

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 the Supreme Court of Minnesota

BRIEF OF AMICUS CURIAE
THE CENTER FOR AUTO SAFETY
IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

This Amicus brief is submitted on behalf of THE CENTER FOR AUTO SAFETY (CAS) in support of the Respondents.¹ The issue raised in this appeal has significant jurisprudential implications for every consumer who purchases and uses motor vehicles throughout the United States.

The CAS was established in 1970 by Ralph Nader and the Consumers Union and it is an outgrowth of the “Corvair” scandal. After that ordeal, “Nader realized that his singlehanded, sporadic monitoring of the auto industry would be ineffective.” Thus, he and the union created the Center as an independent (but affiliated) organization “to keep a sharp eye on the National Highway Safety Bureau” (Acton and LeMond, 1972, p. 69) by lobbying, researching, and litigating as necessary. Today, the Center is independent of both Nader and the Consumers Union, but the Center’s original goals remain: to work for improved vehicle highway safety, reliability, and fuel economy. While these basic tenets reflect its founders’ original purposes, the Center itself has grown tremendously. Employing a small full-time staff, CAS has reached more than 10,000 members and supporters and is funded by individual contributions and grants. CAS is a nonprofit research and advocacy organization which provides a public voice for auto safety. Our mission is to improve the safety, efficiency, reliability and cost

¹ Pursuant to Sup. Ct. R. 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than the amicus curiae made any monetary contribution to the preparation or submission of the brief.

to the consumer of vehicles, which explicitly demands that we do what we can to help reduce motor vehicle deaths, injuries and crashes. These goals often cause the Center to furnish testimony before Congressional oversight committees and sponsor independent analysis of pending safety legislation, government safety regulations and public health issues arising because of mistakes in the marketing of unsafe vehicles. To this end, the Center has also been involved in several lawsuits, challenging decisions of the Secretary of Transportation and the National Highway Traffic Safety Administration (NHTSA). Examples of the Center's public health advocacy include: *Center for Auto Safety v. National Highway Safety Admin.*, 793 F.2d 1322 (1986), in which the Center challenged an administrative rule involving fuel economy; *Center for Auto Safety v. Lewis*, 685 F.2d 656 (D.C. Cir. 1982), asking a federal court to examine the Secretary of Transportation's settlement "of a safety investigation concerning 23 million Ford vehicles"; and, *Center For Auto Safety v. Volkswagen AG, et al.*, Case No. 1:15 CV-1356 (U.S.D.C. E.D.VA. 2015), seeking injunctive relief against these car companies for defrauding consumers by manipulating EPA tests intended to restrict vehicle emissions.

In addition to its direct sponsorship activity, the Center occasionally participates as an amicus curiae, when the issue relates directly to the relationship between vehicle safety, consumer protection and the role of the civil justice system in facilitating these goals. The safety of the design of motor vehicles is dependent, in part, upon allowing the American Civil Justice System to monitor when injury occurs because of poor design decisions and providing the injured

consumer access to our court system to allow jurors to decide whether compensation is warranted. The CAS appears as Amicus to explain the importance of keeping open the courthouse doors for citizens of every state where multi-national manufacturers market and sell their motor vehicles—and derive huge financial benefits. Until recently, vehicle manufacturers like Ford Motor Company did not challenge the jurisdiction of courts to preside over personal injury and wrongful death cases filed in the forum state where the harm occurred and the Plaintiff resides.



WHY THE CENTER FOR AUTO SAFETY HAS FILED THIS BRIEF

Your Amicus has prepared and respectfully submits this Brief to explain why this Honorable Court should not reverse the decisions below and, just as importantly, the Court should once and for all acknowledge, approve and authorize courts of general jurisdiction to exercise jurisdiction over business entities that enjoy the marketing of their “transferrable” products in each of the fifty states and, therefore, should be subject to civil liability in the forum where the injury occurred because: (a) the defendant has marketed the product to be used across state borders, (b) the plaintiff resides in the forum, (c) the plaintiff used or suffered harm in the forum because of a flaw in the product, (d) the plaintiff incurred costs of care and other losses in the forum, (e) and it is most convenient to litigate the claim in the forum—regardless of the marketing methods

which caused the product to end-up in that forum state.

