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

AMICUS CURIAE BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR ON THE MERITS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

DRI – The Voice of the Defense Bar (www.dri.org) is an international organization composed of approximately 20,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation for the role of defense lawyers in our legal system, and anticipating and addressing substantive and procedural issues germane to defense lawyers and the clients they represent.

In keeping with its mission, DRI participates as *amicus curiae* in cases where the issues significantly affect civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation. The issue in this case — the ability of a state to exercise specific jurisdiction over an out-of-state corporation — affects each one of these interests, and materially so.

DRI's members represent clients in a wide variety of lines of commerce who sell products and goods nationwide. These clients, both domestic and international, routinely ask where in the United States they will be amenable to suit. Based on these discussions, DRI can state with assurance that companies make choices about where and how to

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[1] Pursuant to Rule 37, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. *Amicus* timely notified the parties of its intention to file this amicus brief and both parties have given their consent.

conduct their affairs and market their products based on issues related to personal jurisdiction. For these companies, a state's exercise of personal jurisdiction can be, and often is, of pivotal importance in making risk assessments, determining the cost of insurance, and even the availability of the products they sell.

A moment's reflection reveals why that is so. If a state can assert personal jurisdiction over a defendant, its substantive law may well determine the liability theories, defenses and damages available. That state's judges and juries also will be the decision-makers. These issues are central when determining the degree of risk and attendant costs in making a product available for sale. *See* 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. Comm. L.J. 171, 198-202 (2014).

Given these ripple effects, DRI has submitted amicus briefs in several recent cases in this Court where the constitutional limits on the exercise of personal jurisdiction over corporate defendants were at the heart of the controversy. *See, e.g.*, *State of Arizona v. State of California*, No. 22O150 (2019) (pending), *Exxon Mobil Corp. v. Healey*, ___ U.S. ___, 139 S. Ct. 794 (2019), *Bristol-Myers Squibb Co. v. Superior Court of California*, ___ U.S. ___, 137 S. Ct. 1773 (2017), and *China Terminal & Electric Corp. v. Willemsen*, 568 U.S. 1143 (2013). Those constitutional limits are stage center in this case as well, and DRI's members' interests in the outcome here are profound.

The specific jurisdiction paradigm recognized by Minnesota and Montana is not fairly drawn from

this Court's precedents. The exercise of jurisdiction by those states is an unwarranted extension of state sovereignty that injects uncertainty and unwarranted cost into the specific jurisdiction calculus, and threatens a resurrection of the "sliding scale" approach to specific jurisdiction that this Court expressly condemned in *Bristol-Myers* "as a loose and spurious form of general jurisdiction." 137 S. Ct at 1781. Instead, beginning with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court has insisted that an assertion of "specific jurisdiction," must find support in a direct factual connection between the defendant's forum contacts and the claims being made in the litigation. *Bristol-Myers*, 137 S. Ct. at 1778-80 (noting that such a specific connection creates the "affiliation between the forum and the underlying controversy" needed to satisfy due process).

With respect to a state's assertion of specific jurisdiction, DRI believes that the interests of the civil justice system can best be advanced, and principles of due process and federalism can best be furthered, by construing "arising out of or related to" to require a direct factual connection between the defendant's forum contacts and the legal claims made by the plaintiff in the lawsuit. This amicus brief explains why this requirement follows from this Court's existing precedents, promotes needed certainty and predictability, furthers the limitations on a state's exercise of personal jurisdiction embedded in principles of federalism, and is fair to all sides in accordance with due process.

SUMMARY OF ARGUMENT

The Minnesota and Montana decisions on review insist that this Court's precedents should be read to give an expansive interpretation to the phrase "arising out of or related to" in the specific jurisdiction calculus. Their view splits "arising out of or related to" into alternative formulations requiring independent inquiries about whether the controversy "arises out of" or "relates to" the defendant's forum contacts. They also posit that the "related to" prong permits reliance on any connections the defendant might have to the forum when a resident plaintiff has brought the lawsuit – even those extraneous to that litigation.

