NO. 16-466

In the Supreme Court of the United States

BRISTOL-MEYERS SQUIBB COMPANY,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISO, ET AL.,

Respondent.

On Writ of Certiorari to the
Supreme Court of California

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

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INTEREST OF AMICUS CURIAE

This Amicus brief is submitted on behalf of The Center for Auto Safety (CAS)[1] in support of the Respondents. The issue raised in this appeal has significant jurisprudential implications for every American consumer who purchases and uses products distributed nation-wide by foreign corporations.

CAS was established in 1970 by Ralph Nader and the Consumers Union and it is an outgrowth of the "Corvair" scandal. After that ordeal, "Nader realized that his singlehanded, sporadic monitoring of the auto industry would be ineffective." Thus, he and the union created the CAS as an independent (but affiliated) organization "to keep a sharp eye on the National Highway Safety Bureau" (Acton and LeMond, Ralph Nader: A Man and a Movement, p. 69, 1972) by lobbying, researching, and litigating as necessary. Today, the CAS is independent of both Nader and the Consumers Union, but certain residues of that affiliation remain. However, the Center for Auto Safety's original goals remain: to work for improved vehicle highway safety, reliability, and economy. While these basic tenets reflect its founders' original purposes, the CAS itself has grown tremendously. Operating

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing; letters of consent have been lodged with the Court.

with more than 10,000 members and benefiting from public and private contributions, along with the sale of its published research, the CAS employs a small staff. CAS is a nonprofit research and advocacy organization to provide a public voice for auto safety. Our mission is to improve the safety, efficiency reliability and cost to the consumer of vehicles, which explicitly demands that we do what we can to help reduce motor vehicle deaths, injuries and crashes. These goals often cause the CAS to furnish testimony before Congressional oversight committees and sponsor independent analysis of pending safety legislation, government safety regulations and public health issues arising because of mistakes in the marketing of unsafe vehicles. To this end, the CAS has also been involved in a number of lawsuits, challenging decisions of the Secretary of Transportation and the National Highway Traffic Safety Administration (NHTSA). Examples of the Center for Automotive Safety's public health advocacy include: *Center for Auto Safety v. National Highway Safety Admin.* 793 F.2d 1322 (1986), in which the CAS challenged an administrative rule involving fuel economy; *Center for Auto Safety v. Lewis*, 685 F.2d 656 (1982), asking a federal court to examine the Secretary of Transportation's settlement "of a safety investigation concerning 23 million Ford vehicles"; and, *Center For Auto Safety v. Volkswagen AG, et al.,* Case No. 1:15 CV-1356 (U.S. D.C. E.D.VA. 2015) seeking injunctive relief against these car companies for defrauding consumers by manipulating EPA tests intended to restrict vehicle emissions.

In addition to its direct sponsorship activity, the CAS occasionally participates as an *amicus curiae*

when the issue relates directly to the relationship between vehicle safety, consumer protection and the role of the civil justice system in facilitating these goals. It is for these reasons that the CAS has prepared this *Amicus* Brief. The CAS appears as *Amicus* to explain the importance of preserving a broad definitional predicate for specific jurisdiction so that every American consumer has available to him or her the civil justice system in the state of their residents and, if so desired, alternatively in another state where the defendant's product is marketed to seek fair compensation for the serial /national marketing of an unsafely designed or manufactured product. If the Court were to adopt the radically revised definition of specific jurisdiction proposed by the Petitioner and its Amici, it would limit an injured party's access to courts by only permitting suits in a forum where the following circumstances coalesce: (1) the forum is the state in which the product was originally released into the stream of commerce and (2) where the plaintiff was harmed. Limiting specific jurisdiction in this fashion would undoubtedly fly in the face of how products such as motor vehicles and pharmaceutical drugs are marketed and used across the country. It would also elevate form over substance by ignoring the fact that products like motor vehicles and drugs like Paxil are designed, manufactured and marketed for sale in every state in the United States using the exact same plans and practices. And, every major product manufacturer expects—and in fact hopes—that its product will be used or consumed by as many Americans as possible. Thus, limiting access to the civil justice system in the manner argued by the

Petitioner and its Amici would essentially ignore our modern product delivery system.

