

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 Court of Montana and Minnesota

**Brief for *Amicus Curiae*
Professor Jonathan R. Nash
in Support of Respondents**

JONATHAN R. NASH

Counsel of Record

EMORY UNIVERSITY SCHOOL OF LAW

1301 CLIFTON ROAD NORTHEAST

ATLANTA, GEORGIA 30322

(404) 712-1715

jnash4@emory.edu

Counsel for Amicus Curiae

Professor Jonathan R. Nash

April 2, 2020

TABLE OF CONTENTS

Table of Authorities	ii
Interest of the <i>Amicus Curiae</i>	1
Summary of Argument	2
Argument.....	3
Conclusion	9

TABLE OF AUTHORITIES

Cases

<i>Bristol-Myers Squibb Co. v. Superior Court of California</i> , 582 U.S. ___, 137 S. Ct. 1773 (2017).....	8
<i>Daimler AG Estate of Allen v. Bauman</i> , 571 U.S. 117 (2014)	2-5
<i>Goodyear Dunlop Tire Operations, S.A. v. Brown</i> , 564 U.S. 915 (2011)	2, 4, 5
<i>Hertz Corp. v. Friend</i> , 559 U.S. 77 (2010)	2, 3

Other Authorities

Alexandra D. Lahav, <i>The New Privity</i> (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3413349	7
Jonathan Remy Nash, <i>On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction</i> , 65 Vand. L. Rev. 509 (2012).....	1, 3
Jonathan Remy Nash, <i>The Rules and Standards of Personal Jurisdiction</i> , 72 Ala. L. Rev. (forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228871	1-2, 4, 5, 8
Arthur T. von Mehren & Donald T. Trautman, <i>Jurisdiction to Adjudicate: A Suggested Analysis</i> , 79 Harv. L. Rev. 1121 (1966).....	5

**BRIEF FOR JONATHAN R. NASH
AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENTS**

Amicus curiae Jonathan R. Nash respectfully submits this brief in support of Respondents in the above-captioned cases, *Ford Motor Co. v. Montana Eighth Judicial District Court* and *Ford Motor Co. v. Bandemer*, which are before the Court on writs of certiorari from the judgments and opinions of the Supreme Courts of Montana and Minnesota.¹

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae is a law professor who teaches and writes in the areas of civil procedure and federal courts. The interplay of rules and standards and jurisdiction is a subject in which *amicus* has a special academic interest. His scholarship on this subject has highlighted, among other things, the degree to which rules and standards should govern jurisdictional boundaries.² *Amicus curiae* is not affiliated with any parties in this case.

¹ Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party. *Amicus* did not receive any monetary contribution for the preparation or submission of this brief apart from the financial support of Emory University School of Law to defray the costs of printing the brief. The opinions expressed in this brief are those of *amicus* and do not necessarily reflect the views of his academic institution. Pursuant to Supreme Court Rule 37.3(a), the parties of record have provided consent for the filing of this brief.

² See Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 Vand. L. Rev. 509 (2012); Jonathan Remy Nash, *The Rules and*

SUMMARY OF ARGUMENT

This Court in *Daimler AG v. Bauman*, 571 U.S. 117 (2014) justified its decision to constrict general personal jurisdiction by reciting the desire to make the law surrounding constitutional personal jurisdiction governed more by “[s]imple jurisdictional rules.” *Id.* at 137 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)). Yet the law governing general jurisdiction prior to *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler* was substantially rule-like. Further, by shrinking the scope of general jurisdiction, the Court’s holdings will have the effect of forcing more plaintiffs into the realm of specific jurisdiction, where standards generally dominate. Whatever benefit was gained by making general jurisdiction marginally more rule-like is lost to the reality that more plaintiffs will now have to navigate the standard-like dominion of specific jurisdiction.

