would extinguish jurisdiction in the States with the strongest interests, leaving

the parties to litigate in forums with less compelling interests. And as Ford surely knows, some plaintiffs will just give up.

Ford fails to identify which forums would be permissible, much less optimal, for these cases. While the vehicles were first sold in Washington and North Dakota, J.A. 41, 67, Ford does not contend that those States have superior interests, or even that they would have jurisdiction. Ford does not identify where the vehicles or their allegedly faulty components were designed, nor does it explain how a plaintiff could reasonably obtain that information. And although the vehicle at issue in the Minnesota case was manufactured in Canada, Ford does not suggest that personal jurisdiction would lie in a Canadian court.

Even Michigan, home to Ford headquarters and a significant amount of its manufacturing activity, is not a reliable forum. Ford recently secured dismissal of a product-defect case on the ground that the underlying injuries occurred in other States and should be heard in the plaintiffs' respective places of domicile. *See Cyr v. Ford Motor Co.*, No. 345751, 2019 WL 7206100, at *3-7 (Mich. Ct. App. Dec. 26, 2019). It cannot consistently argue here that the place of an injury and the injured party's residence are not important factors in the analysis.

More broadly, Ford argues that its approach best serves the "jurisdiction-allocating function" among the States. Pet. Br. 24. It suggests that, without the proximate cause test it asks the Court to adopt, the States would tread on one another's domains. *Id.* at 25. But Ford points to no evidence of any such jurisdictional incursions, and the mere number of States that have joined this brief defeats Ford's point.

b. The United States finds "no apparent link" between the claims in these cases and Ford's advertisements, dealerships, employees, and services in Montana and Minnesota. U.S. Br. 20. The link it overlooks is the ongoing relationship between Ford and its Montana and Minnesota customers.

The challenged decisions do not, as the United States suggests, reflect improper reliance on "unilateral activity of another party," the controversy's "center of gravity," or litigation convenience. *Id.* at 20-21. Rather, they properly account for "the relationship among the defendant, the forum, *and the litigation*." *Walden*, 571 U.S. at 284 (quotation mark omitted) (emphasis added). It is impossible to accurately evaluate the relatedness between a given claim and the defendant's forum conduct without considering how the plaintiff's claim relates to the defendant's conduct. The nature of the claim to be assessed alongside the defendant's forum conduct necessarily brings along consideration of who was injured and where, how, and why the injury occurred.

That does not amount to reliance on "the extensiveness of the defendant's ties to the forum," a merger of "intensity and relatedness," or a "sliding-scale approach" of the type the Court rejected in *Bristol-Myers Squibb*. U.S. Br. 21-23; *see Bristol-Myers Squibb*, 137 S. Ct. at 1781. Instead, it properly accounts for the nature of the defendant's ties to the forum. Without dispute, Ford affirmatively and successfully established ongoing relationships with consumers in Montana and Minnesota, making it easy for them to buy and properly maintain Ford vehicles in those States. 19-368 Pet. App. 12a; 19-369 Pet. App. 17a.

And Ford sold the very models of vehicles at issue, containing the very defects alleged to exist, in the forum States. 19-368 Pet. App. 12a; 19-369 Pet. App. 4a. It is not a "coincidence" that other customers in Montana and Minnesota purchased the same types of vehicles. U.S. Br. 22. Ford intended that to happen.

True, the particular vehicles involved in the accidents happened to have been purchased in other States even though Ford also sells those models in the forum States. But Ford intends for that to happen, too. It structures its business to serve customers in these exact circumstances. It treats existing Ford owners who bring their vehicles in for services, repairs, and warranty work no differently based on the States in which they acquired the vehicles. Ford arranges its affairs to support the ability of consumers in every State to buy and drive its vehicles.

And nor do the lower courts' judgments enable plaintiffs to sue in the "wide[] range of forums" that the United States contemplates. *Id.* at 28. The forum in which a plaintiff lives and was injured is not a variable subject to manipulation.