But this Court's precedents, guided by bedrock principles of federalism and due process, demand a more direct factual connection to the forum before the assertion of specific jurisdiction is allowed. The need for such a particularized factual connection necessarily follows from the truisms that jurisdictional principles must, first and foremost, (i) protect the liberty interests of the defendant, and (ii) recognize the territorial limitations on state power. *See Walden v. Fiore*, 571 U.S. 277, 283 (2014); *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

For a proper assertion of specific jurisdiction – one that is faithful to the governing principles of federalism and due process – there must be a specific factual connection between the defendant's forum contacts and the legal claims made in the lawsuit. *See*

Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444, 1462 (1988); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 82-84 (1980). Requiring that substantive nexus promotes predictability and fairness in jurisdictional adjudications and makes the resolution of jurisdictional disputes more cost-effective and efficient. Those results, in turn, promote the fair administration of justice.

ARGUMENT

A. THIS COURT'S PRECEDENTS ESTABLISH THAT SPECIFIC JURISDICTION REQUIRES A SPECIFIC CONNECTION BETWEEN A DEFENDANT'S FORUM CONTACTS AND THE CLAIMS IN THE LAWSUIT

Specific jurisdiction, as the term imparts, has its focus on the actual controversy that confronts a court. For nearly 150 years, this Court has critically examined a state's extra-territorial assertion of jurisdiction by focusing on the prudential limitations that come from principles of federalism and the constitutional due process limitations that protect a defendant who is haled into court. And while this Court's specific jurisdiction cases have arisen in a variety of contexts with differing fact patterns, one thing has remained constant: The Court has resisted and condemned (often in unanimous or near-unanimous decisions) the exercise of specific jurisdiction unless there is a direct connection between the defendant's forum-related conduct and the actual claim over which jurisdiction is sought.

This Court likewise has never ascribed differing meanings or reached different results depending on whether contacts "arise out of" or "relate to" a controversy.

1. This Court's Decisions Establish the Need for a Specific Factual Connection Between a Defendant's Forum Contacts and the Claims in the Lawsuit

For many years, this Court anchored the factual connection to the state asserting jurisdiction in a territorial analysis, most prominently articulated in *Pennoyer v. Neff,* 95 U.S. 714 (1878). *Pennoyer* held that a tribunal's jurisdiction over persons reaches no farther than the geographic bounds of the forum. *Id.* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."). In adopting that view, the Court placed particular emphasis on the defendant's relationship to the forum; specifically, whether the defendant had a physical presence in the forum at the time of service of process or was domiciled in the forum state.

Over a half century later, in *International Shoe*, this Court, for the first time, specifically defined the limits on a state's assertion of personal jurisdiction in terms of the connection between claim and forum. *International Shoe* is thus the watershed for the specific jurisdiction analysis the Court will apply here. In *International Shoe*, the Court explained that a state could assert personal jurisdiction over a controversy "[s]o far as those obligations arise out of or are connected with the activities within the state." 326 U.S. at 319. But of more direct importance here,

the Court stated that under this "connected with" standard, casual and infrequent activities that are unconnected to the cause of action *would not* sustain personal jurisdiction, while continuous and systematic activity giving rise to the cause of action should be sufficient. *Id.* at 317.

In the decades following *International Shoe*, "the relationship among the defendant, the forum, and the litigation . . . became the central concern of the inquiry into personal jurisdiction." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). In that regard, seven years after *Shaffer* another watershed moment arrived, at least in terms of defining the basis for specific jurisdiction. In *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984), the Court first used the term "specific jurisdiction" and contextually defined what would govern its proper exercise by a state. As Justice Blackmun put it: "[W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Id.* at 414 n.8.

As was true of the jurisdictional analysis in *Pennoyer* and *International Shoe*, the Court's attention remained on the defendant and its contacts with the forum that related to the specific case in controversy. The Court found that the defendant Helicol, a Colombian helicopter corporation, had insufficient connections to Texas to support the assertion of jurisdiction because it never performed any services, solicited any business, sold any product,

signed any contracts, had any employees, owned any property, or maintained an office there. *Id.* at 411-12.