The cases at bar provide one such example. Prior to *Goodyear* and *Daimler*, it would have been largely undisputed—with rule-like precision—that the Montana and Minnesota state courts had general jurisdiction over Ford Motor Co. (“Ford”). After *Goodyear* and *Daimler*, it is clear that these courts lacked general jurisdiction. This has left the plaintiffs to claim specific jurisdiction over Ford. The Court should embrace a more predictable approach to specific jurisdiction under which, if the defendant

Standards of Personal Jurisdiction, 72 Ala. L. Rev. (forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228871.

continuously sells the injury-causing product in the forum state (even if the particular item or widget at issue was not originally sold in the forum state) and the injury occurs in the forum state, then the defendant's contacts with the forum state relate to the claim.. Such an approach offsets the existing pressure toward jurisdictional standards and is consistent with the Court's goal of ensconcing rules along personal jurisdictional boundaries. The Court should accordingly affirm the judgments below on that basis.

ARGUMENT

This Court has recognized that, whatever the relative merits of rules and standards in the context of substantive legal questions, simple rule-like approaches generally make more sense in defining jurisdictional boundaries. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Jurisdictional rules promote predictability and conserve resources for litigants and the judiciary alike. *See id.* at 94-95; Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 Vand. L. Rev. 509, 529-33 (2012). The Court in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), extended the *Hertz* Court's choice of rules for subject matter jurisdiction purposes to the setting of personal jurisdiction. *See id.* at 137 (highlighting the importance of ensconcing "[s]imple jurisdictional rules" to define the boundaries of constitutional personal jurisdiction (quoting *Hertz Corp.*, 559 U.S. at 94)).

In the years before *Goodyear*, 564 U.S. 915 (2011), and *Daimler*, lower courts had long understood the importance of simple, predictable rules in expounding general personal jurisdiction—that is, personal jurisdiction applicable where the controversy underlying the lawsuit does not relate to or arise out of the defendant’s contacts with the forum. It was well understood that a corporation with multistate operations was subject to general jurisdiction in any state in which it had substantial operations from which it derived substantial revenue.³ See Jonathan Remy Nash, *The Rules and Standards of Personal Jurisdiction*, 72 Ala. L. Rev. (forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=322887 1 (draft at 23-24). While other aspects of general jurisdiction were less clear, this rule—which applied in a large swath of cases—was very clear.

This Court in *Goodyear* and *Daimler* saw fit to constrict general jurisdiction essentially to settings where a defendant corporation is sued in the state of its incorporation or of its principal place of business. See 571 U.S. at 137-38. (The *Daimler* Court acknowledged, consistent with earlier precedent, that general jurisdiction might inhere under other circumstances, but it made clear that those circumstances are severely circumscribed. See *id.*)

³ Indeed, the point was so uncontested, that *Daimler* AG’s U.S. subsidiary raised the argument that it was not subject to general jurisdiction in California only belatedly, in a footnote in its Supreme Court brief. See 571 U.S. at 134; *id.* at 153 (Sotomayor, J., concurring).

In so doing, the *Daimler* Court surely made general jurisdiction more rule-like. However, by failing to acknowledge the substantially rule-like nature of the test that lower courts had been using for general jurisdiction over defendant multistate corporations, the Court overstated the need for its intervention.

More importantly, even if the result of *Goodyear* and *Daimler* is to render general jurisdiction more rule-like, the fact remains that, after these decisions, more litigants will be subject to unpredictable jurisdictional standards than predictable jurisdictional rules. By narrowing general jurisdiction, *Goodyear* and *Daimler* leave plaintiffs wishing to sue a corporation in a state other than its place of incorporation or principal place of business to seek to invoke specific jurisdiction—that is, personal jurisdiction where the underlying controversy is related to or arises out of the defendant’s forum contacts. However, specific jurisdiction is notoriously standard-like. See Nash, *The Rules and Standards of Personal Jurisdiction*, *supra* (draft at 32-35); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1164 (1966). In short, if the goal of *Daimler* was to expand the role of predictable rules in the calculus of personal jurisdiction, the result was, to the contrary, to reduce it.