3. The United States rightly opposes the adoption of Ford's proximate cause test. *Id.* at 29-32. It proposes a different test based on "where the defendant makes or sells a product," allowing businesses to "take more precautions or reduce the volume of sales" in States with less desirable litigation environments. *Id.* at 18.

But a defendant's ability to avoid certain forums already exists. The independent requirement of purposeful availment ensures that only the voluntary conduct of the defendant itself can demonstrate an adequate relationship with the forum. *See Walden*, 571 U.S. at 286; *Hanson*,

357 U.S. at 253. No one forced Ford to build the Explorer and the Crown Victoria and profit from ongoing relationships with customers using those vehicles in Montana and Minnesota. If Ford wanted to avoid litigation in those States, all it had to do was not reach out to their consumers or otherwise seek to tap into their markets with the Explorer and the Crown Victoria.

This case does not require the Court to address other ways in which a nonresident defendant's conduct might establish specific personal jurisdiction in a State. All the Court need hold, consistent with its prior pronouncements, is that in a product liability case like this one, specific personal jurisdiction exists when a product allegedly caused injury in the forum State to a plaintiff who resides in that State and the defendant manufacturer sells the exact product at issue in that State.

The United States suggests that the Court should permit plaintiffs to sue in their home States only with regard to products that they "buy and use . . . in their home States." U.S. Br. 27. But that approach would require a Montana court to shut its doors to new residents of Montana, who were injured in Montana, just because they have items purchased outside of Montana. Taking that path would be difficult to square with the constitutional protections this Court has recognized against restrictions on interstate commerce and travel. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 502 (1999); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

The everyday, ongoing relationships between Ford and its existing customers have nothing to do with where the vehicles they drive were originally purchased. Again, there is no indication that Ford refuses to provide ser-

vices, warranties, or repairs to customers who purchased their vehicles in different States. For that reason, the United States' own proposed forum-of-sale test suffers from a focus on an "individual act[] considered in isolation," rather than the defendant's broader course of conduct. U.S. Br. 29.

Finally, the United States' proposed test, which ignores the locus of injury, would not function in accordance with this Court's teachings when the injured plaintiff was not also the product's owner. In *Goodyear*, the Court emphasized that when a product sale "'is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in [several] States,'" the defendant may be sued "'in one of those States if its allegedly defective merchandise *has there been the source of injury to its owner or to others*.'" 564 U.S. at 927 (quoting *World-Wide Volkswagen*, 444 U.S. at 297, with emphasis added). In other words, an injury in the forum to a forum resident is, and should remain, a critical consideration in any analysis of specific personal jurisdiction. All the more so when the defendant sells the very product that caused injury in the forum State.

II. The Court Should Reject Ford's Proximate Cause Test for Relatedness.

As already noted, the Amici States agree with the United States that the Court should not adopt Ford's proposed proximate cause test for relatedness. *See* U.S. Br. 29. Adopting that test would be inconsistent with the notions of fair play and substantial justice that form the

foundation of the Court's approach to personal jurisdiction, and it would likely lead to undesirable consequences.

A. Adopting Ford's test would undermine principles of fair play and substantial justice.

For specific personal jurisdiction to exist, the defendant must have minimum contacts with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (quotation marks omitted). The decisions below correctly recognize that there would be no unfairness to Ford if Montana and Minnesota exercised personal jurisdiction in these cases. Ford is proposing an entirely new test without establishing that a new test is needed to solve any problem with the existing test or its application.

Predictability and fairness to the defendant are important factors in any analysis of specific personal jurisdiction. *See Bristol-Myers Squibb*, 137 S. Ct at 1780; *Burger King*, 471 U.S. at 472; *World-Wide Volkswagen*, 444 U.S. at 297. Those factors cut against Ford's proposal. The company cannot plausibly suggest that it is burdened by having to litigate in Montana and Minnesota or that it is surprised that it has to defend lawsuits there. Further, its proposed test is impractical.