While the resolution of *Helicopteros* ultimately rested on general jurisdiction grounds, Justice Blackmun's utilization of the phrase "arising out of or relating to" became a focal point for the specific jurisdiction jurisprudence that followed; not only in this Court, but in federal and state courts as well. Much ink has been spilled by courts and commentators over the meaning of that phrase, but notably not by this Court.

As for the source of the phrase, Justice Blackmun cited a law review article to explain why the phrase "arising out of or relating to" was meaningful in the specific jurisdiction analysis: Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144-45 (1966); *Helicopteros*, 466 U.S. at 414 n.8. The article, however, adds a qualifier with respect to "related to" that reveals the limited meaning the authors' intended: "In the case of specific jurisdiction, the assertion of power to adjudicate is limited to matters arising out of — or *intimately* related to — the affiliating circumstances on which the jurisdictional claim is based." *Id.* at 1144-45 (emphasis added). This limiting language did not make its way into Justice Blackmun's opinion, but there is no indication that he intended to announce a specific jurisdiction test reaching beyond an analysis of the relationship between the defendant's forum

contacts and the actual claim in controversy.[2] And given that this Court has never specifically construed the meaning of the phrase, it has not said that either.

After *Helicopteros*, the first case to consider the "arising out of or relating to" language was *Burger King v. Rudzewicz*, 471 U.S. 462 (1985). *Burger King* made very clear that the Court's focus in the specific jurisdiction calculus remained on the relationship between the defendant's forum contacts and actual claim before the state court.

In that case, Burger King sued Michigan franchisees who refused to comply with corporate directives. Defendants claimed they were not subject to suit in Florida because the litigation did not "arise" from Florida and none of the plaintiffs had ever visited the state. *Id.* at 479. This Court held that specific jurisdiction nonetheless existed, primarily because of

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[2] Correspondence from the Library of Congress between Justice Blackmun and Justice Brennan's clerks reveals that an early draft of *Helicopteros* contained a footnote stating that the Court "need not address the question of the nature of the relationship between a cause of action and a contact necessary to a determination that the cause of action 'arises out of' the contact." Justice Harry A. Blackmun draft opinion in *Helicopteros Nacionales v. Hall*, 466 U.S. 408 (1984) (3rd draft, Feb. 22, 1984) (on file with The Harry A. Blackmun Papers, The Library of Congress). A clerk for dissenting Justice Brennan then requested, without explanation, addition of the phrase "or relates to", Note from Law Clerk "AD" to Justice Harry A. Blackmun re *Helicopteros Nacionales v. Hall*, 466 U.S. 408 (1984) (April 17, 1984) (on file with The Harry A. Blackmun Papers, The Library of Congress), and Justice Blackmun altered the footnote. Nothing in this exchange suggests that Justice Blackmun intended the use of this phrase, in an opinion turning on general jurisdiction, to have the definitional significance for specific jurisdiction that the lower courts have ascribed to it.

the nature of the parties' contract: "[P]arties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities." *Id.* at 473 (citation and quotation marks omitted). More particularly: "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [personal jurisdiction] is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Id.* at 472 (citation and quotation marks omitted).

Two other cases that bookend *Helicopteros* and arose contemporaneously with *Burger King*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), also serve to emphasize the need for a direct connection between the defendant's forum contacts and the actual claim as a specific jurisdiction prerequisite.

In *World-Wide Volkswagen*, the Court rejected Oklahoma's attempt to exercise jurisdiction over an out-of-state car dealership, even though most of the evidence and witnesses related to the accident were in Oklahoma, because the dealership had no contact with the forum. The consumer's "unilateral" act of bringing the defendant's product into the forum, even when combined with the location of the evidence and witnesses, was not a sufficient basis for exercising personal jurisdiction over the dealership defendant. *World-Wide Volkswagen*, 444 U.S. at 297-98. In

Asahi, the plurality opinion held that a Taiwanese tire-tube manufacturer sued in a California product-liability action could not implead its Japanese tire-valve supplier because the valve supplier had no agents or employees in California and had not directed that its products should be sold there. *Asahi*, 480 U.S. at 112.

