Nos. 19-368 & 19-369

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, et al.,
Respondents.

FORD MOTOR COMPANY,
Petitioner,

v.

ADAM BANDEMER,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state court may exercise specific personal jurisdiction over the manufacturer of a defective product when the manufacturer (1) placed the product into the stream of commerce intentionally, (2) the product caused the plaintiff's injury in the forum State, and (3) the manufacturer, through its actions, indicated an expectation that the product at issue be purchased or used in the forum State.

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INTEREST OF AMICUS[1]

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose broad mission is to enhance the climate for housing, homeownership, and the residential building industry, and to promote policies that will keep safe, decent, and affordable housing a national priority. Since its inception in the early 1940s, NAHB has served as "the voice of America's housing industry."

NAHB is a federation of more than 700 state and local associations. It represents more than 140,000 members nationwide. About one-third of NAHB's members are home builders and/or remodelers. The others are associates working in closely related fields such as sales and marketing, housing finance, and the manufacturing and supplying of building materials. NAHB's members construct over 80% of the housing in the United States. NAHB's website address is www.nahb.org.

As further explained below, the home building industry plays a major role in the national economy, accounting for three to five percent of the national GDP, employing more than four million people for residential construction alone, and generating substantial tax and fee revenue for governments at every level. This case involves an issue of critical importance to NAHB and its members—and thus of critical importance to those they employ, and the local, state, and national governments they support—namely, whether courts

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[1] All parties have consented to this filing. No party's counsel authored this brief in whole or in part, and no one other than *amicus*, its members, or its counsel contributed money to fund its preparation or submission.

that routinely have jurisdiction over those members will also have jurisdiction over the entities ultimately responsible for the injuries.

SUMMARY OF ARGUMENT

There is perhaps a perception that the business community uniformly favors narrow rules of personal jurisdiction that limit suits against defendants to only those States in which their forum contacts can be said to be the direct and proximate cause of the injury. If so, that perception is misplaced. That rule does favor *certain* businesses: It particularly helps manufacturers or designers of defective products, many of whom are now located abroad and will face *no* obvious forum for claims against them in the United States under petitioner's rule. But it harms other businesses—particularly those businesses that lie between consumers and initial manufacturers within the stream of commerce and face potential liability for defects in the original maker's design. Home builders are archetypical examples of such firms, and their experience demonstrates how such ill-considered rules can end up unfairly leaving some businesses holding the bag for others, through no fault of their own.

The problem is that intermediate businesses like home builders are often subject to uncontroversial claims of specific personal jurisdiction where the injury occurs. For example, the general contractor who builds a house will be subject to personal jurisdiction for claims related to that house where it was built—say, a claim that the drywall is defective. *See, e.g.*, *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d 576, 582-83 (5th Cir. 2014) (discussing suits related to "hundreds of millions of square feet of drywall imported from China in homes across the United

States" that caused "property damage and health problems"). Applicable tort or products-liability rules will also often make this intermediate business liable for the full extent of the injury. Responsibility may thus fall on this business to implead or seek contribution from the manufacturer that actually caused the damage by selling defective products to that general contractor (or, more realistically, one of its subcontractors).

If courts routinely can reach only an intermediate business, and not the ultimate wrongdoer, the inevitable result is to multiply litigation about the same matter, and—quite possibly—to stick an intermediate business with liability when they have no fault and cannot find a U.S. court with jurisdiction over the responsible party. In fact, under petitioner's proposed rule, whether the court can adjudicate the liability of the actual wrongdoer in such cases will turn on utterly trivial happenstances, like whether a particular piece of drywall can be traced to a particular delivery and whether title to that drywall passed from the manufacturer to the purchaser in the very same State where the home at issue was built. What will inevitably result is a system only lawyers and bureaucrats could love.

Instead of allowing the law to get caught up in such irrelevant details—and a potential storm of premerits litigation in every case—this Court has the opportunity here to reaffirm the simple and predictable "stream of commerce" rule that has been an accepted background principle for personal jurisdiction in product-related cases for decades. This is a different tack than the one respondents take. *Compare* Resp. Br. 44. Under that rule, 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 purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). Where that rule is satisfied, *and* the product at issue caused the plaintiff's injury in the forum State, there should be no need for further inquiry into specific personal jurisdiction.

That is particularly so because, in any such case, *all* the possible concerns that animate personal jurisdiction doctrine are satisfied. In contrast, petitioner abstracts away from the particular words this Court has used to describe its doctrine—words like "purposeful availment" or "arising from or related to"—which are themselves abstractions away from first principles. But this case is simple if one just attends to the first principles themselves. The only constitutional concerns this Court has identified as grounding points for personal jurisdiction doctrine are (1) fairness to defendants; and (2) principles of sovereignty and federalism. Both are well served by the stream-of-commerce test: There can be no fairness objection from a defendant who puts a product on sale *expecting* it to be used or purchased in the forum State, and there can be no federalism or sovereignty objection to allowing a State to adjudicate a case about an injury that *occurred within its own borders*.