Further, the outcome argued by the Petitioner and its Amici would, if followed to its logical conclusion, bestow upon corporations unfair control over the venue where they can be haled into court. If the Court adopts the rule that a product manufacturer/distributor can only be sued via specific jurisdiction in the state where the harm occurred and the product was originally distributed, a huge change in the marketing of products will arise and the civil justice system may be substantially altered. Manufacturers will then have the option to release their products into the stream of commerce in the least populated states and then use a third-party distribution network to deliver their products across the United States. Doing so will significantly change the face of the civil justice system. Restricting jurisdiction to states in which the injury and the distribution of the product coalesce could in fact limit injured consumers to filing in the defendant's home state. Such a restrictive ruling will undoubtedly and needlessly cause a huge burden on the public and substantively alter access to our civil justice system.

STATEMENT OF THE CASE

Your Amicus accepts and incorporates here the Statement of the Case submitted by the Respondent.

SUMMARY OF ARGUMENT

In the context of this products liability case, there is a vast difference between the Petitioner's legal complaint about the ruling below and the remedy it seeks, including a significant reworking of this Honorable Court's definitional scope of specific jurisdiction. It is your Amicus' position that the decision below was warranted; however, even if the Court should find fault with the analysis below, there is no need to redefine the scope of specific jurisdiction to include limitations which will significantly alter every American's access to the civil justice system.

In the Supreme Court of California, the Majority found that because Bristol-Myers Squibb pursued the exact same allegedly negligent and misleading marketing practices in-state and out-of-state in the sale of Plavix pills and, as a result of the use of Plavix, both in-state and out-of-state plaintiffs suffered similar adverse consequences, the defendant was subject to specific jurisdiction. In other words, the California court found a substantial nexus between all of the plaintiffs' claims and the in-state marketing practices of Bristol-Myers Squibb, thereby allowing for personal jurisdiction of these claims, regardless of the state of residence of the Plaintiffs. The Court below reasonably found that the defendant's contacts with the forum were undoubtedly sufficient that it should have foreseen or "reasonably anticipate[d] being haled into court here." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980).

The Petitioner and its Amici challenge the ruling below on the basis that Bristol-Myers Squibb's alleged wrongdoing was not related to, nor did it arise out of misconduct in California that harmed the out-of-state plaintiffs. Stated otherwise, the argument is that since the out-of-state plaintiffs ingested and suffered injury outside of California and because the defendant marketed Plavix to these plaintiffs outside of California, there is no nexus with California and, therefore, specific jurisdiction cannot obtain. This argument asks the Court to erect a territorial shield that artificially and inconsistently acknowledges that California courts have specific jurisdiction over the defendant in California for Californians, but not for out-of-state plaintiffs. That argument contorts the principle that specific jurisdiction is predicated upon a defendant's presence in the forum state and not the plaintiffs. Likewise, this argument is inconsistent with "modern transportation and communications" which have lessened the burden of a defendant being sued in the venues where they conduct business. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

The Petitioner and its Amici ask this Honorable Court to find that unless a plaintiff's harm/claim arises out of or relates to a defendant's in-state conduct via marketing and/or distribution of the product which caused the plaintiff's harm in-state, a court cannot obtain specific jurisdiction over the out-of-state defendant—despite the defendants huge marketing efforts and derived in-state profits. With all due respect, if the Court adopts this highly restrictive definitional basis upon which specific jurisdiction must lie, it will have, in effect, turned its back on the marketing practices which flourish in this

country; and, a restrictive ruling of this nature will effectively close the court house doors to thousands of American consumers who suffer injury every year because of the distribution of carelessly or defectively manufactured products.

In an age of nationwide marketing practices by U.S. and foreign international conglomerates, singularly restricting jurisdiction over out-of-state company to a forum which satisfies two criteria—*i.e.*, where the product was first placed into the stream of commerce and the injury occurred—ignores the distribution practices which allow Americans to enjoy nationwide product marketing and the portability of most consumer products, which offer huge profits to national and international companies. Restricting specific jurisdiction in this fashion would literally close the court-house doors to hundreds of thousands of Americans who rely on the civil justice system to rectify harm caused by poorly designed or manufactured products intentionally placed in the stream of commerce with specific intent to sell them across all state lines.

Despite the array of nationwide marketing schemes employed by domestic and foreign business entities to market and distribute their products to every corner of this great country, the Petitioner seeks a ruling to restrict every type of legal controversy (contract or tort) to the state in which the initiating action coincides with the resulting harm. The Respondent argues that due process can only be secured by restricting lawsuits to the forum where a non-resident defendant is "at home" or the forum where the foreign defendant purposefully released the product into the stream of commerce (*e.g.*, marketing

its product) and the harm occurred—despite an out-of-state defendant's extensive in-state marketing practices and a nationwide distribution plan that caused the product to be used in the forum state. This is an extremely dangerous, self-serving jurisdictional argument.

