No. 19-368 & 19-369

IN THE
Supreme Court of the United States

FORD MOTOR COMPANY, *Petitioner*,
v.
MONTANA EIGHTH JUDICIAL DIST. COURT, *et al.*,
Respondents.

FORD MOTOR COMPANY, *Petitioner*,
v.
ADAM BANDEMER, *Respondent*.

On Writs of Certiorari to the Supreme Court of Minnesota and the Supreme Court of Montana

BRIEF AMICUS CURIAE OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers.

Those concerns, as reflected in the cases at bar, are rooted in the Constitution's recognition of rights reserved to the states and to the people. U.S. Const., amend. X.

INTRODUCTION AND SUMMARY OF ARGUMENT

While protecting the due process rights of defendants, this Court should be careful not to strip citizens of individual states of the right to sue in their own courts for injuries incurred within their state of residence attributable to defendants who have a significant and related commercial presence within those states.

Defendants seek to relegate potential plaintiffs to a game of jurisdictional hopscotch in which injured parties are severely disadvantaged in bringing suit in comparison to major corporations with a national

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

presence who are well able to defend where their products cause injury and they have well established commercial affiliations.

The principles established 40 years ago in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), are as valid today as then and should control the outcome.

ARGUMENT

I. *World-Wide Volkswagen*: Application of the non-affiliation principle.

A state has specific jurisdiction over a nonresident defendant if the cause of action arises out of or relates to the defendant's contacts with the State. *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408, 414 (1984). Additionally, the nonresident defendant must have purposefully availed itself of the privilege of conducting business in the state, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), such that it "should reasonably anticipate being haled into court" there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297. Petitioner Ford Motor Company ("Ford") easily satisfies the "purposeful availment" and "reasonable anticipation" criteria in these cases. By manufacturing millions of vehicles for the United States market, thousands of which were regularly marketed through Ford dealers in Minnesota and Montana, Ford "purposefully avail[ed] itself of the privilege of conducting activities within [those states], thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Thus, "it is presumptively not

unreasonable to require [Ford] to submit to the burdens of litigation in [Minnesota and Montana] as well." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

If Ford's only contacts with Minnesota and Montana were the fortuitous act of respondents driving the Ford vehicles they purchased into those states, Ford would not have been subject to jurisdiction in Minnesota and Montana simply because the accidents occurred there. In that circumstance Ford would not have purposefully availed itself of the Minnesota and Montana markets and could not reasonably have anticipated being haled into court in those states. By purposefully avoiding all commercial connection with Minnesota and Montana, Ford could have structured its dealings to avoid liability in the courts of those states. By withdrawing from certain states or avoiding entering them, a business can shield itself from litigation in the courts of those states. Businesses are entitled to make such nonaffiliation decisions. "Nonaffiliation is the notion that a business … should have a clear way of avoiding a particular state's laws." Flavio Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 Cal. L. Rev. 1545, 1562 (1994). Because a foreign corporation has not been chartered by the forum state, it should not be subject to that state's laws except by its own voluntary act. *See* Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. Colo. L. Rev. 5, 19-21 (1989) (discussing the "right to remain unconnected with, and to be treated as unconnected to, a sovereign"). The Due Process Clause, which ensures the right of nonaffiliation, "gives a degree of predictability to the legal system

that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

In *World-Wide Volkswagen*, an Audi distributor and dealer whose market activities were limited to the states of New York, Connecticut, and New Jersey were held to lack sufficient contacts with Oklahoma where one of their vehicles was involved in an accident while being driven cross-country by a purchaser. Because the dealer and distributor lacked all commercial affiliation with Oklahoma, a finding of jurisdiction would logically have subjected all sellers of products to personal jurisdiction in any state to which a consumer might unpredictably convey one of their products that caused injury therein. "[A]menability to suit would travel with the chattel." 444 U.S. at 296. Ford deduces from *World-Wide Volkswagen* that respondents' purchase of used Ford vehicles in Minnesota and Montana that were originally sold elsewhere is a "fortuitous circumstance" not attributable to Ford's affiliation with those states. 444 U.S. at 295.

Unlike the dealer and distributor in *World-Wide Volkswagen*, however, who had no business affiliation whatsoever with Oklahoma, Ford does "indirectly, through others, serve or seek to serve the [Minnesota and Montana] market[s]." *Id.* Thus, respondents do not "seek to base jurisdiction on one, isolated occurrence." *Id.* Minnesota and Montana may not exercise jurisdiction over Ford simply because it was theoretically foreseeable that respondents might one

day purchase used Ford vehicles in those states that were originally sold elsewhere.. "[T]he forseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State." 444 U.S. at 297. But that act in the context of Ford's substantial availment of the Minnesota and Montana markets does suffice to establish jurisdiction. The forseeability critical to a due-process analysis "is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* Such "conduct and connection" exist here.

