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.

FORD MOTOR COMPANY, PETITIONER,

v.

ADAM BANDEMER

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

BRIEF OF MAIN STREET ALLIANCE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the due-process standards for establishing specific personal jurisdiction should incorporate a new causal test under which an out-of-state manufacturer cannot be held to answer in the forum state for injuries caused in the forum state, by a product that it regularly sells and markets in that forum state, unless the first sale of the particular individual item also took place in that state.

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INTRODUCTION AND INTEREST OF AMICUS[1]

Main Street Alliance files this brief on behalf of America's small-business community to inform the Court of the unfair and potentially catastrophic economic effects that the rule proposed by Petitioner would have on small businesses. If the Court adopts Petitioner's jurisdictional rule, small local businesses will often get left holding the bag for large out-of-state manufacturers. Even where the manufacturer bears *all* the responsibility for an allegedly defective product that it routinely markets in the state where the product has caused injury, the manufacturer will nonetheless be able to avoid suit under Petitioner's rule in many cases. The inevitable consequence will be to shift risk onto the innocent local seller.

In this scenario, a local business would lose the statutory "innocent seller" immunity it currently enjoys. The manufacturer's unavailability to suit in the forum would trigger a common statutory exception to immunity. So the retailer would bear all of the litigation burden and could be liable for all of the damages. The retailer's only recourse could be to sue the manufacturer for indemnification or contribution, at the retailer's own expense, in the manufacturer's home state or country. Petitioner's rule thus dramatically shifts the burdens and risks—from the party most responsible, and with the most resources—to the party least responsible, with the least resources. That is manifestly unfair, and makes little sense.

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[1] All parties have consented to this filing. Neither party's counsel authored this brief and no one other than *amici*, their members, or their counsel contributed money to fund its preparation or submission.

Main Street Alliance is a national network of state-based small-business coalitions that provides its members with a platform to express views on issues affecting their businesses and local economies. Its members include tens of thousands of small businesses across the country, including both retailers and manufacturers. Main Street Alliance believes that independent businesses and local economies are the backbone of a thriving community, and its work aims to level the playing field for small businesses by allowing them to express with one voice their views on the most pressing policy issues of the day. It is filing this brief because the jurisdictional rule proposed by the Petitioner would affirmatively tilt the playing field by giving large out-of-state corporations an unfair advantage over small, local businesses.

SUMMARY OF ARGUMENT

From reading the U.S. Chamber of Commerce's brief, one might come away with the impression that the resolution of these cases has only one implication for the American business community. According to the Chamber, it is important that the Court adopt Petitioner's new causal test for personal jurisdiction to avoid imposing "unwarranted burdens on businesses." U.S. Chamber Br. 5. The Chamber's brief does not specify what these burdens are for the giant corporations that the Chamber represents—corporations with armies of lawyers and the ability to easily defend litigation anywhere in the country.

But there is another side to the story. And, on this side, the potential burdens come into much sharper focus: small local businesses will end up holding the bag if large out-of-state manufacturers are able to assert a new constitutional due-process right to avoid suit even

in states where they extensively sell their products and where those products cause serious injury to the states' residents.

This case thus presents an issue of vital importance to hundreds of thousands of small businesses in the United States that form the foundation of the nation's economy. Small businesses employ nearly half the nation's private-sector workforce and make outsized contributions to local economies. Like larger firms, small businesses need stability and predictability in order to thrive. But, unlike large businesses, local businesses—particularly small retailers—lack limitless litigation resources, if they have any at all. And unlike America's largest corporations, which often market their products in every state in the nation, small businesses are often rooted in their communities, where they interact directly with their customers.

Forcing a local business to bear the entire brunt of a product-liability suit that should really have been defended by the manufacturer that designed, made, and marketed the product—and where the manufacturer may have extensively marketed and sold that product in the forum state—is unfair. And, in some cases, it can be ruinous for a small business. The resolution of the question presented is thus of great importance to retailers and other small businesses, who are uniquely vulnerable under Petitioner's proposed rule and who have a strong interest in predictable jurisdictional rules of uniform application.

Under existing law, retailers and other small businesses that sell products in their communities may do so with two important legal assurances. *First*, small businesses know that, under the legal regime that has prevailed under this Court's cases for the last

four decades—from *World-Wide Volkswagen Corp. Woodson*, 444 U.S. 286, 297 (1980), to *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 927 (2011)—a manufacturer that routinely markets its products in the forum state will be subject to personal jurisdiction there. So a consumer who goes into his local hardware store and is injured by a nail gun because of a product defect will sue the manufacturer, not the hardware store. *Second*, the hardware store in most states can rely on immunity from strict product liability under state "innocent seller" or "seller's exception" statutes.