An equally constrained approach to the exercise of specific jurisdiction followed in *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873 (2011), and *Walden*. In *Nicastro*, the plurality stuck to the analysis in *World-Wide Volkswagen* and *Asahi*, asserting that a defendant's forum-related contacts in relation to the underlying lawsuit were what mattered for the exercise of specific jurisdiction, not if the defendant could foresee that its product would end up there. *Nicastro*, 564 U.S. at 881-85. And in *Walden*, the Court held that the conduct of a Georgia police officer, occurring entirely in Georgia, could not support Nevada's exercise of jurisdiction even though the officer knew his actions would have an effect on Nevada plaintiffs. *Walden*, 571 U.S. at 286. The "proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 290.

This Court's latest decision setting forth the proper approach to specific jurisdiction further reinforces its historic message that the focus must be on the relationship between the defendant's forum contacts and the actual claim in controversy. In *Bristol-Myers*, 137 S. Ct. 1773, this Court held that a California Superior Court lacked personal jurisdiction

over 592 non-resident plaintiffs in a group of eight coordinated personal injury "mass actions" because none of their claims bore any connection to any Bristol-Myers contacts or activities in California. The Court reasoned that under *International Shoe*, specific jurisdiction requires that the plaintiff's suit must actually "arise out of or relate to the defendant's contacts with the forum" such that there is "an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* at 1780 (internal quotation marks, citations, and alterations omitted).

This Court also made clear that this "affiliation" or "connection" could not be based on the defendant's forum contacts that were unrelated to the lawsuit. In that regard, it expressly rejected the California Supreme Court's "sliding scale" test for specific jurisdiction, which allowed the defendant's unrelated forum contacts showing that BMS "purposefully availed" itself of doing business in California — with over 100 employees and 250 sales representatives, research laboratories and government advocacy facilities, and nearly one billion dollars in sales — to be determinative in the specific jurisdiction calculus. "[A] corporation's continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." *Id.* at 1781 (internal quotation marks omitted). Indeed, the Court's opinion described this relaxed "sliding scale" test as "resembl[ing] a loose and spurious form of general jurisdiction," holding that for specific jurisdiction, an actual connection between the claims

and the forum — which was missing from the non-residents' claims — must be shown for each plaintiff. *Id.* This Court thereby drew a bright line between "case-linked" forum contacts satisfying the "arising from" or "relating to" standard, and general forum contacts, that even if numerous, were not "relevant" to the jurisdictional analysis.

So where does that leave us? This Court's precedents unequivocally require that the defendant's forum contacts must have direct relevance to the actual claims in the lawsuit — that is, the relevant contacts in the specific jurisdiction analysis are those that are "substantively relevant" to the claims actually made in the particular lawsuit. *See* Brilmayer, *supra*, at 82-84. As Professor Brilmayer explains: "A contact is related to the controversy if it is *the geographical qualification of a fact relevant to the merits*. A forum occurrence which would ordinarily be alleged as part of a comparable domestic complaint is a related contact. In contrast, an occurrence in the forum State of no relevance to a totally domestic cause of action is an unrelated contact, a purely jurisdictional allegation with no substantive purpose." *Id.* at 82 (emphasis added).

2. The Specific Factual Connection Required by this Court Promotes Certainty, Predictability, and Reduces Cost

It is no accident that the Court has arrived here. The requirement that the defendant's forum contacts be substantively relevant to the claims actually being made by the plaintiff in the lawsuit is

a workable and clear standard that makes abundant good sense for three main reasons.

First, requiring a direct factual connection to the legal claims being made promotes certainty and predictability. If courts exercise specific jurisdiction only on a showing of substantively relevant forum contacts, defendants can more readily anticipate when they will be subject to a particular state's adjudicatory authority. This helps companies make risk assessments and determine liability exposure from the marketing and sale of their products. Similarly, courts can more readily perceive what contacts are relevant, thus promoting consistency in adjudication in an area where our law should demand it.