1. Ford's proposed test would not increase predictability. Ford chose to accept the benefits and risks that come with advertising and selling mass-produced vehicles in Montana and Minnesota. Mass-produced vehicles are, of course, all made according to the same design. If the design is defective, all units will have the same defect. So once Ford sells a mass-produced vehicle in a forum, it

knows that it might be sued in that forum for injuries to forum residents caused by the defect.

Equally predictable is the fact that the vehicle is likely to have multiple owners over its lifetime. The number of used cars sold each year is roughly 40 million, more than half of which are sold by used car dealers or private parties not affiliated with a single manufacturer. 2018 NIADA Used Car Industry Report at 22, https://www.niada.com/uploads/dynamic_areas/ei5l4ZznCkTc8GyrBKd6/34/UCIR_2018_Web.pdf.

Ford decides whether it will sell a vehicle in a forum and at what volume. Pet. Br. 27-28. By choosing to sell mass-produced vehicles in Montana and Minnesota, Ford knew, and could plan for, the risk of defects that cause injuries and lead to lawsuits in those forums. *Id.* Ford could easily predict that it would be subject to jurisdiction in Montana and Minnesota on exactly the defective product claims brought here. That predictability did not depend on which particular vehicle was sold in which State.

In each of these cases, the claim was brought in a State where Ford maintained an active presence, sold the allegedly defective model that failed and caused injury in the forum, and knew it could be sued for that defect and that sort of injury. The sale of the defective vehicle was "not simply an isolated occurrence." *World-Wide Volkswagen*, 444 U.S. at 297. Ford's decision to take advantage of selling products in a State itself resolves the question of whether Ford availed itself of the benefits of doing business in the forum. Ford does not make that decision individually for each vehicle it ships to a State.

Yet for purposes of personal jurisdiction, Ford wants a test that gives dispositive weight either to whether the

particular vehicle involved in the accident happens to have been originally sold in the forum or to where that vehicle was manufactured or designed. Ford Br. 29-30. Ford should not be able to take advantage of a particular vehicle's journey from design to ownership when that journey plays no role in the company's business decisions.

Under Ford's proposal, innocent bystanders injured by defective vehicles in their home States would not be able to seek redress in those States when the particular vehicles involved happened to have been first sold elsewhere, even though the models of vehicle that hit them were sold in the State. In any given case, Ford itself would not know whether it could escape liability in a State until it identified the initial place of sale for the particular vehicle involved. That is a fact irrelevant to the accident, the defect, and Ford's intentional volume of sales of the vehicle in the forum. *Cf. World Wide Volkswagen*, 444 U.S. at 288 (case in which the defendant sold nothing in the forum State). Whether a bystander may sue Ford in the forum of injury should not depend on the fortuity of where a vehicle was first sold.

2. Ford's proposed test would not increase fairness. The company does not assert that a decision here will affect where and how it sells its vehicles. The decision will presumably affect only whether Ford can avoid litigation in a State (and perhaps altogether) when it discovers that the individual vehicle involved in an accident happened to have been first sold in another State.

This Court recently overruled two of its cases that gave favorable tax treatment to remote sellers, concluding that "[f]airness dictates quite the opposite result." *Wayfair*, 138 S. Ct. at 2096. Similarly here, fairness

dictates that when corporations "avail themselves of the States' benefits," *id.*, by marketing and selling products in those States, they should bear the burden of defending lawsuits regarding their products that injure forum residents in the forums of suit.

3. Ford's proposed test would also be impractical. Ford does not explain how it makes sense to graft a tort-focused causation standard onto a personal jurisdiction test that would apply in a variety of cases, including those involving contracts, antitrust, privacy, family relationships, consumer protection, and environmental or other regulatory enforcement. *See* U.S. Br. 30-31; *e.g.*, *Int'l Harvester*, 234 U.S. at 585-86.

Furthermore, Ford's test would not mesh with the realities of today's economy, where it is increasingly old-fashioned to assume that something is designed in a single State, or even to assume that determining where something is sold is a simple question. Today's companies use cross-office design teams, and consumers in one State often purchase gifts online from companies in different States for shipment to residents of yet more States, to give just two examples. Ford's proposal appears to be driven not by a desire for clarity and certainty, but rather by a desire to make suits against it more difficult to bring.