The upshot of this correct approach is that personal jurisdiction doctrine will remain tied to facts that matter, and avoid becoming a source of unnecessary red tape and court-induced complication in business dealings. Those who manufacture products and put them into the market expecting that they be sold

all over the United States—including those who do so from abroad—can be asked to answer claims arising from those products wherever they cause injury in the United States, even if the particular item involved first entered the stream of commerce somewhere else. This will relieve intermediate businesses (like home builders) of the need to maintain pointless paper trails tracing, for example, a particular pipe in a particular house back to a particular sale delivered in a particular State. And it will provide those businesses with some certainty that, when asked to answer for the products or services they sell in a particular forum, the upstream manufacturers or sellers that are intentionally supplying that market with defective products can be asked to answer in the same forum as well.

ARGUMENT

I. Intermediate Businesses Depend On The Personal Jurisdiction Supplied By The Stream-Of-Commerce Rule.

Intermediate businesses like home builders increasingly depend on an interconnected web of business dealings and relationships. The contracts, subcontracts, and supply chains that cause a particular material to be used in building any given home may involve multiple steps or intermediaries, and may or may not permit the differentiation of any given item of a product from another instantiation of that same product used in another home or even another part of the same house.[2] Businesses like home builders thus

[2] For convenience, this brief uses the word "product" to refer to a given product type or design (say, 3M's Multi-Purpose Duct Tape 3900) and the word "item" to refer to any given

depend on the basic assumption that, when a product is marketed for purchase or use in every State, the company that expects its product to permeate the U.S. market can be sued about that product wherever in the United States the plaintiff suffers an injury caused by that product. Were it otherwise, both the risks and the bureaucratic demands imposed upon intermediate companies that lie between manufacturers and consumers would be enormous.

Home builders are hardly alone in this regard. Almost any firm that provides services using components designed by others could face the same concern. Take construction companies of all stripes, hospitals, retailers, repair shops, and pharmacies, which all have a reliable physical presence in the States in which they operate and will thus be subject to personal jurisdiction for claims related to those in-forum operations. All rely on complex and diffuse supply chains involving multistate and international channels and suppliers. Meanwhile, substantive liability regimes often create a risk that these companies may be held jointly liable with those other companies in their supply chains for defects in the parts or materials that they use. For these companies to plan operations with reasonable awareness of their potential liabilities, they need to know whether and when the same courts that hold *them* liable for design defects they did *not* create can reach the manufacturers and other companies in their supply chains that actually caused the plaintiff's harm. That need is even more acute in the

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instantiation of that product (say, a *particular roll* of 3M's Multi-Purpose Duct Tape 3900).

case of international suppliers, who have no home forum in the United States.

A. Home builders are an important example of how businesses themselves depend on the stream-of-commerce rule.

1. The home building industry plays a major role in the national economy. Even since the "Great Recession," residential construction has accounted for three to five percent of the national GDP. *See* NAHB, *Housing's Contribution to Gross Domestic Product*, https://bit.ly/2X1vafI (last visited Apr. 4, 2020). In recent years, the industry has employed more than four million people to work in residential construction, about a quarter of whom were employed by home builders and three-quarters of whom were specialty trade contractors—nearly three percent of the entire U.S. civilian workforce. *See* Paul Emrath, NAHB Econ. & Hous. Policy Grp., *Residential Construction Employment Across States and Congressional Districts, 2017*, at 1-2 (2019), https://bit.ly/33ZqdWb.

Viewed through a different lens, building 100 average single-family homes generates 290 jobs, measured in full-time equivalents. *See* Paul Emrath, *National Impact of Home Building and Remodeling: Updated Estimates* 1 (Apr. 1, 2020), https://bit.ly/2UWRJ2m. And building 100 average rental units generates 125 jobs by that measure. *See id.* In turn, those construction projects generate crucial tax and fee revenue for all levels of government—nearly $13 million for 100 average single-family homes, and about $5.5 million for 100 average rental units. *See id.* at 5. This is especially important now, as we look to how the economy will recover from the economic effects of the current pandemic. *What Building 1,000*

Homes Means to the U.S. Economy, LBM Journal (Apr. 2, 2020), https://bit.ly/2xPmBd4.

2. Home building represents one industry (of many) in which the finished task or product involves an exceedingly complex array of parts and materials sourced by different actors from various firms here and abroad. Building even a run-of-the-mill residence ordinarily requires the coordination of many participants and subcontractors, and the installation of thousands of component parts. Indeed, as many as 30 different *categories* of materials are used in a single 2,000-square-foot home. Manufactured Hous. Research All., *Factory Built Housing Roadmap (Including Recommendations for Energy Research)* 10 (Jan. 2006), https://bit.ly/2UQFYdW. Within those categories are innumerable products and even more innumerable items, be they individual screws, nails, beams, tiles, panels of drywall, buckets of paint, shingles, window panes, and the like.