The mere fact that the Ford vehicles purchased by respondents were brought to Minnesota and Montana by third-parties is not controlling. In *World-Wide Volkswagen*, the Court indicated, though in dicta, that a manufacturer that deliberately markets its products, directly or indirectly, in a state is liable for the harm caused by such products *in that state*:

> Hence 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.

444 U.S. at 297. The Court contrasted that scenario with that of a roadside stand in Florida that sells a

bottled soft drink to a tourist who suffers harm when he opens the bottle back home in Alaska. 444 U.S. at 296. In the latter case it would be unreasonable to subject the soft-drink seller to suit in Alaska because, like the dealer and distributor in *World-Wide Volkswagen*, it had otherwise no connection whatsoever with the place of injury. A manufacturer, however, suffers no detriment when haled into court to answer for a defective product that is identical to those it regularly markets in the forum state.

The implication of *World-Wide Volkswagen* is that if the New York dealer and distributor had been actively marketing their products to Oklahoma residents, the mere fortuity that the injury-causing vehicle was purchased in New York would not have defeated jurisdiction. But Ford in this case seeks to enjoy the benefits of the sale of its vehicles in Minnesota and Montana while at the same time shedding, in part, the concomitant obligations that come with doing business in those states. Although it is true that "the mere 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State,'" *World-Wide Volkswagen*, 444 U.S. at 298 (quoting *Hanson*, 357 U.S. at 253), the "unilateral activity" of driving used Ford vehicles into Minnesota and Montana and reselling them there is far outweighed by Ford's substantial availment of the automotive market in those states. Unlike the dealer and distributor in *World-Wide Volkswagen* that had no "'contacts, ties, or relations'" with the forum state, 444 U.S. at 299 (quoting *International Shoe*, 326 U.S. 310, 319 (1945)), Ford is not deprived of fair play and substantial justice by being required to answer in

Minnesota and Montana for accidents that took place in those states involving vehicles comparable to those it regularly markets there.

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla*, 357 U.S. at 253, 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.

World-Wide Volkswagen, 444 U.S. at 297. One commentator states:

> [A]udi and Volkswagen did not sell th[e] automobile in Oklahoma (so there is no substantively relevant or causal contact of either defendant in Oklahoma), yet the Court still indicated that jurisdiction would be warranted based on their continuous efforts to serve the Oklahoma market. ... [Thus,] their "continuous and systematic" forum activity is sufficiently similar to their actions giving rise to the suit to implicate the state's interests in protecting from harms suffered within the state.

Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207, 240-41 (2014).

II. *Uppgren* and *Tilley*: a deeper look at *World-Wide Volkswagen*

Two cases cited in *World-Wide Volkswagen* make the point in greater detail. In *Uppgren v. Executive Aviation Services, Inc.*, 304 F. Supp. 165 (D. Minn. 1969) (cited in *World-Wide Volkswagen*, 444 U.S. at 296), a helicopter originally sold by a Maryland dealer to the United States government crashed in northern Minnesota. The Maryland dealer had no commercial connection with Minnesota. In that case "[t]he presence of the defective product in Minnesota was an isolated instance, even conceding the mobile nature of the helicopter." 304 F. Supp. at 171. The dealer's helicopter business had not "resulted in substantial use and consumption of defendant's products in Minnesota." *Id.* Thus, the dealer had not "benefited in any way from the protection which Minnesota law would afford if [the dealer] had been marketing its products in this State." *Id.* Because of the absence of "affiliating circumstances," *World-Wide Volkswagen*, 444 U.S. at 295, the Maryland helicopter dealer, like the New York dealer and distributor in *World-Wide Volkswagen*, was not subject to jurisdiction in the state of the accident. The lack of amenability to jurisdiction in *Uppgren* arose from "*the absence of any additional facts*." 304 F. Supp. at 170. But when "the alleged defective product is mass-produced and in extensive commercial use in the forum state" and "the foreign corporate defendant derives substantial revenue from goods used or consumed in the state or at least expects or should reasonably expect that his conduct will have

consequences in the state," the presence of these "additional factors" can support jurisdiction. *Id.*