B. Adopting Ford's test would likely lead to undesirable consequences.

Adoption of Ford's proposed test could have several consequences that concern the Amici States. First, it could hamper efforts by attorneys general to vindicate the interests of their States and their citizens. Second, it could inefficiently shift risk in multi-defendant tort actions.

Third, it could undermine state and constitutional interests in promoting interstate mobility. Fourth, it could diminish an otherwise robust secondary market for consumer goods. Fifth, it could undermine States' innocent seller statutes. And finally, it could impede access to justice for people in remote or rural areas.

1. Attorneys general take their *parens patriae* duties seriously and act on them when necessary to tackle issues important to their States' citizens. The Amici States have a strong interest in preserving their ability to assert jurisdiction over nonresident defendants that engage in actions to the detriment of their citizens. The Amici States are concerned that defendants could benefit from Ford's test even when they market and sell dangerous products in the forum and their products cause injuries there. Adoption of Ford's test could reduce the deterrent effect of litigation over injuries caused by those dangerous products. That would undermine the efficient administration of justice and the protective role of state attorneys general.

A State's ability to vindicate its citizens' or its own interests is particularly compelling when the alleged wrongdoing violates state law. And sometimes, a State may pursue violations of state law only in state court. *See, e.g.,* Tex. Health & Safety Code § 382.085(b); Tex. Water Code §§ 7.101, 7.102, 7.105(c); 30 Tex. Admin. Code § 114.20(b), (e); *see also Keeton*, 465 U.S. at 776 (explaining that a State has "an especial interest in exercising judicial jurisdiction over those who commit torts within its territory" because "torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection"); *Travelers Health Ass'n v. Virginia*, 339 U.S.

643, 648 (1950) (recognizing a "state's interest in faithful observance" of its regulatory scheme by nonresidents).

The Amici States' concern is not abstract. A number of attorneys general, including those who sign this brief, are engaged in active litigation to address the opioid crisis. Opioid pharmaceutical products are sold throughout the country and cause tremendous harm in the forums where they are sold. Yet some residents will inevitably have purchased opioids or become addicted to them elsewhere. That happenstance should not give rise to a jurisdictional defense by a nonresident opioid manufacturer, shifting liability to local distributors and doctors.

Nor should a State be precluded from pursuing design-defect litigation in its courts against, for example, a nonresident commercial airplane manufacturer arising from a crash within its borders that kills or injures its citizens. Yet under Ford's proposed test, the forum State would lack personal jurisdictional over the manufacturer as long as the airline that operated the flight purchased the defective plane in another State—even if the manufacturer regularly sold that exact type of plane in the forum State.

The same analysis would apply to claims arising from any number of other defective products. And it could lead to jurisdictional anomalies in litigation arising from injuries in a commercial region that spans state borders, where citizens from one State regularly purchase products in the other State, and manufacturers advertise and seek to sell their products in the common market that includes both States. Contrary to Ford's suggestion (at 41), the State in which an injury occurs most certainly has a

"regulatory interest in the plaintiff's claims" in this and the other scenarios just discussed.

2. Ford's proximate cause test could also produce inefficiencies in multi-defendant litigation. By making it harder to hale manufacturers into court in the State where an accident occurred, Ford's test could shift risk to other defendants—such as smaller, local distributors and retailers—even when a nonresident manufacturer shares a substantial portion of the liability.

This problem could arise when a defect in a vehicle was a contributing factor to operator error, which led to a multi-car accident. In that circumstance, an injured party would typically sue the driver, the driver's employer, and the vehicle manufacturer. The Amici States and their agencies are often defendants in these kinds of multi-defendant suits, such as when a state fleet driver is involved in an accident. Under Ford's proposed test, though, a plaintiff might choose not to add the vehicle manufacturer as a defendant because doing so could make it difficult or impossible to establish complete personal jurisdiction. That would leave the other defendants responsible for a verdict for which the manufacturer would otherwise have some degree of shared responsibility.