Whether intended or unintended by their arguments before this Honorable Court, the reality is that the Petitioner and its Amici are not just asking to restrict specific jurisdiction to those cases involving in-state marketing of a product causing harm in that state, but also for a reconstitution of definitional jurisdiction, which will effectively and dramatically shorten the fair reach of the civil justice system. Exercising specific jurisdiction over an out-of-state party, which has purposefully acted to distribute its products in-state, is essential to allow every American the opportunity to access the civil justice system when harm befalls them.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT ADHERED TO THE TENETS OF DUE PROCESS AND PROPERLY ALLOWED FOR SPECIFIC JURISDICTION OVER THE DEFENDANT

There is no doubt that California courts have specific jurisdiction over the defendant to litigate the *California plaintiffs'* claims that Bristol-Myers Squibb tortuously marketed Paxil—as an allegedly defective product—which led to injuries to Californians. In fact,

no one disputes this conclusion because Bristol-Myers Squibb released Paxil into the stream of commerce, it floated throughout the state of California and it harmed Californians. Instead, the issue here is whether out-of-state plaintiffs may join in the California based lawsuit against the defendant when these consumers allege that they were harmed in the same manner and as the result of the same tortious conduct, but their harm arose in a different state?

The decisions of this Court counsel that specific jurisdiction is dependent upon the defendant's conduct and connections with the forum State. Specific jurisdiction has never been predicated upon the forum state residency of the Plaintiffs. Emphasizing the obvious distinctions that must be drawn between Due Process analysis and the natural inclination that every forum state will have to provide a convenient forum to redress injuries, Mr. Justice Brennan emphasized that:

> . . . the constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State. [citation omitted] Although it has been argued that foreseeability of causing injury in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a "sufficient bench-mark" for exercising personal jurisdiction. [citation omitted] Instead, "the foreseeability that is critical to 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."

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

Critical and controlling the resolution of whether a court may obtain specific jurisdiction is not the site of harm but rather " . . . it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp., supra.*, 471 U.S. at 474-475, citing *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

So long as a foreign defendant has more than minimal contacts within the forum State, the issue is not whether or not Due Process has been satisfied, but instead it's a question of whether the assertion of personal jurisdiction would comport with "fair play and substantial Justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 320 (1945). This very issue was addressed by the Court in *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 779-781 (1984), when it decided that the forum state (New Hampshire) had specific jurisdiction over the foreign defendant in a libel action brought for harm suffered by a New York plaintiff because of false publications distributed throughout the United States. Addressing the notion that the Plaintiff was not a resident of the forum and that the subject matter was minimally related to the forum, the Court ruled:

> Finally, implicit in the Court of Appeals' analysis of New Hampshire's interest is an

emphasis on the extremely limited contacts of the plaintiff with New Hampshire. But we have not to date required a plaintiff to have "minimum contacts" with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking. In *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952), none of the parties was a resident of the forum State; indeed, neither the plaintiff nor the subject matter of his action had any relation to that State. Jurisdiction was based solely on the fact that the defendant corporation had been carrying on in the forum "a continuous and systematic, but limited, part of its general business." *Id.*, at 438. In the instant case, respondent's activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities. But respondent is carrying on a "part of its general business" in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire.

The plaintiff's residence is not, of course, completely irrelevant to the jurisdictional inquiry. As noted, that inquiry focuses on the relations among the defendant, the forum, and the litigation. Plaintiff's residence may well play an important role in deter-

> mining the propriety of entertaining a suit against the defendant in the forum. That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum. Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises. *See Calder v. Jones*, post, at 788-789; *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). But plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts.

Instead, once it is determined that a foreign defendant has the requisite minimum contacts with the forum, the court must decide "whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Burger King Corp.,* 471 U.S. at 476. That determination then calls into play the plaintiffs' interests, the burden on the defendant, the efficiency of resolving the controversies and the shared interests of several States in providing substantive relief. *Burger King Corp.,* 471 U.S. at 477.