Meanwhile, homebuilders of all kinds will very rarely perform all construction work themselves, with just their employees. Instead, builders usually subcontract much (or all) of the actual construction to trade contractors—specialists who perform work like excavation, framing, roofing, plumbing, electrical installation, tiling, finished carpentry, masonry, painting, drywall installation, and paving. On average, 22 different subcontractors are used to build a single home. Paul Emrath, *Subcontracting: Three-Fourths of Construction Cost in the Typical Home* 1, https://bit.ly/2UxFLx2 (last visited Apr. 4, 2020). And these subcontractors often select the particular building products and items they install. Paul Emrath, *Buying Products for Home Building & Remodeling:*

Who and Where 1, 5 (Nov. 9, 2012), https://bit.ly/3aLMY2x.

This fact only compounds the complexity of a supply chain that is already multifaceted and increasingly international in scope. Today, many of the key building products used for residential construction come from foreign sources and suppliers. Bipartisan Policy Ctr., *The State of the Residential Construction Industry* 7 (Sept. 2012), https://bit.ly/3dLxnSl. This is so for drywall, lumber, veneer, plywood, cement, iron, steel, appliances, and accessories, among many others. Indeed, the majority of the gypsum used for manufacturing drywall in the United States is now imported from Canada and Mexico. And less than seven percent of copper—a metal used extensively throughout residences—is sourced within our borders. *See* U.S. Geological Survey, *Mineral Commodity Summaries 2020*, at 52-53 (2020), https://on.doi.gov/2JujYQu. This trend will only increase as foreign manufacturers' interest in the U.S. market grows. Most recently, for example, NAHB's International Builders Show attracted over 80,000 visitors from more than 100 different countries—and attendance increases year after year. *See International Attendees*, NAHB IBS, https://bit.ly/2UCSXkB (last visited Apr. 5, 2020).

Builders will certainly know their suppliers and the manufacturers of the products that they use. But for the reasons just given, it will frequently be difficult or impossible to track a particular item back through the supply chain that brought it into a particular home. As a concrete example, it is relatively likely that a builder could say that the drywall used for a given home in Oklahoma was manufactured by a particular Chinese company. But it is not likely that, for

any given linear foot of drywall, the builder will know with certainty whether it came from a batch sold directly into the State, or from one sold into a different State but ultimately distributed to a warehouse in Oklahoma. And it will be even less clear to a general contractor what kind of contractual relationships exist between manufacturers, distributors, shippers, and retail outlets before a given manufacturer's parts are chosen for installation by a subcontractor.

3. In recent years, home builders have faced an increase in lawsuits brought by homeowners alleging construction-related claims.

Builders are generally liable to homeowners in the first instance for construction-related defects, even if the harm was caused by a trade contractor or defective building product. And even if a home builder could defend itself from liability, the builder and homeowner typically want the same thing in the first instance—to fix the problem. Home building is a competitive business that requires builders to maintain a reputation for constructing quality residences and standing behind their work. *See* J.D. Power & Assocs., *Satisfaction with New-Home Builders and New-Home Quality Reach Historic Highs, as Home Builders Respond to Tough Market Conditions by Improving Products and Service*, PR Newswire (Sept. 15, 2010), https://prn.to/2Uwxolw. That means that the builder will typically respond to a complaint by at least initially eating the cost of repairing the home.

As a matter of law, policy, and fairness, however, the ultimate cost of repairing the defect ought to fall on the party in the chain of distribution or installation responsible for causing the problem. That person is best situated to prevent the problem in the first

instance, and should thus be incentivized to supply a quality product or do quality work. For this reason, a builder who corrects another's defect or mistake is generally indemnified under the law for the cost of repair, and can seek contribution from the responsible party or try to join them to any suit.

This leads to the concern that animates NAHB's participation here. It is uncontroversial for a court to assert personal jurisdiction over a home builder or a contractor or subcontractor in the forum where the house was built. But rules like those advocated by petitioner can make it quite difficult for those same courts to reach the responsible manufacturers and distributors higher up in the supply chain. This is true for both domestic and foreign companies, but the issue is most serious in the case of foreign entities, for whom—under petitioner's misreading of the law—there may be *no* available forum for personal jurisdiction in the United States.

In this regard, consider a few examples from the home building industry, the most vivid of which may be the health and property complaints associated with defective Chinese drywall.

a. From about 2005 to 2008, hundreds-of-millions of square feet of drywall manufactured in China was exported to the United States and installed in new and reconstructed homes. *See In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 742 F.3d 576, 582 (5th Cir. 2014). This drywall caused both property damage and health problems, and thousands of affected homeowners filed suits across the country, in the jurisdictions where they were injured. *Id.*

Relevant here, one foreign-manufacturer defendant (Taishan, for short) claimed that it could not be held to account in various U.S. forums because of a lack of personal jurisdiction. *See* 742 F.3d at 585; *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 526-27 (5th Cir. 2014). In these cases, the Fifth Circuit correctly held that Taishan could not escape answering for its products where they had caused injury, employing the stream-of-commerce approach.

For example, Taishan argued that—although it did have many contacts with Florida—the plaintiffs there could not "prove that the drywall … installed c[ould] be traced directly to [its] Florida related activities," just as Ford argues here. *See* 753 F.3d at 543. But the Fifth Circuit disagreed. Instead, it reaffirmed that, fundamentally, the stream-of-commerce test focuses "on whether the defendant could foresee being haled into th[e] forum to answer plaintiffs' claims." *See id.* at 543-44. And there, it "should [have] come as no surprise to Taishan that it [wa]s defending suit in Florida" for injuries sustained in Florida on account of its defective drywall. *Id.* at 544.