A similar concern could arise in litigation over medical devices, which are often sold or distributed by local businesses. Under Ford's proposed test, a nonresident manufacturer could avoid jurisdiction in the forum of injury if a defective device was designed or produced in a different forum—even if the manufacturer intentionally sold the type of device at issue in the forum.

The Amici States have an interest in protecting themselves, their businesses, and their citizens from bearing

the brunt of litigation when comparative negligence, or joint and several liability, should justly be assigned to a nonresident manufacturer. Ford's causation test would shift risk away from manufacturers and leave the States, their small businesses, and their citizens with more exposure.

3. Ford's test could also undermine interstate mobility. Businesses often relocate, and citizens frequently pack up and move across state lines for new jobs or opportunities. An overly restrictive jurisdictional rule could restrict that type of mobility.

A business that purchases equipment for use in one of its plants will sometimes decommission or sell a facility and transfer the equipment to a plant in a different State. In that scenario, the equipment manufacturer often sells the same equipment in the new State, where it has a dealer network, provides aftermarket support, and services a secondary market. The equipment manufacturer likely anticipates that it could be sued in the new State for defects in its products transported there from another State.

The same is true for individual relocations. Mobile workers—including military personnel, business professionals, and seasonal laborers—require the freedom to move from State to State and to bring their belongings with them. Those belongings typically include such things as vehicles, kitchen appliances, recreational equipment, baby furniture, and batteries, all of which have been known to fail and cause injury. It is likely that manufacturers sell these products in the individual's new State and anticipate being sued there for defects.

Adopting Ford's test would undermine this mobility. Making it easier for manufacturers to avoid jurisdiction whenever their products are transported across state lines would shift risk away from the manufacturers and toward the businesses and individuals doing the moving.

4. Secondary markets could be another casualty of Ford's proposed test. When a product retains value and can be resold on a secondary market, the manufacturer benefits because the product will have a higher initial sale value. At the same time, goods often travel across state lines on the secondary market. For those goods, Ford's proposed test would shift risk away from the manufacturer and to the businesses and consumers operating on the secondary market.

Ford's proposed test is also problematic with respect to the many products, such as small appliances or commodity industrial feedstocks, that do not have an easily traceable origin or may be intertwined with other products. When such products are defective, it may be impossible to confirm whether a specific unit's original sale took place in the forum State. By contrast, it would be easy to confirm that the product is sold in the forum State (whether on retail shelves or by distributors). It is also easy to ascertain where the injury occurred.

5. Ford's test could undermine States' innocent-seller statutes, which provide that a retailer is not liable for a manufacturer's product defects. *E.g.*, Colo. Rev. Stat. § 13-21-402; Del. Code tit. 18, § 7001; Minn. Stat. § 544.41. These laws generally insulate retailers from liability when they had no involvement in designing or manufacturing defective products. But a common exception authorizes liability against the retailer if the manufacturer is not

subject to jurisdiction in the forum State. *E.g.*, Colo. Rev. Stat. § 13-21-402(2); Del. Code tit. 18, § 7001(c)(2); Minn. Stat. § 544.41 subdiv. 2(2). The Amici States want to ensure that, where their Legislatures have adopted innocent-seller statutes and crafted exceptions relying on this Court's existing precedents, the protections of those laws are not weakened by adoption of a proximate cause test. Any such weakening would frustrate jurisdiction over a manufacturer that is actually responsible for the defective product and otherwise amenable to suit in the forum.

6. Finally, the Amici States are concerned that adopting Ford's proximate cause test would impede access to justice. Ford's test would place the largest burdens on injured citizens who live farthest from transportation hubs. It is far easier for Ford's representatives to travel to Helena, Montana, than it is for someone in rural Montana to travel to Dearborn, Michigan. In many cases, injured plaintiffs will not be able to travel to faraway States to litigate their claims, allowing manufacturers to escape jurisdiction and, in so doing, escape liability as well.

CONCLUSION

The judgments of the Supreme Courts of Montana and Minnesota should be affirmed.

Respectfully submitted.

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