Every American citizen has the right to access the courts of his or her home state to rectify wrongs committed by corporations that distribute unsafe motor vehicles throughout the United States. Denial of access to the consumer's home state court system will create havoc-because it will compel consumers to bring lawsuits far away from home and deprive our citizenry of the right to fair compensation for harm suffered in the forum.

As your Amicus will explain, if the Plaintiffs are denied the right to sue Ford Motor Company in the State where the defendant's product caused harm, then not only will forum predictability be obliterated, but the finely balanced jurisprudential rules relied upon by all Americans to meter civil justice will be undeniably destroyed. The test for specific jurisdiction and the alternative test Ford seeks would substantively alter or significantly implicate many substantive and procedural aspects of the civil justice system, including these:

1. The consumer harmed by the product will not be able to bring one lawsuit for the harm caused and join all responsible parties to that litigation—to avoid duplicative and potentially inconsistent results and to comply with statutory apportionment law in most jurisdictions.
2. If the product manufacturer is not amenable to suit, then the financial burden will fall upon retailers alone—an outcome unintended in more than 50% of the states today, which

have enacted laws to immunize retailers when the manufacturer is subject to the court's jurisdiction.

3. Absent recovery in the State where the harm occurred, the consumer victim may not bring suit, thereby depriving the State and Federal medical aid funds from recovering the monies they have paid (*i.e.*, medical liens) for the care and treatment of the victims of product neglect.
4. Forum shopping will arise in an unparalleled fashion: product manufacturers will produce and deliver their products to either their "home state" or to other states that enact pro-business laws limiting liability.
5. Courts which under Ford's jurisdictional test have authority to hear cases will undoubtedly confront and grant dismissals or transfers to other venues based upon *forum non conveniens*.
6. Foreign corporations, venued outside the United States, will remove all interaction with the U.S. in marketing their products to avoid jurisdiction and liability.

Every American citizen must have the right to access the courts of his or her home state to rectify wrongs committed by corporations that mass-produce and distribute unsafe products throughout the United States. Denial of access to the consumer's home state court system would create havoc, eliminate the predictability of our civil justice system and deprive our citizenry of the right to fair compensation for harm suffered. There is a need for a more balanced

approach to the test of specific jurisdiction when a single citizen suffers injury because of a flaw in a mass-produced product marketed in every state.



SUMMARY OF THE RELEVANT POLICY ARGUMENTS

Your Honors' Amicus Curiae respectfully submits that fair play requires that (a) when harm arises in a state from the use of a motor vehicle, then (b) out-of-state "foreign" manufacturers who enjoy the profits of marketing their products across this country and obtain substantial income derived from the regular and continuous sale of their products in a forum State, (c) should be subjected to the same jurisdictional authority of the courts of that state as that allowed over those who manufacture their products in-state or who directly deliver their products in state. Any other outcome will either immunize out of state companies from liability or create a huge disparity between in-state and out-of-state manufacturers. Further, the outcome sought by Ford will force every consumer harmed by an out-of-state made or marketed (flawed) product to seek compensation only if they are willing to leave the State and find the forum in which the manufacturer first distributed or released the product into the stream of commerce. That result will cause havoc amongst our citizenry.

While the United States of America has less than 5% of the world's population², the United States and

² <http://www.worldwatch.org/node/810>

China are the world's two largest auto markets.³ Every major car manufacturer in the world markets its products in the U.S. and most manufacturers do so through a network of corporations with headquarters overseas or in one specific state, and then they use a nationwide distribution process to ship their products to every state in the country. This sales distribution system has worked quite well, allowing companies like Ford Motor Company to design their products in several venues including Dearborn, Michigan. Then, once the design phases are completed, Ford assigns the manufacturing/assembly tasks to its assembly plants across the U.S., Mexico and Canada. Once manufactured, Ford directs the shipping of its products to markets in virtually every state in the Union and around the world. The record in this case illustrates this marketing process. And, once delivered by the manufacturer or its agent to a particular market/dealership network, the Ford authorized retailer is free to sell the vehicle to either a consumer in that forum—regardless of the consumer's actual home state—or to transfer that product to another dealership anywhere in the United States—known as a “dealer trade”. *See*, Edmunds.com/car-buying/the-pros-and-cons-of-a-dealer-trade.html. Further, vehicle marketing across state lines is a huge profit center for used vehicle sales. Most dealerships obtain twice as much gross profit from used vehicle sales than from new unit sales. *See*, autodealertodaymagazine.com/310099/best-practices-to-market-used-inventory-online.