Second, keeping the focus on the substantive relevance of the defendant's forum contacts reduces the likelihood that the "related to" language in the standard will be cut loose from its causal connection — something this Court has never endorsed. When that happens, as is evident from the Minnesota and Montana decisions on review, contacts that have nothing to do with the claim in question are cobbled together to support the assertion of jurisdiction, exactly what this Court decried as "loose and spurious" forms of general jurisdiction in *Bristol-Meyers*. Further, as Professor Brilmayer explains, consideration of these non-substantively relevant contacts is unfair to the defendant because it leads to arbitrary results where there is a need for greater certainty given the interests to be protected. Brilmayer, *supra* at 86 ("[it would be arbitrary, and thus a violation of due process if the court merely

seized on the [non-substantively relevant] contact . . . as a pretext for jurisdiction."). By comparison, requiring a direct factual connection between the defendant's forum contacts and the legal claims made in the lawsuit provides the requisite nexus this Court has insisted on and ensures that the state asserting jurisdiction has a demonstrable vested interest in adjudicating the dispute.

Third, requiring a direct connection between the defendant's forum contacts and the claims in the lawsuit reduces costs and avoids delays in resolution. A principal concern of civil defendants who become embroiled in jurisdictional disputes is the amount of time and expense they engender, all of it diverted from the merits of the case.

In DRI's members' experience, disputes over personal jurisdiction impede litigation and devolve into a resource-intensive exercise that includes written discovery, document productions, depositions, and protective orders. The discovery often is broadly directed to sales, marketing, manufacture, product distribution, product testing, business strategies, corporate decision-making, and the like. Multiple meet and confer sessions and court intervention often result. *See* Anand Agneshwar and Paige Sharpe, *BMS Battlegrounds: Practical Advice for Litigating Personal Jurisdiction After Bristol-Meyers*, U.S. Chambers Inst. For Legal Reform (June 2018), at 14-16 *available at* http://www.instituteforlegalreform.com/research/bms-battlegrounds-research (highlighting examples of burdensome jurisdictional discovery); S.I. Strong, *Jurisdictional Discovery in United States Federal*

Courts, 67 Wash. & Lee L. Rev. 489, 493, 541-53, 558-64 (2010) (highlighting resource investment in jurisdictional discovery and explaining difficulties engendered by imprecise jurisdictional standards).

By contrast, a more tightly drawn specific jurisdiction standard — one focused more narrowly on the factual connection to the substance of the legal claims in dispute — generates a more measured approach to jurisdictional discovery with a scaled back set of inquiries. *See Bigelow v Garrett,* 299 F. Supp. 3d 34, 47 (D.D.C. 2018) (careful scrutiny applied to discovery request to ensure that information sought will yield facts specific to plaintiff's lawsuit); *Capel v. Capel,* 272 F. Supp. 3d 33, 41-42 (D.D.C. 2017) (same).

Jurisdictional principles should deliver certainty and predictability, not cost, expense, and delay. Requiring the defendant's forum-related contacts to have a specific factual connection to the legal claims being made accomplishes that salutary result, just as this Court's precedents envision. There is no reason to depart from that now by altering the construction of "arising out of or related to."

B. THIS COURT'S PRECEDENTS ESTABLISH THAT FEDERALISM AND DUE PROCESS PRINCIPLES REQUIRE A SPECIFIC CONNECTION BETWEEN DEFENDANT'S FORUM CONTACTS AND THE CLAIMS IN THE LAWSUIT

As noted, this Court's specific jurisdiction analysis consistently rests on two primary considerations: (i) the need to provide due process protections to an out-of-state defendant; and (2) the

need to adhere to principles of federalism in determining where disputes can be adjudicated. In construing the phrase "arising out of or related to" in the specific jurisdiction analysis, therefore, these two considerations must occupy center stage. And if they do, then the construction of that phrase likewise should require a direct factual connection between the defendant's forum contacts and the legal claims made in the particular lawsuit.

1. This Court's Decisions Establish That Principles of Due Process and Federalism Control the Exercise of Personal Jurisdiction

The roots of due process considerations in the personal jurisdiction analysis also begin with *Pennoyer*. There, this Court first tied limitations on state courts' exercise of personal jurisdiction to the Due Process Clause of the Fourteenth Amendment. But importantly here, the Court brought due process considerations to bear in *International Shoe*, 326 U.S. at 316, when it tied the need for minimum contacts and "traditional notions of fair play and substantial justice" directly to due process. The Court explained that to satisfy due process, a corporation's presence within a state can "be manifested only by activities carried on in its behalf" by the corporation's agents. *Id.* Echoing *Pennoyer*, the Court acknowledged that the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.* at 319.