In *McIntyre Machinery America, Ltd. v. Nicastro*, 564 U.S. 873 (2011), Justice Breyer observed in his concurring opinion that the holding of the New Jersey Supreme Court—which was overturned by the issuance of a plurality opinion—finding specific jurisdiction without more than evidence of injury and the distribution of just one of defendant's products in New Jersey was incorrect. Essentially, the Court ruled that without sufficient contacts with the forum

state beyond the marketing of one of its products and an injury, a court did not have a due process basis for jurisdiction. Following that logic here, the opposite is true. Bristol-Myers Squibb has in the past and continues to enjoy the benefit of the substantial and continuous marketing of Plavix in California. Undoubtedly, and incontrovertibly the defendant had to have foreseen it was subject to suit in California. And, for that reason alone, the Due Process test of specific jurisdiction was met and the Court below was correct in affirming the ruling of the trial court.

II. SPECIFIC JURISDICTION PROPERLY LIES AGAINST A FOREIGN DEFENDANT WHEN IT MARKETS ITS PRODUCTS IN A SUBSTANTIAL AND CONTINUOUS MANNER IN THE FORUM AND THE GRAVAMEN OF THE CLAIM RELATES TO THE SAME PRODUCT, REGARDLESS OF THE FORUM OF THE INJURY OR THE FORUM WHERE THE PRODUCT WAS ORIGINALLY RELEASED INTO THE STREAM OF COMMERCE.

The Petitioner and its Amici have argued that the Court should redefine specific jurisdiction so that a forum court may only exercise its authority to decide a case involving a foreign defendant, despite clear and convincing evidence that it purposefully and substantially distributes its products in the forum, if the court also concurrently finds that the harm was suffered in the forum and the specific product causing the harm was marketed in the forum. As set forth below, your Amicus respectfully submits that neither principles of Due Process nor the policy arguments raised by the Petitioner's Amici justify the shrinkage of the authority of courts of general juris-

diction to serve as arbiters of legitimate claims against foreign defendants which should reasonably expect to be subject to a forum State's civil justice system.

A. The Policy Arguments Raised by the Petitioner's Amici Are Unsuitable to a Principled and Reliable Definition of Specific Jurisdiction.

For decades, the Court has stressed that Due Process allows a nonresident defendant to be subjected to the jurisdiction of the forum state when the defendant evidences certain minimum contacts so that the suit does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)). The facts supportive of fair play and substantial justice warranting specific jurisdiction have always related to the activities the "defendant himself" created with the forum. *Walden v. Fiore,* 134 S. Ct. 1115, 1122 (2014). It is the "defendant-focused" minimum contacts rather than the contacts between the plaintiffs or third parties and the forum that tests the boundaries of Due Process. *Id.* The jurisdictional test of foreseeability embraced by the Court provides that the foreign defendant's contacts with the forum be sufficiently substantial and continuous so that the defendant can anticipate that he or she is subject to suit in the forum. These principles have appropriately caused the Court to find that " . . . mere injury to a forum resident is not a sufficient connection to the forum". *Calder v. Jones,* 465 U.S. 783, 788-789 (1984). Rather, the focus has been and must remain on the non-

resident defendant's contacts with the forum state rather than with " . . . persons who reside there." *Walden*, 134 S. Ct. at 1122.

When the underlying controversy is shown to have an *"affiliation"* between the forum and the underlying controversy, and the controversy relates to the defendant's activities (which are continuous and substantial), the defendant will be and should be subject to the specific jurisdiction of the forum. *Walden*, *Id.*; *Goodyear Dunlop Tires Operations, S.A. Brown,* 564 U.S. 915, 919 (2011). It has, until now, been the view that the *"affiliation"* requirement pertains to the defendant's activity in the forum *or* an occurrence in the forum, justifying a State's regulation of the defendant's activities. *Id.*

> Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to specific jurisdiction. See, *e.g.*, *World-Wide Volkswagen*, 444 U.S., at 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (where "the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in [several] 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" (emphasis added)).

Goodyear Dunlop Tires Operations, S.A., supra., 564 U.S. at 927.

What is critical to jurisdictional analysis is the nature of the contacts between the defendant and the forum, and whether the underlying controversy relates to or arises out of the defendant's forum activities. *Burger King Corp., supra.* 471 U.S. at 476-477. And here, there is little dispute that the controversy—a products liability claim—relates to the negligent marketing of Plavix as a defective product. The record below clearly showed the distribution of the same product and the use of the same marketing practices in virtually every state in which a plaintiff resided. Undoubtedly, therefore, a rational affiliation existed and it was quite predictable that Bristol-Meyers Squibb would be subject to litigation in California.[2]

Despite the rational and appropriate predicate for obtaining specific jurisdiction and deciding that fairness abounds in litigating all the plaintiffs' virtually identical claims in California, the Petitioner and its Amici ask that the decision of the California Supreme Court be reversed—claiming that absent proof that each plaintiff suffered harm in the forum State,

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[2] In *Helicopteros Nacionales De Colombia v. Hall,* 466 U.S. 408, 411, n. 10 (1984) the Court mentioned but did not address the jurisdictional meaning of the phrases "arising out of" and "related to" the defendant's forum contacts. In fact, the Court queried whether or not these two phrases describe different connections, or what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists, or if there is a difference between these two phrases how it effects a challenge to specific jurisdiction. Fortunately, there is no need to decide this thorny issue because the present controversy clearly "relates to" the same marketing of Plavix which is claimed to have been done negligently and/or in a defective manner across the United States.