The Fifth Circuit likewise correctly employed the stream-of-commerce approach to reject Taishan's effort to escape liability in Louisiana. Although it "lacked direct physical contacts" with the State, the court found that Taishan's "Louisiana contacts [we]re substantial," having sold hundreds-of-thousands-of-dollars of drywall that it "'absolutely' knew … was going to New Orleans," and this was "not … an isolated sale." 753 F.3d at 547-48. The claims arose out of and related to the forum-related contacts, the court reasoned, because there was sufficient evidence that the

company's drywall was "in the homes of Louisiana plaintiffs." *Id.* at 549 (quoting the district court's opinion). In other words, the court did not require that the specific defective product be tied to a first sale or transaction within the forum because the requirements of *World-Wide Volkswagen* were satisfied: Taishan expected its product to be sold and used in substantial quantities in Louisiana, and that product caused plaintiffs' injuries there.

Under Ford's proposed standard, this would not be enough because there was no showing that Taishan's contacts with Louisiana and Florida were themselves the direct and proximate causes of the plaintiffs' injuries in those forums. This is a transparently unacceptable result. Taishan had intentionally profited from its product being sold in the United States for use in those markets, and it "absolutely knew" those markets were contributing to its profits. Drywall will be exceedingly difficult for plaintiffs to trace back to some particular delivery in some distant port in a distant State. And absent an absurdly complex paper trail that could trace a panel of drywall to a sale in some U.S. forum, it is unclear that Ford's standard would allow Taishan to be sued anywhere at all. Indeed, if a firm like Taishan now delivered its product to its U.S. distributor abroad and (with a wink) disclaimed any intent that it land in any given U.S. port or reach any given U.S. forum, it could—under Ford's rule—hide safely from suit anywhere in the United States.

The unfair result of such a rule is to shift the cost of a defective product to homebuilders and homeowners. Builders should not have to be the ultimate party responsible for paying those costs. But a domestic

distributor of the product might not be available—indeed, in Taishan's case, its domestic distributor in Virginia went out of business as a result of the lawsuits. *See* Josh Brown, *Norfolk Company That Imported Drywall Closes*, The Virginia-Pilot (Jul. 10, 2009), https://bit.ly/2Jy5izQ. And some builders' insurers also denied coverage for the costs. *See, e.g.*, *Evanston Ins. Co. v. Germano*, 514 F. App'x 362 (4th Cir. 2013) (per curiam) (pollution exclusion in builder's insurance policy applies to Chinese drywall claims against builder); *Granite State Ins. Co. v. Am. Bldg. Materials, Inc.*, 504 F. App'x 815 (11th Cir. 2013) (same). Such costs will, at the least, ultimately be passed on to homeowners in pricing homes. And when smaller builders are simply unable to shoulder the costs of repairs, homeowners will be left without any recourse altogether.

b. Examples like that above are not a one-off for the homebuilding industry. And when such situations arise, it is critical that the manufacturer be available to help fix the problem and resolve the homeowners' claims.

Another such example involved a "synthetic stucco" exterior-barrier system used from the mid-'80s to the mid-'90s, designed to resist water penetration at the outer surface of homes. A flaw in the design resulted in water getting trapped within, resulting in damage to the substrate and other interior wall materials. Predictably, this led to a slew of class actions against the manufacturers, distributers, builders, and trade contractors (among others), resulting in multi-million-dollar nationwide settlements with the manufacturers. *E.g.*, *In re Senergy & Thoro Class Action Settlement*, 1999 WL 33563728 (N.C. Super. Ct. July

14, 1999); *see also Simmermon v. Dryvit Sys., Inc.*, 953 A.2d 478, 481-82 (N.J. 2008). Had the manufacturers been able to avoid personal jurisdiction under Ford's rule, that enormous cost might have been borne by homebuilders alone, even though they were not actually responsible (and could not have prevented) the harm.

The same thing happened with polybutylene pipe, which had been installed in single-family homes and other residential structures across the country from the early '70s through the '90s. Shell Oil Co. and Hoechst Celanese Corp. ultimately agreed to pay up to nearly one billion dollars to resolve the case, and the settlement provided for replumbing, repairs, and damage compensation to homeowners nationwide, for their role in the defect. *See Cox v. Shell Oil Co.*, 1995 WL 775363, at *5 (Tenn. Ch. Ct. Nov. 17, 1995). Again, under Ford's rule, that cost could easily have fallen on parties who did not cause the harm and could not have prevented it.

Finally, a more recent example involves the "Kitec Plumbing System" manufactured by IPEX, which prematurely failed, resulting in leaks and damage to the residences and other structures in which they were installed. Approximately 20 class actions were filed throughout the United States and Canada, and the ones here were consolidated in a multi-district litigation. IPEX ultimately entered a nationwide settlement in which the company contributed $125 million in a fund to pay for repairs in the homes and other structures equipped with the system. *See* Kitec Plumbing System Settlement, http://www.kitecsettlement.com/ (last visited Apr. 4, 2020). It is imperative that the entities responsible for the harm continue to

be held accountable for the costs of the damage, so homebuilders are not left to foot the bill.