In *Tilley v. Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P.2d 128 (1968) (cited in *World-Wide Volkswagen*, 444 U.S. at 291 n.9), a truck dealer in Colorado sold a truck to a Colorado resident. The dealer, located 150 miles from the Kansas border, did not market to Kansas residents and had no commercial dealings with them. A wheel on the truck allegedly collapsed while it was being driven through Kansas, causing the truck to overturn and injuring the passengers in the truck and in a car that crashed into it from the rear. Did Kansas have personal jurisdiction over the Colorado truck dealer? Foreshadowing the analysis in *World-Wide Volkswagen*, the Kansas Supreme Court answered "no," reasoning that "there must be something more in 'product hazard' cases than a foreseeable injury from the product to fulfill the minimum contact requirement of due process." *Tilley*, 200 Kan. at 648, 438 P.2d at 133. The Kansas Supreme Court then explained that jurisdiction would have been appropriate if the Colorado dealer had been serving the Kansas market:

> If the defendant advertises, solicits or sells its product in the forum state it then has or can anticipate some direct or indirect financial benefit from the sale, trade, use or servicing of its products in the forum state. It is then subject to in personam jurisdiction. *The particular product or service causing the injury need not be sold or performed in the forum state but the*

> *defendant must reasonably have or anticipate financial benefit from the sale, trade, use or servicing of its products in the forum state.*

200 Kan. at 648, 438 P.2d at 133-34 (emphasis added). Thus, as in this case, if a defendant benefits from the market in a state, it cannot complain if held to account for injuries *occurring in that state* caused by products it markets there, even if the particular injury-causing product was sold elsewhere.

III. These cases satisfy the criteria for the assertion of personal jurisdiction set out in *World-Wide Volkswagen*.

The act of "doing business" in the forum state is not sufficient of itself to permit jurisdiction over the out-of-state seller who is not "at home" in the state. Likewise, the decision of a consumer to transport the seller's product into a state to which the seller does not market is not a contact attributable to the seller. This case, however, displays both the "continuous and systematic contacts" that demonstrate purposeful availment and an expectation of being subject to suit, and also an injury in the forum allegedly caused by the product the seller markets there. Although respondents' injuries do not directly arise out of Ford's contacts with Minnesota and Montana, they do "relate to" those contacts in the sense that it is the same type of liability that Ford could routinely expect to answer for in the courts of those states.

Such "hybrid" facts satisfy the *International Shoe* requirement that a defendant have "fair warning" that it would be subject to liability in the forum state for injuries caused by the products it markets there. Professor Mary Twitchell, analyzing hypothetical facts parallel to those in *World-Wide Volkswagen*, stated:

> [I]t is the fact that this accident occurred within the forum, coupled with the similarity between the manufacturer's conduct in the forum and the conduct underlying the plaintiff's cause of action, that makes exercising jurisdiction over this claim particularly reasonable. Having sold and serviced identical cars in the state, the manufacturer will have foreseen such suits and insured against them. ... The fact that the car was not actually sold within the state is, in this context, fortuitous.

Twitchell, *Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 661 (1988). Another scholar states succinctly: "In products liability cases, plaintiffs have sometimes purchased the defective product outside the forum. If the manufacturer sells that same product in the forum, one could argue that a court within the forum should still be able to exercise jurisdiction over the seller." Rose, *Related Contacts*, 82 Cal. L. Rev. at 1575. Therefore, "[t]he sale of a product in the forum is *related to* a claim that an identical product caused harm to a forum resident because of a defect." *Id.* at 1589 (emphasis added). *See also* Stan Mayo, *Specific Jurisdiction: Time for a "Related To" Analysis*, 4 Rev. Litig. 341, 360 (1985)

("Limited only by the fairness of the circumstances, a state court should be able to subject to its jurisdiction any interstate corporation transacting business in that state, if the controversy is related to that business.").

In *Helicopteros*, the Court expressly declined to clarify the "distinction between controversies that 'relate to' a defendant's contacts with a forum and those that 'arise out of' such contacts." 466 U.S. at 415 n.10. The question whether "relate to" has a distinct and broader meaning than "arise out of" is still open. See *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir. 1994) (stating the view that the "relate to" language "portends added flexibility and signals a relaxation of the applicable standard"). One commentator, generalizing from the dicta in *World-Wide Volkswagen*, suggests viewing the phrase "relate to" as a "similarity of contacts test." Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 Indiana L. Rev. 343, 367 (2005). The similarity test would permit contacts not causally related to a plaintiff's claim to be considered in the specific-jurisdiction analysis so long as the injury-causing product is similar to those routinely marketed in the state.