By the same token, federalism frequently has been invoked as a limitation on a state's assertion of personal jurisdiction. This, too, is reflected in *Pennoyer*'s territorial constraints and it came to the fore in *Hanson*, 357 U.S. at 251, where this Court recognized a defendant's liberty interest in being subjected only to lawful judgments. *Id.* ("Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."). The Court noted, however, that these territorial limitations derived from our federal system also were rooted in due process. *Id.* Importantly for this discussion, neither of these principles — due process or federalism — were viewed as flexible notions that could be dispensed with if the extraterritorial assertion of jurisdiction would not place significant burdens of the defendant. On the contrary, "[h]owever minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." *Id.*

An equally explicit explanation of the import of federalism and due process in specific jurisdiction analysis came in *World-Wide Volkswagen Corp.*, 444 U.S. 286. There, the Court forcefully explained that due process "protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." 444 U.S. at 292. By the same token, the Court in *Burger King* noted that "[b]y

requiring that individuals have fair warning that a particular activity may subject [defendants] to the jurisdiction of a foreign sovereign, . . . the Due Process Clause 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." 471 U.S. at 472 (internal quotation marks and citations omitted). The "foreseeability that is critical to [the] due process analysis" is that which ties the defendant's conduct to the forum state, "such that he should reasonably anticipate being haled into court there." *Id.* at 474 (internal quotation marks omitted).

The primacy of the defendants' interests as the polestar of personal jurisdictional analysis persists through the Court's late-20th and early-21st century decisions as well. *See Goodyear*, 564 U.S. at 918-19 ("[a] state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause"); *Nicastro*, 564 U.S. at 881 ("jurisdiction is in the first instance a question of authority rather than fairness," and that "those who operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter"); *Helicopteros,* 466 U.S. 414 (petitioner's contacts with Texas insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment, noting that Due Process requirements are only satisfied "when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has certain minimum contacts with [the forum] such that

the maintenance of the suit does not offend traditional notions of fair play and substantial justice.") (internal quotation marks and citations omitted).

Finally, the Court's recent decisions in *Walden* and *Bristol-Myers* have cemented this view. In *Walden*, the Court renewed its emphasis on the due process "minimum contacts" test to protect defendants' liberty interests, stating that "[d]ue process limits on the State's adjudicative authority principally protect the liberty interest of the nonresident defendant – not the convenience of plaintiffs or third parties." *See Walden*, 571 U.S. at 284-85. To this end, the Court acknowledged that "the plaintiff cannot be the only link between the defendant and the forum. Rather, it is *the defendant's conduct that must form the necessary connection with the forum State* that is the basis for its jurisdiction over him." *Id.* at 285 (citing *Burger King*, 471 U.S. at 478)) (emphasis added). Likewise, in *Bristol-Myers*, the Court returned to these fundamental principles by explicitly rejecting a general contacts analysis and asserting that "the primary [due process] concern is the burden on the defendant." 137 S. Ct. at 1780 (citation and quotation marks omitted).

Defendants' contacts with the forum thus hold center-stage when determining whether a state court has the authority to adjudicate a particular dispute. The observation that there must be an "affiliation between the forum and the underlying controversy" is rooted in a deep historical understanding of the limits on a state court's jurisdiction. *Id.* (internal quotation marks omitted). *See also* David W. Ichel, *A New Guard at the Courthouse Door: Corporate Personal*

Jurisdiction in Complex Litigation After the Supreme Court's Decision Quartet, 71 Rutgers U. L. Rev. 1, 7 (Fall 2018) (recognizing that "[t]he fact that the Court's [recent personal jurisdiction] decisions are either unanimous . . . or nearly unanimous . . . demonstrates a very strong level of agreement on the new brighter-line approach" that requires a tie between the "suit itself [and] the defendant company's contacts with the forum state"); Philip S. Goldberg, *et al.*, *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 Duke J. Const. L. & Pol'y 51, 76, 89 (Spring 2019) (recognizing that the Court's recent jurisprudence marks another step "toward an exacting analysis of where a business may be subject to a lawsuit").