California cannot hale the defendant into court. While articulated slightly differently, each of the Petitioner's Amici make these arguments:

- A court should not exercise specific personal jurisdiction over a defendant with respect to claims of nonresident plaintiffs that did not arise out of acts or injuries within the forum State. [Amicus Brief of United States, p.11]
- Principles of "fair play and substantial justice" should prevent a forum State from hearing the claims of out-of-state plaintiffs even when the very same alleged wrongful conduct has caused similar harm to plaintiffs within the forum. [Amicus Brief of U.S., p. 13]
- The California Supreme Court's decision that the same in-state and out-of-state conduct established a substantial affiliation is an unwarranted extension of jurisdictional authority, because it reduces the ability of businesses to predict the jurisdictional consequences of their activities. *Id.*
- Allowing a forum State to hear cases brought by a non-resident plaintiff—despite the fact that the defendant's same business activities were substantial and continuous in the forum and in Plaintiff's home state—would impair trade interests on the part of foreign companies. [Amicus Brief of U.S., p. 14]
- Allowing an injured non-resident plaintiff to file an action against a manufacturer that distributes the same (allegedly) defective product in the forum and elsewhere would

impermissibly sever the connection due process requires between the place of the defendant's conduct and the place where it may be sued for that conduct. [Amicus Brief, Product Liability Advisory Counsel, p. 2 and Amicus Brief of the Chamber of Commerce, p.3]

- Unless the defendant's in-forum conduct is the proximate cause of the plaintiff's injury or loss in the forum, there is no grounds for specific jurisdiction; absent "suit related conduct" a defendant cannot be sued in the forum state. [Amicus Brief, Product Liability Advisory Counsel, p. 7; Amicus Brief, Chamber of Commerce, p. 5]

Each of these arguments ask the Court to turn on its head the following principled statement: "[w]e have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum state". *Walden*, *supra.* 134 S. Ct. at 1122. The Amici argue that jurisdiction can only be obtained upon proof that the defendant's in-state conduct caused harm to the plaintiff in the same state. If the Court accepts the Petitioner and its Amici's arguments, then it will foster disastrous results for the American consumer. Here are just three examples of the untoward results of the establishment of such a narrow and unreasonable definition of specific jurisdiction:

1. In the instant case it would mean that a California resident who bought the product in California, but then moved to Florida and suffered injury in Florida from the product

could not sue in California or Florida. Why? Because the Petitioner and its Amici would require the coalescence of "suit related conduct"—defined as the defendant's activities and the injury—in the same forum to obtain jurisdiction.

2. If a consumer purchased a used car in New Jersey and suffered injury in New Jersey because of a defect in the car, but it turned out that the car was sold as a new product by the defendant manufacturer in Ohio, according to the Petitioner's Amici the consumer would not be able to obtain jurisdiction over the manufacturer in New Jersey—because the defendant released the product for sale in Ohio.

3. If an allegedly defective motor manufactured by a foreign defendant is imported and marketed in the forum state by its wholly owned U.S. subsidiary, specific jurisdiction is not obtained for a breach of warranty, even though the warranties are shown to have been written by the parent corporation for delivery in the forum state. Specific jurisdiction is not obtained absent proof that the foreign defendant either intended to sell the product in the forum or that the subsidiary was the parents alter ego.[3]

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[3] *Williams v. Yamaha Motor Co.,* 2017 U.S. App. LEXIS 5210 (9th Cir. 2017). While the appellate court did not mention the actions of YMC in preparing the warranties, these "related to" activities were carried out by YMC. *See* the Yamaha Owners Manual confirming it was written by the foreign manufacturer

The end result of this proposed narrow and unreasonable restriction upon courts of general jurisdiction will be that thousands and thousands of consumers will be denied access to the courts in their home state or another state where the manufacturer provides a significant distributive market. And, if a consumer wants to sue a manufacturer, he or she will be forced to file suit in the manufacturer's home state. Undoubtedly, the product manufacturers of the world will welcome this outcome because it will further deter lawsuits and it will allow manufacturers to choose a state of incorporation with the least favorable substantive law for the victims of their defective products.[4]