As this brief explains, both of these important assurances will evaporate if this Court adopts Petitioner's first-sale rule for specific personal jurisdiction. Personal jurisdiction would turn in many cases on the site of the original sale by the manufacturer rather than the site of injury. And, because the immunity statutes do not apply where the manufacturer cannot be sued, sellers would lose their immunity and be subject to strict liability. These consequences will be particularly harmful to America's small businesses.

ARGUMENT

Jane runs a local second-hand store in the small town where she has a lived her whole life. Sam comes into Jane's store and buys a table saw. Because of a notorious design defect, the table saw malfunctions. Sam's hand is badly injured. This defect was the fault of the manufacturer, Globocorp, which sells and markets this same table saw throughout the state. Globocorp has sold thousands of this exact same saw in the state, cultivates the market for new and used table saws through advertising and authorized dealers in

the state, and has done a steady business in replacement parts and repairs in the state.

Sam decides to sue Globocorp. But there is a catch: Because it is impossible to trace *this particular* second-hand table saw to the site of its original sale (how would one even go about trying?), Sam's lawyer tells him that, under this Court's decision for Ford in *Ford v. Montana Eighth Judicial District Court*, he has reluctantly concluded that Sam cannot sue Globocorp (unless Sam goes to Globocorp's home state or home country). Globocorp would (correctly) maintain that Sam cannot prove that any specific in-state actions caused his injuries.

So Sam sues Jane's store instead. Jane ends up facing all the liability for something that is really Globocorp's fault. She also bears all the burden and expense of litigating. If a multimillion-dollar judgment is rendered against her, her only option is to hire lawyers to go after Globocorp in a distant location for indemnification or contribution—if those options are even available to her under her state law.

Jane can't afford any of this. She is also under great strain as a result of the economic fallout following the coronavirus pandemic. Jane lays off all her employees and is forced to go out of business.

Unfortunately, this hypothetical sequence is not fanciful. For small businesses nationwide, a version of this scenario—with varying degrees of severity—could be the inevitable consequence of adopting the rule proposed by Petitioner here.

I. PETITIONER'S CAUSATION RULE WOULD SHIFT LITIGATION EXPOSURE AND LIABILITY FROM LARGE MANUFACTURERS THAT ARE RESPONSIBLE FOR PRODUCT DEFECTS TO LOCAL BUSINESSES THAT ARE NOT.

In the typical product-liability case, someone injured by a defective product seeks redress from the manufacturer. It is usually the manufacturer that is most culpable and the most likely source of meaningful compensation. For this reason, if Mary buys a bicycle from her neighborhood bike shop and is badly injured because of a design defect, she would typically sue the bicycle's manufacturer—not the local store that sold it to her.

This is true regardless of whether Mary buys her bicycle new or used. For the past century, ever since courts dispensed with strict privity requirements, it has been the law that a consumer who purchases a resold product is able to seek redress directly from the manufacturer. This universal understanding is most famously embodied in Justice Cardozo's opinion in *MacPherson v. Buick Motor Co.*, which held that Buick owed a duty of care not only to "the immediate purchaser" of a car but also to the next owner, after "a retail dealer" had "resold [it] to the plaintiff." 217 N.Y. 382, 384-85 (1916); *see generally* Alexandra D. Lahav, *The New Privity* (2019), https://bit.ly/2Rhc5Cy (criticizing efforts to reintroduce the long-gone privity requirement through limits on personal jurisdiction).

But liability for injuries caused by defective products (new or used) isn't limited to the manufacturer. It also extends to immediate sellers, "who were not and did not purport to be manufacturers at all." William L. Prosser, *The Assault Upon the Citadel (Strict*

Liability to the Consumer), 69 Yale L. J. 1099, 1101 (1960). The current Restatement on Torts explains that liability for product defects attaches to "*all* commercial sellers and distributors of products, including nonmanufacturing sellers and distributors such as wholesalers and retailers," and that such liability exists "even when such nonmanufacturing sellers or distributors do not themselves render the products defective and regardless of whether they are in a position to prevent defects from occurring." *Restatement (Third) of Torts: Prods. Liab.* §1 cmt. e (1998).