³ <http://www.cnbc.com/2014/01/09/global-auto-sales-hit-record-high-of-828-million.html>

We respectfully submit that these marketing dynamics make the resolution of the issue of specific jurisdiction over Ford Motor Company very different from the issue of jurisdiction decided by this Court in other types of litigation. In the instant case, Ford argued to the trial court and it renews the argument here that prior decisions of this Honorable Court and jurisprudential principles of law require reversal because courts may not exercise specific jurisdiction over an out-of-state corporation doing continuous and substantial business in the forum state unless the product injuring or killing the Plaintiff's decedent was delivered by Ford directly to the forum State. That argument flies in the face of the statutory jurisdictional laws of all 50 states. Virtually every state has enacted laws—consistent with this Court's teachings—allowing that when a defendant's misconduct arising outside the forum state leads to tortious injury or damage in this state, then proof that the corporate entity regularly does or solicits business, or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services in the forum state, warrants specific personal jurisdiction over it. *E.g., Long-Arm Statutes: A Fifty-State Survey*, euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/LongArmSurvey.pdf.

The Complaint in this case and the evidence presented to the trial court demonstrated that Ford Motor Company markets its vehicles for sale and use in all 50 states, that Ford delivers thousands of its products to the forum states every year, that Ford understands that its vehicles will be owned and operated in all 50 states regardless of the state in

which it is originally sold and that Ford relies upon the mobility of its products to enhance its market share. Ford was well aware that any one of its vehicles will be operated on the roads in the forum regardless of the state in which it was sold. That inevitable use is precisely the predicate for specific jurisdiction first recognized by the U.S. Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980): (“[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.”)



ARGUMENT

The predicate for specific personal jurisdiction over Ford Motor Company must continue to be based upon two interrelated conditions: the predictable use of the product in the forum in question and that the harm was suffered in the forum state. When the defendant’s product is used in the forum state while in a defective condition (that existed when it was first released into the stream of commerce) then the tort has “arisen out of or relates to” the defendant’s activities. The location of the sale is not the controlling factor, nor should it be a controlling determinate. The marketing of its products throughout the US establishes a predicate for the application of the

principles of law that embrace the stream of commerce jurisprudential logic.



THE ESSENTIAL ELEMENTS WARRANTING SPECIFIC JURISDICTION

Personal jurisdiction over a non-resident defendant has been discussed and defined in both state and federal courts for decades. Essentially, a court has jurisdiction over a non-resident when the defendant has enjoyed appropriate contacts with the state warranting resolution of the legal conflict in that jurisdiction. To what extent a nonresident defendant has minimum contacts depends upon the facts of the individual case. One essential inquiry is whether the defendant has purposefully acted to obtain benefits or privileges in the forum state. A state court's assertion of personal jurisdiction over a non-resident defendant is consistent with due process if that defendant has sufficient minimum contacts with the forum state, and maintenance of the suit would not offend traditional notions of fair play and substantial justice. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 476 (1985); *Collier v. Land & Sea Rest. Co. LLC*, 2014 U.S. Dist. LEXIS 147118 *20 (D.C. W.Va. 2014) (Specific jurisdiction found against a nationwide wholesaler of shellfish, which sold its product to a Massachusetts' named defendant which it knew marketed the fish throughout the U.S.). Justice Ginsburg reaffirmed the importance of the "specific jurisdiction" /stream-of-commerce test" in *Daimler v. Bauman*, 134 S.Ct. 746, 755, n.7 (2011) by recounting the holdings in several prior decisions:

“ . . . *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (opinion of O’Connor, J.) (specific jurisdiction may lie over a foreign defendant that places a product into the ‘stream of commerce’ while also ‘designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State’); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) (‘[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.’); *Calder v. Jones*, 465 U.S. 783, 789-790, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) (California court had specific jurisdiction to hear suit brought by California plaintiff where Florida-based publisher of a newspaper having its largest circulation in California published an article allegedly defaming the complaining Californian; under those circumstances, defendants ‘must ‘reasonably anticipate being haled into [a California] court’); *Keeton v. Hustler*

Magazine, Inc., 465 U.S. 770, 780-781, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) (New York resident may maintain suit for libel in New Hampshire state court against California-based magazine that sold 10,000 to 15,000 copies in New Hampshire each month; as long as the defendant ‘continuously and deliberately exploited the New Hampshire market,’ it could reasonably be expected to answer a libel suit there).” [Emphasis added.]

In the instant case, the record reflects that Ford products, made by Ford outside the forum states, are marketed in large volume across the United States including the forum states and, by their very nature, cars, trucks and SUVs are sold, resold and transported every day from state to state. In fact, the Ford authorized dealership network allows for the exchange of new vehicles between dealers from state-to-state to facilitate sales and the management of inventory. It is a conceded fact in this case that Ford products are delivered for original sale in one state and that those same vehicles originally sold in some other state will inevitably be used in the forum state—exposing these plaintiffs to harm if they are defective in design. These facts demonstrate the propriety of the forum states exercising personal jurisdiction over Ford. The scope of jurisdictional authority of most state courts, embedded in their respective “long-arm rule”, includes a “tort out/harm in” provision. *E.g.*, *Pennzoil Prods. Co., v. Colelli & Associates*, 149 F.3d 197, 201-202 (3rd Cir. 1998); *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253 (11th Cir. 1996).

Forty years ago, the Supreme Court confirmed that a forum State does not exceed its powers under

the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be used in all 50 states. Stated otherwise, the *Woodson* Court stated: “if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. . . .” *World-Wide Volkswagen Corp. v. Woodson, supra.*, 444 U.S. 297-98. *World-Wide Volkswagen* involved a vehicle made by Audi NSU Auto and which was imported to the US by Volkswagen of America, Inc., distributed in New York by World-Wide Volkswagen Corp., sold in New York by Seaway Volkswagen, Inc., and crashed in Oklahoma. *Id.*, 444 U.S. at 288, 100 S.Ct. at 562. The Supreme Court of the United States found these facts would permit Oklahoma to exercise jurisdiction over the manufacturer Audi and the importer Volkswagen-but insufficient for the exercise of jurisdiction over the regional distributor World-Wide or seller Seaway:

When a corporation “purposefully avails itself of the privilege of conducting activities within the forum State,” *Hanson v. Denckla*, 357 U.S., at 253, 78 S.Ct., at 1240, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers,

or, if the risks are too great, severing its connection with the State. *Id.*

Your Amicus submits that there is no reason to retract the jurisdictional principles articulated in *Woodson, supra.* and followed by thousands of courts. In the case now before the Court, Ford Motor Company can only prevail if this Court decides to overrule *World-Wide Volkswagen Corp. v. Woodson, supra.* Clearly, the Court has given no reason to overrule *Woodson.* In fact, the Dissenting Opinion in *Bristol-Myers Squibb Co.,* 137 S.Ct. 1773, n. 3 (2017) reminded us all of the limits in the Majority’s decision, rejecting the defendant’s request to limit specific jurisdiction to in-state harm from in-state misconduct, stating:

Bristol-Myers urges such a rule upon us, Brief for Petitioner 14-37, but its adoption would have consequences far beyond those that follow from today’s factbound opinion. Among other things, it might call into question whether even a plaintiff injured in a State by an item identical to those sold by a defendant in that State could avail himself of that State’s courts to redress his injuries—a result specifically contemplated by *World-Wide Volkswagen Corp., v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

Many years ago, under similar circumstances, the Eleventh Circuit Court of Appeals found that it was appropriate to exercise specific jurisdiction over Renault in the state of Georgia when the Plaintiff suffered catastrophic injury in Georgia and while riding in a Renault car marketed and sold as a new car in North Carolina. *Vermeulen v. Renault, U.S.A., Inc.,* 985 F.2d 1534, 1550-51 (11th Cir. 1994), stating:

In sum, RNUR designed the Renault LeCar for the American market, advertised the LeCar in the United States, established channels for customers in the United States to seek advice about the LeCar, and maintained a distribution network by which LeCars were imported into the United States. These contacts are sufficiently related to appellant's cause of action to confer specific jurisdiction upon the United States. RNUR's activities were inextricable links in the advertising and distribution network by which the appellant obtained her vehicle, the subject of this product liability suit. More important, RNUR directly targeted its LeCars toward the United States and thus fairly could expect to defend in this country the very type of action this case presents: a personal injury action challenging the car's design and safety. RNUR intended its LeCars to be brought to the United States and took numerous affirmative steps to bring that result about, and jurisdiction in this country would not violate RNUR's due process rights. Because RNUR satisfied all the criteria identified by the *Asahi* plurality as indicative of purposeful availment, we hold that RNUR possessed minimum contacts with the United States sufficient to satisfy the first prong of the due process inquiry.



A REASONABLE DEFINITION OF THE PREDICATE FOR SPECIFIC JURISDICTION

The decisions of this Honorable Court have, over the past 10 years, refined the factors and circumstances which allow courts to obtain specific jurisdiction over a product manufacturer. In doing so, your Amicus has perceived the existence of a conflict between the notion that the controlling “contact” with the forum is that of the product manufacturer’s case specific contacts with the forum and real-world circumstance in which manufacturers employ and enjoy the benefit of nationwide distribution marketing practices, exposing consumers across the country to the product’s untoward injury producing characteristics. For instance, in *Bristol-Myers, supra.*, while the Court appreciated that the product manufacturer marketed Plavix in all 50 states, it nevertheless drew a jurisdictional line between the forum state and the Plaintiff’s state of use and harm. The Court found that specific jurisdiction could be obtained only upon proof that three circumstances coalescence—the forum was where the: (1) the product was used, (2) the product was marketed, and (3) the harm arose. In reaching that conclusion, the Court admittedly did not address the circumstance here: (4) the use of the product includes the distribution of the product to a forum state beyond the state in which the manufacturer “dropped” it into the stream of commerce.

Your Amicus urges this Honorable Court to either define the test of specific jurisdiction to include the circumstances here (including the predictable resale of the defective product in the forum state where the defendant conducts continuous and substantial

business) or apply a reasoned approach which allows specific jurisdiction under these facts because any other result will lead to this predictable harm:

1. Manufacturers will take steps to identify the “friendliest forums” and deliver all their products to that state.
2. Retailers will then be subject to suit—even in states with innocent seller statutes—because the manufacturer will not be subject to jurisdiction.
3. Claims for indemnity will have to be resolved piece meal—only after the resolution of the injury case and probably in a foreign forum.
4. Claims against manufacturers cannot be processed along with the claims against any other party who contributed to the harm.
5. Forum state retailers will be obligated to defend lawsuits ordinarily brought against manufacturers and then the manufacturer—like Ford Motor Company—will be obligated to indemnify and defend the retailer.
6. Medical providers and insurers who have liens on these injury claims will lose recovery rights because the injured consumer will not pursue the claim in a distant forum.
7. Apportioning fault will disappear if the manufacturer is not subject to jurisdiction in the forum state or other tortfeasors are not subject to jurisdiction in the forum where the manufacturer must be sued.

8. Questions of dismissal for *forum non conveniens* will create circular arguments of the appropriate venue.



CONCLUSIONS

Your Amicus respectfully submits that the Plaintiffs in these case must be allowed to litigate their claims against the Ford Motor Company in the forum states where the defective Ford product caused injury, where the Plaintiff (decedent) lives and where this defendant has marketed this same vehicle to thousands of consumers—and obtained untold financial reward from its marketing practices. To end the jurisdictional reach of our courts to the State where the defendant “dropped-off” the vehicle into the stream of commerce is to ignore the realities of the marketplace. Further, such a ruling will forever alter the essential legal balance existent in this country for decades—allowing consumers to bring suit in their home State to recover for injuries arising in their home state and leaving consumers without a reasonable remedy. There is nothing unpredictable or unfair about obtaining specific jurisdiction over Ford Motor Company under the facts here.

Respectfully submitted,

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