B. Courts have been fairly applying the stream-of-commerce test for years.

1. Among federal cases, an excellent illustration of the issues implicated here can be seen in *LLOG Exploration Co. v. Federal Flange, Inc.*, 2019 WL 4038599 (E.D. La. Aug. 27, 2019), involving products-liability claims. There, the plaintiff—a Louisiana oil and gas company operating wells off the Gulf Coast—sued Federal Flange when parts that the plaintiff had purchased from the company to use in the plaintiff's oil wells failed, resulting in millions of dollars in damages. *Id.* at *1-2. In turn, Federal Flange filed multiple third-party complaints against the foreign and domestic companies that had an upstream hand in manufacturing and importing the defective product. *Id.*

Two of the companies—a Delaware/New Jersey-based importer, and an India-based manufacturer—filed motions to dismiss, arguing that they did not expect or have specific knowledge that the parts would be distributed to a Louisiana end user. 2019 WL 4038599, at *2-3. Indeed, the importer argued that it did not control nor have knowledge about where and for what purpose the downstream distributor "would resell the [parts] from batch number H-3501" to a user in Louisiana three years later. *Id.* at *7. Because the specific parts that caused the harm could be traced and had not been sold directly into the forum, the importer urged the court to "disregard its direct Louisiana sales in the contacts analysis." *Id.* at *8.

Thankfully, the court rejected that argument: "The unique traceability of the tees at issue in this

case, by batch number, should not muddy the stream-of-commerce analysis," the court reasoned, because the "touchstone for stream-of-commerce analysis is not the defendant's specific knowledge, nor its control, nor a traceable route of the goods; instead, it is the defendant's purposeful availment of the forum through the stream of its goods rather than its agents." 2019 WL 4038599, at *7. Thus, the importer "need not have a particularized knowledge of the destination, or route, of each individual tee that it places into a stream of commerce in order to be subject to personal jurisdiction in a forum destination of one of its products said to be defective." *Id.* Critically, the court recognized that "many manufacturers and distributors do not have such a clearly traceable stream." *Id.* Placing the product into "this stream of commerce, flowing as it did into Louisiana, … ma[de] reasonable [the importer's] anticipating being haled into court in Louisiana," when other items of the same product caused injury there. *Id.* at *10.

The issues before the Court arise in multiple other contexts. In *Hoffman v. Empire Machinery & Tools Ltd.*, 2011 WL 1769769 (W.D. Mo. May 9, 2011), plaintiffs—a husband and wife—brought suit against a Canadian distributor in Missouri, where the husband was injured by a device the distributor sold to his employer. *Id.* at *1. In response, the distributor asserted a third-party claim against the Spanish manufacturer. The manufacturer moved to dismiss, arguing that it had never directly conducted any business, advertised, visited, called, or otherwise corresponded with anyone in the United States, let alone Missouri. *Id.* The court denied the motion, based on evidence that the distributor sold most of its stock of the manufacturer's

machines throughout the United States, where the distributor also advertised and attended trade shows to sell the defective product. *Id.* at *5. Moreover, the manufacturer's name and logo were on the machines, and the company even customized the devices and accompanying literature to comply with North American standards. *Id.* Because the claims arose "from the efforts of the manufacturer to indirectly access the market for its product in the United States—including Missouri"—the court held that "it [wa]s not unreasonable to subject [the manufacturer] to suit" in the State. *Id.* at *6.

So too in *Verde v. Stoneridge, Inc.*, 2015 WL 1384373 (E.D. Tex. Mar. 23, 2015), in which the plaintiffs alleged injury due to a defective part—manufactured by a Connecticut company—that ultimately ended up in plaintiffs' Dodge Ram. *Id.* at *1-2. The manufacturer argued that it could not be "subject to personal jurisdiction in [Texas] merely because it manufactured a spring that was incorporated into a switch that was incorporated into a clutch safety interlock device that was incorporated into a truck sold in Texas." *Id.* at *2. The court rejected the argument, because the manufacturer had not sought to limit where the end product would be sold, and was aware when placing its component part into the stream of commerce that it would ultimately be used in vehicle's, like plaintiffs', that would be sold throughout the United States, including in Texas. *Id.* at *4.

Similar examples abound. *See, e.g.*, *Paz v. Brush Engineered Materials, Inc.*, 445 F.3d 809, 813-14 (5th Cir. 2006); *Luv N' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 468-71 (5th Cir. 2006); *Clune v. Alimak AB*, 233 F.3d 538, 543-45 (8th Cir. 2000); *Vandelune v. 4B*

Elevator Components Unlimited, 148 F.3d 943, 947-48 (8th Cir. 1998); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1549-51 (11th Cir. 1993); *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420-21 (5th Cir. 1993); *Boat Serv. of Galveston, Inc. v. NRE Power Sys., Inc.*, 2019 WL 6716907, at *1-9 (E.D. La. Dec. 10, 2019).