One of the most famous and influential cases illustrating this principle, it so happens, involved a suit against Ford Motor Company and a local independent Ford dealership alleging product defects. In an opinion by Justice Traynor, the California Supreme Court held that both Ford and the dealership were subject to suit for strict liability. *See Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171 (Cal. 1964). The prevailing rule since *Vandermark* is that "a retailer is subject to strict tort liability for a defective product notwithstanding the fact that the retailer was not responsible for creating the defect in the product or that the retailer's reasonable inspection of the product failed to disclose the defect." Frank Cavico, *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 Nova L. Rev. 213, 218 (1987). Moreover, "the retailer's liability is coextensive with that of the manufacturer of the product. Retailers will also be strictly liable to one who did not purchase the defective product, such as an innocent bystander." *Id.* at 218-19. In other words, when a consumer is injured, strict liability extends to everyone in the distribution chain, from the manufacturer to the seller. If the consumer

wins a judgment, liability is to be apportioned according to those companies' relative fault. *See Restatement (Third) of Torts: Prods. Liab.* § 16 cmt. c (1998).

Recognizing the potentially harsh effect of imposing strict liability for injuries caused by defective products on sellers who didn't themselves do anything to render the products defective, many states have enacted statutes immunizing non-manufacturing sellers from liability—statutes known as "innocent seller" or "seller's exception" laws. Robert A. Sachs, *Product Liability Reform and Seller Liability*, 55 Baylor L. Rev. 1031, 1039 & n. 23 (2003); *see*, *e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 82.003(a) ("A seller that did not manufacture a product is not liable for harm caused to the claimant by that product.").[2]

But, crucially, "[t]he majority of statutory provisions that protect innocent sellers from strict liability contain an exception—they *can* be held strictly liable when the manufacturer cannot be found, served with process, or otherwise held liable." *Hinton v. Sportsman's Guide, Inc.*, 285 So.3d 142, 148 n.8 (Miss. 2019) (emphasis in original). This exception is triggered when the manufacturer can successfully assert a

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[2] Ala. Code §§ 6-5-501, 6-5-521; Colo. Rev. Stat. § 13-21-402(2); 18 Del. Code Ann. § 7001(b); Ga. Code Ann. § 51-1-11.1(b); Idaho Code § 6-1407(1); Ill. Ann. Stat., Ch. 735 § 5/2-621(a)-(c); Ind. Code. Ann. § 34-20-2-3; Iowa Code § 613.18; Kan. Stat. Ann. § 60-3306; Ky. Rev. Stat. Ann. § 411.340; La. Rev. Stat. Ann. § 9:2800.53; Md. Code Ann. § 5-311; Minn. Stat. Ann. § 544.41; Mo. Rev. Stat. § 537.762; Miss. Code. Ann. § 11-1-63(h); Neb. Rev. Stat. § 25-21, 181; N.C. Gen. Stat. § 99B-2; N.D. Cent. Code § 28-01.3-04; Ohio Rev. Code Ann. § 2307.78; Okla. Stat. tit. 76, § 57.2(A); S.D. Comp. L. § 20-9-9; Tenn. Code Ann. § 29-28-106; Tex. Civ. Prac. & Rem. Code Ann. § 82.003(a); Wash. Rev. Code Ann. § 7.72.040; Wis. Stat. Ann. § 895.047(2).

personal-jurisdiction defense. *See* Tex. Civ. Prac. & Rem. Code Ann. § 82.003(a)(7)(B) (exception to immunity where "the manufacturer of the product ... is not subject to the jurisdiction of the court.").[3] In this way, the innocent-seller statutes seek to "ensure that the injured party has a remedy," while in the great majority of cases "passing along the costs and burden of litigation to the manufacturer." Rachel Nevarez, *Practice Points: How to Take Advantage of "Seller's Exception" Statutes*, (2016), https://bit.ly/3bUxNnD. When the manufacturer can't be haled into court in the state where injury occurs (as would occur more often under Petitioner's rule), the immunity disappears and the injured person gets a remedy against the seller.

The loss of this immunity has significant consequences. "[I]n a case in which the manufacturer cannot be subject to personal jurisdiction . . . the distributor is left holding the bag and must take the entire burden of defending the claim—and of potential liability—onto its own shoulders." Cody Jacobs, *A Fork in the Stream: The Unjustified Failure of the Concurrence in* J. Mcintyre Machinery Ltd. v. Nicastro *to Clarify the Stream of Commerce Doctrine*, 12 DePaul Bus. & Com. L.J. 171, 201 (2014).