And, this Court's precedents plainly emphasize three principles that have been a part of its personal jurisdiction jurisprudence since *Pennoyer*: (i) that federalism limits the extraterritorial application of state court personal jurisdiction; (ii) a focus on the constitutional due process rights of individual defendants not to be haled into court in a state that lacks a specific connection to the claims in the suit; and (iii) a recognition that jurisdictional limits and due process protections are aimed at protecting defendants and limiting where they may be sued.

2. This Court's Specific Factual Connection Requirement Furthers Principles of Due Process and Federalism

Nevertheless, some courts and commentators have urged rejection of a specific jurisdiction standard that requires a defendant's forum contacts to be

substantively relevant to the plaintiff's legal claims because such a requirement increases the likelihood that a plaintiff will be forced to leave his or her home jurisdiction to file a lawsuit and may be forced to file suit in more than one jurisdiction where multiple defendants are involved.

But this effort to shift the jurisdictional focus away from the defendant's interests does not square with this Court's precedents that have rejected the notion that the relative ease of bringing suit in a particular forum should play a role in the analysis. The primary concern in determining specific jurisdiction accordingly should remain right where this Court's precedents place it: on the due process right of defendant not to be forced to defend a suit in a state that lacks a sufficient nexus to the claims made in the lawsuit.

Also, given the relative ease of access to an enterprising group of attorneys who are capable of, and ready to, bring lawsuits against manufacturers of all types of consumer products, the notion that it is difficult for a plaintiff to bring suit in a foreign jurisdiction is neither apparent nor real. For years, product liability litigation has been dominated by a nationwide consortia of plaintiffs' attorneys, generally organized by product type, who are able to, and do, bring cases anywhere in the country. Similarly, DRI members defend clients nationwide in a wide variety of industries where this is true, from aircraft and automotive, to pharmaceutical and medical devices, to chemical and food products.

Thus, in modern product liability litigation, on the plaintiffs' side "there is a network of attorneys and

a multiplicity of attorneys outside the network" so that "the attorney network not only brings in other repeat players but also pulls single-shot attorneys into relationships they may not otherwise have had." Margaret S. Williams, *et al.*, *Repeat Players in Federal Multidistrict Litigation*, 5 J. Tort L. 141, 151 (2012).[3] And, again from experience, DRI members and their clients can attest that these networks share work product, tactical insights, discovery and expert witness information. Economic efficiencies and strategic advantages follow as a matter of course. "As a result of litigation networks lowering the cost of litigation, sharing information, and harmonizing approaches, plaintiffs' lawyers are not outgunned by defense counsel." Byron Stier, *Resolving the Class Action Crisis: Mass Tort Litigation As Network*, 2005 Utah L. Rev. 863, 894 (2005) (footnote omitted).[4]

Beyond that, these "litigation networks" have been aided considerably by recent advances in

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[3] For example, the American Association for Justice, through its "litigation groups" organizes "network[s] of attorneys who share trial strategies, documents, and knowledge about similar cases." "Several Groups Focus on Transportation," Trial 53, 56 (Feb. 2015). These networks provide "knowledge and documents from other [similar] cases and access to a network of colleagues who have experience" in litigation involving particular products. AAJ, "Resources for Litigating Medtronic Infuse Cases," Trial, 60 (Nov. 2014).

[4] One such entity, "the Task Force for Plaintiff's Involvement, was established to facilitate plaintiff attorneys' networking and exchanging of information relating to plaintiffs' practice. . . . Through the Task Force, the attorneys communicate with a vast network of attorneys from diverse practice backgrounds who are at the forefront of these changes, and that are of vital concern to consumers and plaintiffs' bar." Stier, *supra*, at 904 (footnotes and internal quotation marks omitted).

information exchange technology. Technology has greatly improved communication and aided the management of complex litigation. 1 Charles S. Zimmerman, *Pharmaceutical & Medical Device Litigation* §7:29 (2017). For would-be litigants, and their counsel, "access to the internet" provides "collaborative technology" that "offer[s] the potential to dramatically improve their access to justice." Michael Wolf, *Collaborative Technology Improves Access to Justice*, 15 N.Y.U. J. Legis. & Pub. Pol'y 759, 789 (2012). In product liability litigation today, "lawyers have increasingly looked to [Internet] social networks as litigation resources." Ryan Ward, *Discovering Facebook: Social Network Subpoenas & the Stored Communications Act*, 24 Harv. J.L. & Tech. 563, 564 (2011).