2. State courts too have routinely addressed these issues. In *Book v. Doublestar Dongfeng Tyre Co.*, 860 N.W.2d 576 (Iowa 2015), the Supreme Court of Iowa confronted "whether a Chinese tire manufacturer that sold thousands of tires in Iowa through an American distributor may be compelled to defend a lawsuit" within the State, where the plaintiff was injured by one of the manufacturer's tires. *Id.* at 579. The court said yes, because that the foreign manufacturer had shipped tens of thousands of tires to Iowa over the years, and hundreds of thousands into the U.S. market for further distribution. *Id.* at 596. It did not matter, according to the court, that the *particular* tires sold directly into Iowa did not include the exact model number that injured the plaintiff, because the company had "cite[d] no authority, and we found none, supporting the proposition that we must disregard for jurisdictional purposes a manufacturer's shipments to the forum state of thousands of tires of a different model than the accident tire," especially since "the tires shipped directly to Iowa, although different models, had the same defective bead design as the accident tire." *Id.* at 596 n.7. And in any event, the court recognized that "indirect shipments count," and the company had sold hundreds of thousands of the particular, defective tire at issue to a distributor for the U.S.

market, which in turn shipped many to Iowa; thus, the manufacturer "at least indirectly served the Iowa market through [its distributor] 'with the expectation that its tires would be purchased by consumers in the forum State.'" *Id.* at 596 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980)) (brackets omitted).

The Supreme Court of Appeals of West Virginia came to a similar conclusion against the petitioner in this very case. In *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319 (W. Va. 2016), Ford urged the court to adopt the reasoning of a single district court case, which held that there was no personal jurisdiction when the plaintiffs bought a Ford vehicle in one State and then drove it to another where they were injured, even though Ford sold the *same* defective vehicle model in the forum State. *Id.* at 342-43. The West Virginia state court rejected a "nexus analysis" that was "so rigid and formalistic as to undermine the precedent of *World-Wide* and its progeny," because using "the place of sale as a *per se* rule to defeat specific jurisdiction …. utterly ignores the 'targeting' of a forum for the purpose of developing a market." *Id.* at 343. As the court correctly concluded, the "focus in a stream of commerce or stream of commerce plus analysis is not the discrete individual sale, but, rather, the development of a market for the products in a forum." *Id.*

Again, similar examples abound. *See, e.g.*, *Align Corp. Ltd. v. Allister Mark Boustred*, 421 P.3d 163, 172-73 (Co. 2017), *cert. denied*, 138 S. Ct. 2623 (2018); *Russell v. SNFA*, 987 N.E.2d 778, 794-95 (Ill. 2013); *Sproul v. Rob & Charlies, Inc.*, 304 P.3d 18, 28-29 (N.M. Ct. App. 2012); *Michelin N. Am., Inc. v. De Santiago*, 584 S.W.3d 114, 133-35 (Tex. App. 2018); *State*

v. LG Elecs., Inc., 375 P.3d 1035, 1040, 1042 (Wash. 2016).

II. The Stream-Of-Commerce Rule Is Correct.

1. Given that this Court has repeatedly failed to achieve a controlling majority on issues related to the stream-of-commerce test, it makes sense to begin with the limited version of the rule *amicus* advocates here. Most importantly, we do not argue that personal jurisdiction simply follows any item the defendant places into the stream of commerce, or even that it follows any item the defendant places into the stream of commerce when the defendant could reasonably foresee that the item would land in the forum State. We argue, instead, that three conditions must together suffice for personal jurisdiction. Those conditions are that:

(1) the defendant placed an item into the stream of commerce intentionally;
(2) that item caused the plaintiff's injury in the forum State; *and*
(3) the defendant has, through its actions, indicated an expectation that the product at issue be purchased or used by potential plaintiffs in the forum State.

The easiest case in which this test is satisfied is one where the defendant directly markets or sells the product at issue in the forum State. And that, of course, is this case.

This rule follows directly from *World-Wide Volkswagen*. There, this Court held that a car *dealer* and *regional distributor*, both of whom made sales exclusively in the northeast, were not subject to personal jurisdiction in Oklahoma based on "the fortuitous

circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." 444 U.S. at 295. This Court held that the "foreseeability" of the vehicle ending up in Oklahoma was not enough, because the dealer had not "purposefully avail[ed]" itself of the Oklahoma market. *Id.* at 297 (citation omitted). But, as this Court made perfectly clear, the same could not be said for Audi or Volkswagen—the manufacturer and national importer—which, unlike the northeastern entities, *were* intentionally serving the Oklahoma market. *Id.* at 297-98. As this Court put it,

> 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*. The 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 purchased by consumers in the forum State*.

Id. (emphasis added). This statement of the rule—fully embodied by Audi's decision not even to *contest* personal jurisdiction in *World-Wide Volkswagen*, both decides this case and demands application of the stream-of-commerce rule as formulated above. *See id.* at 288 & n.3 (explaining that the manufacturer Audi and importer Volkswagen had abandoned any

personal jurisdiction challenges); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 907 (2011) (Ginsburg, J., dissenting) (noting that "the Court's opinion" in *World-Wide Volkswagen* "indicates that an objection to jurisdiction by the manufacturer or national distributor would have been unavailing").