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[3] *See, e.g.*, Ala. Code § 6-5-521; Colo. Rev. Stat. § 13-21-402(2); 18 Del. Code Ann. § 7001(c); Idaho Code § 6-1407(4)(a); 735 Ill. Comp. Stat. 5/2- 621(a); Ind. Code. Ann. § 34-20-2-4; Iowa Code § 613.18(1)(b); Kan. Stat. Ann. § 60-3306(a); Ky. Rev. Stat. Ann. § 411.340; Md. Code Cts. and Jud. Proc. § 5-405(c)(1); Minn. Stat. Ann. § 544.41-1(3); Mo. Rev. Stat. § 537.762(2); N.C. Gen. Stat. § 99B-2(a); Ohio Rev. Code Ann. § 2307.78(B)(1); Okla. Stat. tit. 76, § 57.2(E)(5)-(6); Ohio Rev. Code Ann. § 2307.78; Tenn. Code Ann. § 29-28-106(a)(2); Tex. Civ. Prac. & Rem. Code Ann. § 82.003(a)(7)(B); Wash. Rev. Code Ann. § 7.72.040; Wis. Stat. Ann. § 895.047(2).

One consequence is that merchants "would either have to purchase more liability insurance—and pass these costs onto consumers and/or demand lower prices from manufacturers—or seek broad indemnification clauses in purchase contracts with foreign manufacturers." *Id.* But, when a retailer or dealer *resells* a product, no indemnification or negotiation with the manufacturer is available, even in theory—the retailer is simply on the hook. So an inevitable result of Petitioner's rule would be that local merchants "may end up holding the bag when they did not, and could not, anticipate doing so." *Id.* That does not serve the Due Process Clause's interests in predictability, fair warning, or fairness.

II. PETITIONER'S FIRST-SALE RULE WOULD BE PARTICULARLY HARMFUL FOR LOCAL RETAILERS AND OTHER SMALL BUSINESSES.

A. Small businesses form the backbone of the American economy: They make up 99% of businesses in the United States, employ nearly half of the nation's private-sector workforce, and account for approximately 45% of the nation's gross domestic product. *See* Small Business Majority, *Small Businesses Hire Diverse Entry-Level Workforce* 3 (2015); Kathryn Kobe, Office of Advocacy, U.S. Small Bus. Admin., *Small Business GDP: Update 2002-2010* 24-25 (2012). Small businesses also drive economic recoveries, and are responsible for the majority of new jobs created. Jeff Stibel, *Why Small Businesses Aren't Hiring…And How to Change That*, Harv. Bus. Rev. (Dec. 27, 2013).

Small, independent businesses also create investment in their local communities. They are more likely, for example, to buy goods and services from local sources, hire local employees, and pay taxes to local

and municipal governments. This creates a "virtuous cycle of local spending" that results in more tax revenue, more jobs for residents, and more investments in infrastructure and education. American Booksellers Association & Civic Economics, *Indie Impact Study Series: Las Vegas, New Mexico, Las Vegas First Independent Business Alliance* (Summer 2012), https://bit.ly/2UGOayq. Communities with thriving small businesses report stronger local economies characterized by higher income growth, lower levels of poverty, and more employee retention during economic downturns. See Giuseppe Moscarini & Fabien Postel-Vinay, *The Contribution of Large and Small Employers to Job Creation in Times of High and Low Employment*, 102 Am. Econ. Rev. 2509 (Oct. 2012).

The rigid causation rule for specific personal jurisdiction proposed by Petitioner in these cases would, in many cases, deprive local businesses of an important statutory immunity under existing law. With manufacturers no longer subject to the local court's jurisdiction, businesses that sell products second-hand, or that obtain their products from distributors, wholesalers, or resellers, would become the primary targets of suits by persons injured by defective products. Local drug stores, hardware stores, and equipment supply retailers, for example, would all be vulnerable to this new role as the primary source of an injured individual's tort compensation. And it would be just as expensive, inconvenient, impractical—and unlikely—for the local business to pursue contribution or indemnity from the manufacturer in a jurisdiction that the new rule deems constitutionally acceptable as it would be for the individual to seek compensation from the manufacturer in the first instance.