In the cases at bar, this Court could take a large step toward fulfilling the goal it announced in *Daimler* of establishing clear rules along the

boundaries of personal jurisdiction. While personal jurisdiction's overarching "relatedness" requirement may necessarily be somewhat standard-like in order to function across various subject matters, it is nevertheless possible to ensconce rules for personal jurisdiction in certain classes of cases. Here, the Court should announce a clear rule governing products liability cases such as these and hold that, if the defendant continuously sells the injury-causing product in the forum state (even if the particular item at issue was not first sold in the forum state) and the injury occurs in the forum state, then the defendant's contacts with the forum state relate to the claim.

A contrary holding would be less predictable. It would require proving a chain of title in each case. Sometimes, however, it may not be clear, and indeed may be impossible to ascertain even after discovery, where an item was initially sold. *See* Resp. Br. 39.

Ford argues that proximate cause provides a predictable basis on which to ground personal jurisdiction. *See* Pet. Br. 44-45. However, proximate cause is a mere legal construct that is quite malleable in the hands of judges. Moreover, myriad issues can cloud proximate cause analysis in a products liability suit. *See* Resp. Br. at 37-39. Finally, to whatever extent Ford's suggested reliance on proximate cause provides a predictable test, the test is not a normatively desirable one. A manufacturer's design defect might be the true cause of a plaintiff's injuries, yet under Ford's test the manufacturer would only be liable if it sold *the*

particular item that resulted in the plaintiff's injury in the forum state. As between the manufacturer and some downstream distributor that determines ultimate point of sale, it is the manufacturer that is clearly better positioned to be aware of the defect and address it. See Alexandra D. Lahav, *The New Privity* (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=341334 9 (draft at 30). It thus makes little sense to tie jurisdiction to point of original sale.

In contrast, a rule that subjects a manufacturer to jurisdiction in a products liability case where it (generally) sells the product in question in the forum state and the injury occurs in the forum state is comparatively clear and normatively desirable. The rule rests on two inquiries that will always be (relatively) clear: (1) the forum in which the injury occurred, and (2) whether the defendant sold this (kind of) item in the forum state. While there might conceivably be debate over what constitutes a class of relevant items, and whether a manufacturer's sales of the product in question are substantial enough to give rise to jurisdiction, such questions are nowhere near as nettlesome as the questions inherent in Ford's proposed inquiry. Importantly, in the vast run of products liability cases involving major manufacturers, there will be little debate over such issues at all.

Moreover, the rule proposed here would not subject the defendant to liability in any state in which it sells the product, only in the state in which the injury occurred (and the state in which it sold

the particular product, if that is different). Thus, the rule would greatly simplify the jurisdictional inquiry without greatly expanding the defendant's geographic scope of liability. Compare *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 582 U.S. ___, ___, 137 S. Ct. 1773, 1781 (2017) (rejecting California's "sliding scale approach" as a "loose . . . form of general jurisdiction").

Such a rule would also advance the goals of the personal jurisdiction doctrine in allowing the choice of forum to remain largely in the control of the defendant, not the plaintiff. See *id.* at ___, 137 S. Ct. at 1780. The defendant could choose where to market the product. The plaintiff generally does not choose where the injury is suffered.

Finally, by establishing such a rule, this Court would take an important step toward making specific jurisdiction more rule-like. See Nash, *The Rules and Standards of Personal Jurisdiction*, *supra* (draft at 39-40).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the courts below.

Respectfully submitted,

JONATHAN R. NASH

Counsel of Record

Emory University School of Law

1301 Clifton Road Northeast

Atlanta, Georgia 30322

(404) 712-1715

jnash4@emory.edu

Counsel for Amicus Curiae

Professor Jonathan R. Nash

April 2, 2020