It is also fully consistent with both the plurality and the dissent in *Nicastro*. None of the opinions in *Nicastro* questioned whether there was an adequate relationship between the defendant, the New Jersey forum, and the claims at issue, because the plaintiff was suing regarding an injury he sustained from one of the defendant's machines in New Jersey. Instead, the dispute was over whether the presence of that machine in New Jersey *alone* sufficed to establish that the defendant had purposefully availed itself of the New Jersey market. The plurality (and Justice Breyer's concurrence) thought that this was insufficient, at least in the absence of other evidence that the defendant had purposefully availed itself of the New Jersey market. And, in that regard, the plurality stressed that the defendant "had no office in New Jersey." 564 U.S.at 886 (plurality opinion). It is inconceivable that *Nicastro* would have reached the same conclusion if—as here—the defendant in *Nicastro* in fact had numerous branded dealerships in New Jersey from which J. McIntyre machines were sold for use in New Jersey. Put another way, the plurality denied that the presence of the accident item in New Jersey alone proved the manufacturer's expectation that its products would be sold or used there. One need not quarrel with that view to correctly decide *this* case under the stream-of-commerce approach.

The Solicitor General suggests that this case does not implicate the stream-of-commerce rule because that rule informs *only* the question whether the defendant has "purposefully availed" itself of the forum State, and *not* the question whether the suit is "related to" the defendant's forum contacts. *See* U.S. Br. 28. But that is not correct. The stream-of-commerce test as set forth above satisfies the "relatedness" requirement because it requires that the item at issue have caused the plaintiff's injury in the forum State. It is therefore plain that the element that this Court recently said was "needed" in *Bristol-Myers Squibb Co. v. Superior Court of California* is present—namely, "a connection between the forum and the specific claims at issue." 137 S. Ct. 1773, 1781 (2017).

Indeed, the confusion in this case seems to result from wholly ignoring that personal jurisdiction is grounded in a *three-way* "relationship among the defendant, the forum, and the litigation," *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (citation omitted), rather than *just* the two-way relationship between the defendant's forum contacts and the plaintiff's claims. Where the stream-of-commerce conditions described above are met, all three relationships are tightly bound together by the same thread—namely, the defendant's own product. (1) The relationship between the forum and the defendant is tightly bound because the defendant intentionally markets the product in the forum; (2) the relationship between the forum and the litigation is as tight as possible, because it concerns a claim arising *within the forum* from an item of that same product; and (3) the relationship between the litigation and the defendant concerns its design of that same product.

Thus, where the defendant puts an item into the stream of commerce with the expectation that it will be sold or used in a forum and it there causes a plaintiff's injury, that forum is an appropriate venue for that plaintiff to sue that defendant on that injury—precisely as *World-Wide Volkswagen* says.

Notably, neither the Solicitor General nor petitioner cites a single case in which the three criteria above were satisfied and a court found that personal jurisdiction was lacking. The closest either can come is this Court's 1907 decision in *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U.S. 8 (1907)—decided under the pre-*International Shoe* regime for personal jurisdiction. That decision is wholly inapplicable because it does not involve an item in commerce that ever reached the forum State. Instead, it involved a *contract* that was avowedly entered into in Indiana with an Indiana insurance company. That decision thus has little to do with the issues presented here.

Moreover, the government's description of *Old Wayne* is misleading, because the basis on which the Pennsylvania courts asserted personal jurisdiction in the case was not "that the insurer also sold *other* insurance policies in Pennsylvania." *Contra* U.S. Br. 10. Instead, the argument in *Old Wayne* was that Old Wayne had consented to suits in Pennsylvania—on *any* business done anywhere in the country—through service of process on the Pennsylvania insurance commissioner alone, because it was present in Pennsylvania and doing insurance business without registering to do so. Applying the physical-presence rule of *Pennoyer v. Neff*, 95 U.S. 714 (1878), this Court agreed that Old Wayne had consented to such impersonal service with respect to any business done in

Pennsylvania, but that this "assent" did not extend to "business transacted in another State." 204 U.S. at 23. In fact, this appears to have been a construction of Pennsylvania's statute, not the Constitution. *See id.*

This application of *Pennoyer* is plainly unhelpful under the *International Shoe* regime, but if this Court is inclined to follow it, then under that regime, corporations are forbidden from operating outside their home States *at all* except on such terms as the States of operation may require. *See, e.g.*, *Old Wayne*, 204 U.S. at 21-23; *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). Accordingly, if Minnesota and Montana want to condition Ford's operations in their respective States on assenting to suits respecting *any* car crashes within their borders, they are perfectly free to do so. *International Shoe* signaled a different approach less tied to physical presence. But if defendants like Ford want the benefits of that regime relative to *Pennoyer*'s, they must take the bitter with the sweet.