Simard notes the conditions specified by the *World-Wide Volkswagen* Court for this test to be applicable:

> First, the Court does not suggest that isolated contacts in a forum will be sufficient to confer jurisdiction pursuant to a similarity of contacts theory. Rather, the

> defendant regularly availed itself of the privilege of conducting activities in the forum. Second, the Court emphasizes that the injury that is the subject of the plaintiff's suit occurred in the forum, thus recognizing the forum's interest in protecting its citizens. Third, ... the forum contacts are sufficiently similar to the contacts that gave rise to the cause of action that it would be fair to expose the defendant to jurisdiction.

38 Indiana L. Rev. at 368. The lesson (in dicta) of *World-Wide Volkswagen* is that when (1) the litigation conforms to the defendant's settled expectation of jurisdiction arising from its systematic contacts with the forum and (2) the injury occurred in the forum, the "relates-to" test for specific jurisdiction is satisfied.

In *Goodyear Dunlop Tires Operations, SA v. Brown*, 131 S. Ct. 2846 (2011), the Court spoke favorably of the propriety of exercising specific jurisdiction in such a scenario. "When a defendant's act outside the forum causes injury in the forum, ... a plaintiff's residence in the forum may strengthen the case for the exercise of *specific jurisdiction*." 131 S. Ct. at 2857 n.5. Citing long-arm provisions from North Carolina and the District of Columbia, the Court stated: "Many States have enacted long-arm statutes authorizing courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum state." 131 S. Ct. at 2855 & n.3.

In light of the virtual elimination of general jurisdiction as a means to hale an out-of-state defendant into court, the importance of specific jurisdiction has been magnified. "[I]n the wake of *International Shoe*, 'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role.'" *Goodyear*, 131 S. Ct. at 2854 (quoting Twitchell, *Myth of General Jurisdiction*, 101 Harv. L. Rev. at 628). *See also Daimler AG v. Bauman*, 134 S. Ct. 746, 755 (2014) (noting that the Court's cases since *International Shoe* "bear out the prediction that 'specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene'" (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate*, 79 Harv. L. Rev. 1121, 1164 (1966)). Although respondents causes of action do not directly "arise out of" Ford's contacts with Minnesota and Montana, they are "related to" those contacts in the sense described above: The product at issue in the accidents is the same one that is routinely marketed in those states.

Because of the increased importance of specific jurisdiction, the contemporaneous marketing within Minnesota and Montana of the same products whose alleged defects caused injury to persons then residing in those States permits specific jurisdiction in those states over Ford in this case. Although the continuous and systematic nature of Ford's contacts with Minnesota and Montana are no longer sufficient, standing alone, to create general jurisdiction over Ford in those States, those contacts may legitimately contribute to the relatedness prong of the specific-jurisdiction analysis. The absence of

general jurisdiction as a means of acquiring jurisdiction over an out-of-state defendant, if coupled with a correspondingly narrow view of specific jurisdiction, would be manifestly unjust. "[C]ontracting general jurisdiction, while leaving plaintiffs who are injured in, and sue in, their home states' courts with no access to a realistic forum is both bizarre and unfair." Patrick J. Borchers, *The Twilight of the Minimum Contacts Test*, 11 Seton Hall Circuit Rev. 1, 31 (2014).

Beginning with *International Shoe*, the focus of the specific-jurisdiction analysis has been on the reasonableness of subjecting a defendant to suit outside its state of domicile. The factors considered in the reasonableness calculus are not solely limited to those impinging on the defendant: "Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute [and] the plaintiff's interest in obtaining convenient and effective relief ...." *World-Wide Volkswagen*, 444 U.S. at 292 (citations omitted). Both of those non-defendant factors apply in this case. The States of Minnesota and Montana have an interest in providing a forum for redress of injuries occurring in those States to persons residing there. Each respondent also has an interest in trying its case near the sites of the respective accidents. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984) (noting "New Hampshire's interest in redressing injuries that occur within the State"); *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (stating that

"the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are, of course, to be considered"); *Pugh v. Oklahoma Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155, 159 (E.D. La. 1958) (emphasizing as part of the jurisdictional analysis "[t]he interest of the state in the safety of her highways, the care and hospitalization of persons injured thereon, the availability within the state of witnesses to the accident, [and] the fact that [the forum's] law will determine the liability for damages arising from the accident"). *See also* Twitchell, *Myth of General Jurisdiction*, 101 Harv. L. Rev. at 661 (explaining that "the forum has a very strong interest in regulating the manufacturer's conduct ..., not just because [a] particular automobile malfunctioned there, but because state residents are buying many similar cars and operating them on the forum's highways"); von Mehren & Trautman, *Jurisdiction to Adjudicate*, 79 Harv. L. Rev. at 1167 (noting that "considerations of litigational convenience, particularly with respect to the taking of evidence, tend in accident cases to point insistently to the community in which the accident occurred").

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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