The ready access to experienced and well-connected counsel is as true in this context as any other. Specifically with respect to automotive product liability litigation, there are a multitude of lawyers willing to handle this type of case anywhere in the country:

- "Our attorneys handle consumer fraud and product liability litigation on a large scale, whether it affects one person or thousands of consumers."[5]

- "We can handle cases related to design or manufacturing defects in all

[5] Weitz & Lutzenberg, *Product Liability*, https://www.weitzlux.com/consumer-protection/product-liability/ (last visited Feb. 20, 2020).

types of automobile parts and represent clients throughout the U.S."[6]

- "We have experience fighting against some of the largest auto manufacturing corporations in the United States and abroad. We are ready to handle any type of auto defect case . . . . [We] successfully represented numerous victims of defective products throughout the United States."[7]

- "[O]ur knowledgeable car accident lawyers help victims throughout the United States."[8]

- Products liability cases include: "Automotive defects. . . . Our personal injury law firm represents clients anywhere in America."[9]

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[6] Arnold & Itkin LLP, *Auto Product Liability*, https://www.arnolditkin.com/product-liability/auto-product-liability/ (last visited Feb. 20, 2020).
[7] Adkins Law Firm, *Texas Defective Auto Product Liability Lawyers*, https://adkinslawfirm.com/texas-defective-product-lawyer/ (last visited Feb. 20, 2020).
[8] Moll Law Group, *Chicago Lawyers for Defective Automobiles and Auto Parts*, https://www.molllawgroup.com/defective-automobiles-and-auto-parts.html (last visited Feb. 20, 2020).
[9] Provost Umphrey, *Texas Product Liability Lawyer*, https://www.provostumphrey.com/products-liability?gclid=EAIaIQobChMI2f_l6PLg5wIVE9lkCh1OHgT4EAMYAiAAEgKgE_D_BwE (last visited Feb. 20, 2020).

- We "handle[] complex personal injury claims that focus on automobile accidents. . . . We handle cases nationwide. . . ."[10]

- Auto Defect Lawyers Protecting Injured Clients Nationwide from Our Office in Denver, CO.[11]

In addition to numerous law firms actively seeking new clients, Internet referral services exist whose sole functions are to match would-be automotive product liability plaintiffs with attorneys who will represent them anywhere in the country.[12]

Montana and Minnesota felt compelled to remake the specific jurisdiction landscape to allow litigation in a forum more convenient for the respective states' residents. While that inclination is understandable, it has no grounding in controlling law, and there is no reason it should support a paradigm shift in specific jurisdiction analysis. The focus should remain on the non-resident defendant, and in lawsuits like this one, the legal market will

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[10] Kreindler, *New York City Products Liability Lawyers*, https://www.kreindler.com/Torts-and-Products-Liability/ (last visited Feb. 20, 2020).

[11] The Gilbert Law Group, *Auto Defect Lawyers*, https://www.thegilbertlawgroup.com/auto-defects/ (last visited Feb. 20, 2020).

[12] *E.g.*, Legal Match, *Automotive Product Liability*, https://www.legalmatch.com/law-library/article/automotive-products.html (last visited Feb. 20, 2020); Nolo, *Product Liability Claims Involving Defective Cars*, https://www.nolo.com/legal-encyclopedia/product-liability-claims-defective-cars-29648.html (last visited Feb. 20, 2020).

ensure that prospective plaintiffs will find a way to sue where jurisdiction can be obtained.

CONCLUSION

For the reasons noted above, this Court should determine that neither Minnesota nor Montana properly asserted jurisdiction over Ford Motor Company.

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