The draconian effect of Petitioner's rule is illustrated by the following scenario. A family purchases a used water heater from a small local plumbing business that itself purchased the appliance from another local seller, which in turn obtained the water heater from a national distributor. The water heater has a latent defect and explodes, causing severe injuries. The water heater was manufactured by a company headquartered in another state that aggressively markets its products throughout the country and maintains manufacturing plants in several states, including the state where the plumbing company and the family reside. But because the family cannot show that particular water heater that they purchased was manufactured in their home state, they cannot satisfy Petitioner's proximate-cause test. Lacking the resources to litigate in the manufacturer's home state, the family sues the local plumbing company, demanding full recovery under the strict liability rules described above. Like the family, the local plumbing company lacks the resources to pursue a claim for indemnity in a distant forum that would satisfy Petitioner's jurisdictional test. The plumbing company's business fails, and the family goes uncompensated. Nobody wins. Except the manufacturer, who faces no consequences.

By dramatically curtailing the ability of people injured by defective products to sue the entity that the law decrees should bear primary responsibility (the manufacturer) in the most convenient and appropriate forum (the state where the individual encountered the defective product and sustained injury), the jurisdictional rule proposed by Petitioner promotes the interests of the world's largest multinational corporations at the expense of Main Street. It would also undermine

the policy of virtually all of the states by effectively encouraging tort victims to seek compensation from their local suppliers rather than from the manufacturers that placed the dangerous products on the market.

There is little doubt that local economies would suffer if this Court adopted Petitioner's rule—and small businesses would also be uniquely vulnerable to harmful economic effects. Small businesses have tighter profit margins, are less geographically diversified, and have less insurance than larger enterprises. *See, e.g.*, Karen M. Gebbia-Pinetti, *Small Business Reorganization and the Sabre Professionals*, 7 Fordham J. Corp. & Fin. L. 253, 268 (2002) (describing small business vulnerability in the context of bankruptcy). As a result, they cannot hedge against risk in the same manner as larger corporations can. See Adriano A. Rampini & S. Viswanathan, *Collateral, Risk Management, and the Distribution of Debt Capacity*, 65(6) J. of Fin. 2293, 2312 (2010) (observing that small businesses are less likely to invest in risk management that diverts resources from production). Additionally, small businesses by definition have fewer resources than large businesses do. As a result, they are often unable to dip into capital reserves to address the threat of litigation and liability exposure for conduct for which out-of-state manufacturers are actually responsible. *See* Stibel, *Why Small Businesses Aren't Hiring*.

B. In analyzing the constitutional propriety of a state court's exercise of personal jurisdiction, this Court has considered the way the results would affect small and local businesses. It should do so here too.

In *J. McIntyre Machinery, Ltd. v. Nicastro*, for example, the plurality rejected foreseeability as the

controlling jurisdictional criterion because, on that theory, "the owner of a small Florida farm" who sold crops to a distributor that sold the crops to grocers across the country "could be sued in Alaska or any number of other State's courts without ever leaving town." 131 S. Ct. 2780, 2790 (2011). The plurality further recognized that significant expenses are incurred just on the preliminary issue of jurisdiction" and noted that "[j]urisdictional rules should avoid these costs whenever possible." *Id.*; *see also id.* at 131 S. Ct. at 2793 (Breyer, J., concurring) (observing that "[w]hat might appear fair in the case of a large manufacturer" may not be so for a much smaller company, like an "Appalachian potter"). Similarly, in *World-Wide Volkswagen Corp. v. Woodson*, the Court rejected a mere foreseeability test because it would yield results oppressive to local businesses. 444 U.S. 286, 296 (1980). The Court noted that if foreseeability alone were the criterion, "a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, or a Florida soft-drink concessionaire could be summoned to Alaska for injuries happening there." *Id.*

The jurisdictional rule advocated by Petitioner in these cases would affect local businesses in a different but equally profound way. In many cases, it would strip these small businesses of the immunity from liability that many states confer on non-manufacturing sellers, would render them the primary targets in suits alleging injuries caused by defective products, and would force them to seek reimbursement from the

truly culpable entities in distant jurisdictions. And it would do so for no good reason.

More than half a century ago, in *Gray v. Am. Radiator & Standard Sanitary Corp.*—a case repeatedly cited favorably by this Court[4]—the court considered it "not unjust" to require a manufacturer that sells its products for ultimate use in another state to require the manufacturer to answer to suit in that state for injuries caused there. 176 N.E.2d 761, 766 (Ill. 1961). Complaints about inconvenience and prejudice were no longer persuasive, the court reasoned, because "today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other states." *Id.* Those complaints are even more unavailing today, and do not justify shifting potentially crushing liability from the largest national manufacturers to the small businesses that form the backbone of the American economy.

CONCLUSION

This Court should affirm the decisions below.

Respectfully submitted,

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[4] *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 298; *Calder v. Jones*, 465 U.S. 783, 789 (1984)