2. Under the correct understanding of the stream-of-commerce rule, this case is a relatively easy one because Ford sells and markets Ford Explorers in Montana and Crown Victorias in Minnesota, and thus obviously placed the Ford Explorer and Crown Victoria at issue here into the stream of commerce with the intent that those products be purchased and operated in those States. When a Ford Explorer caused an injury in Montana and a Crown Victoria caused an injury in Minnesota, that sufficed to make those States appropriate forums for *those particular* injuries because there was both an intent by the defendant to avail itself of the forum with respect to the product at issue, and an adequate "connection between the forum and the specific claims at issue." *Bristol Myers*, 137 S. Ct.

at 1781. But while this is a relatively easy case, the Court should—for the sake of clarity—recognize that a much broader array of conduct suffices to demonstrate a defendant's expectation that a product be sold or used within a forum in which it has caused the injury in suit.

Most important, the Court must recognize the basic proposition that an evident intent to target sales in every state market will ordinarily suffice to establish an expectation that the product be used or sold within any given State. Such a rule will often be essential to protect intermediate businesses like home builders, because their suppliers frequently market their products equally throughout the United States.

The simplest rule to follow in this regard was articulated by Justice Ginsburg in *Nicastro*, but narrower rules would be vastly superior to the one petitioner advocates here. As Justice Ginsburg put it—citing a fulsome appendix of similar cases—"a manufacturer seeking to exploit a multistate or global market" should be subject to personal jurisdiction in any "place where the product was sold and caused injury." 564 U.S. at 910 (Ginsburg, J., dissenting). This rule reflects nothing more than the logically irresistible conclusion that "actions targeting a national market" necessarily include actions targeting the included submarkets of the individual States. *Id.* at 905. And that rule would allow businesses like home builders to employ with confidence the products that are regularly sold by suppliers on a nationwide basis, without having to determine whether a supplier's marketing of drywall in America—including drywall the supplier happily sells at local Home Depots—also involves

some special sale or marketing of *this piece* of drywall in *this particular* State.

The Court need not go nearly that far, however, to arrive at a rule that can provide a similar confidence to intermediate businesses. It could, instead, adopt the limitation suggested by Justice Breyer and Justice Alito's concurrence in the *Nicastro* judgment. They reasoned that a line could be drawn between goods that arrived in a forum based on "'the regular and anticipated flow'" of commerce into the State, as opposed to sales that represent only "an 'eddy'" or "isolated occurrence." *Id.* (citation and brackets omitted). Such a rule is decidedly good enough. Home builders do not need to know that out-of-state or international manufacturers will stand behind their products in States where it is at all atypical or random for those products to land. But they do need to know that, when a product is *regularly* used to build homes in a given State, or sold for local use by local dealers, and is marketed as appropriate for the U.S. market in general, they can use any item of that product in that State with the confidence that the manufacturer will answer there for its safety and design, without regard to where that particular item was first delivered.

3. In this way, the stream-of-commerce rule is vastly superior to petitioner's proposed rule in promoting business certainty and keeping the doctrine focused on the facts that really matter.

It is easy for an intermediate business like a home builder to know with certainty whether a given product reaches a forum within the regular flow of commerce. Bosch or Miele may be foreign appliance manufacturers, but it is not hard to check that their products are routinely available from in-state dealers or

retail stores. Conversely, it is *very* hard to tell whether a particular item of an appliance product was first sold by those firms in a given State, and even harder to keep one's own inventory (or, worse, their subcontractors' inventories) sorted by the State of initial sale. In the *very same house* the same product may be used by different subcontractors—consider the number of paint cans it takes to paint a house. Under Ford's rule, if the paint proves defective and the homeowner sues, the builder can join the paint's manufacturer, but only with respect to those cans of *the manufacturer's own identical paint* that the builder can prove were initially sold by the manufacturer in the forum State.

It is fair to ask why on earth that initial sale matters. And, indeed, it does not. There is no issue of sovereignty or federalism when a party sues in the forum where a defendant's product caused them injury. Instead, the issue is purely one of fairness to the defendant, and its purposeful availment of the forum for its *products*. That requirement is satisfied by the fact that other items of the same or similar products routinely enter the forum, in the regular flow of commerce, on account of the defendant's own business decisions. Where that is so, it makes no difference whatsoever where the particular item in suit was first sold or came ashore. Ford's rule thus elevates an unpredictable and sometimes unknowable happenstance into a determinative consideration, in pursuit of no meaningful legal or policy consequence.

Indeed, it is unclear how intermediate businesses will navigate the unanticipated consequences of petitioner's proposed rule. At a minimum, their work will be saddled with huge record-keeping demands, as they attempt to ensure that each *item* of every product

employed can be traced to some in-forum sale or backer. More likely, such businesses will simply find themselves surprised by the endlessly creative ways that out-of-state (and much worse, offshore) firms find to claim that their own forum *contacts* are not the "cause" of the injury for which the intermediate business is being held liable, even if their *products* surely were.

Instead of this unpredictable innovation, the Court should stick with what has been the rule for decades. If a manufacturer puts out a product expecting it to be used or employed in a forum as part of the regular flow of commerce, and it there causes injury, the manufacturer must answer there for the injury its product caused.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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