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and intended to be delivered to California buyers: www.yamaha-motor.com/assets/service/manuals/2005/LIT-a8626-05-85_1022.pdf. This holding is alarming because virtually every non-U.S. manufacturer of motor vehicles uses a similar marketing and importation strategy; if this holding represents the limits of specific jurisdiction then millions of Americans may have lost the privilege of seeking redress against foreign auto manufacturers—providing them a distinct advantage over domestic car manufacturers. Further, if this holding is extended to U.S. manufacturers, these companies will argue that if they placed their product in the stream of commerce outside the forum state, that state does not have personal jurisdiction. See, *Tarver v. Ford Motor Co.*, 2016 U.S. Dist. LEXIS 167363 (W.D. Okla. Dec. 5, 2016), rejecting this very argument.

[4] With respect, while the Product Liability Advisory Counsel's Brief castigates the result of this case as promoting "forum shopping", if the Court accepts the Amici's definition of specific jurisdiction, it will allow for significant corporate forum shopping. We foresee that if the Court adopts the rule that injured consumers cannot file an action against a nationally distributed product manufacturer in the plaintiff's home state without evidence that (a) the injury occurred in the forum and

B. Predictability and Fairness Dictate That Foreign Manufacturers Remain Subject to Specific Jurisdiction When They Have Purposefully Availed Themselves of the Forum's Market Place by Distributing Their Allegedly Defective Products in the Forum Regardless of the Situs of Distribution of the Injury Producing Product or the Situs of the Injury.

We respectfully submit that there is no legal justification to restrict a nationally distributed product manufacturer's obligation to defend its product's safety to (1) its "home state" and (2) the forum where it first placed the product into the national stream of commerce and the injury arose in that same stream (state). Instead, in recognition that specific jurisdiction is founded upon the defendant's conduct and connection with the forum state—which demonstrates predictability that the defendant may be haled into court in the forum—the boundaries of specific jurisdiction should remain welded to evidence that depositing a product into the stream of commerce will result in the intentional distribution of the product in the forum. *World-Wide Volkswagen Corp., supra.,* 444 U.S. at 297-298.

Stated more simply, the formula for specific jurisdiction should begin with the "denominator",

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(b) *the* injury producing product was released by the defendant in the forum, it will require many consumers to file suit in the defendant's home state. That result will allow manufacturers to engage in massive corporate forum shopping by shifting their original state of distribution to one with the most favorable tort reform law and to reincorporate to a home state with substantive laws more favorable to defendants.

which is defined as proof that the corporate defendant has purposefully availed itself of the privilege of marketing its products in the forum State in a regular and continuous fashion. Once the denominator is established (*i.e.*, "the regular and anticipated flow of products from the manufacture to distribution to retail sale": *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.,* 480 U.S. 102, 112, 115, 107 S. Ct. 1026, 1034 (1987) (Brennan, J., concurring in part and concurring in judgment), then the fairness elements should factor into the nominator—to justify a forum court accepting jurisdiction.). The numerating factors should continue to include but not be limited to any one of these facts: (1) the similarity of the gravamen of the forum controversy and the claim raised by any out-of-state plaintiff, or (2) the relationship between the injured plaintiff's claim and the defendant's activities in the forum, or (3) the affiliation or similarity of the marketing of the product in the forum state and other states, or (4) the foreseeability that the distribution of the product in one state will lead to its use and injury in another state (*e.g.*, the marketing volume of the product and the defendant's distribution practices, the portability of the product, or the awareness that the product may cause harm.) *Book v. Voma Tire Corp.,* 860 N.W. 2d 576 (Iowa 2015) (relying upon precedent from this Honorable Court.)

Fairness must remain the crux of the minimum contacts analysis. Is it unfair to compel a manufacturer selling thousands and thousands of products nationwide to defend its allegedly unsafe design in a state where its product was sold—regardless of the state in which the injury occurred—or in a state

where its product was used and injury occurred—regardless of where the product was released into the stream of commerce? We think not and we ask the Court to both affirm the decision below and announce a definition of specific jurisdiction which accounts for the marketing practices of product manufacturers in the United States.

CONCLUSION

The judgment of the California Supreme Court should be affirmed and the Court should further clarify the factors essential to finding specific jurisdiction.

Respectfully submitted,

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