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No. 16-466

IN THE

Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
PETITIONER,

v.

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

On Writ of Certiorari to the
Supreme Court of California

BRIEF OF AMICUS CURIAE ALAN B. MORRISON, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Alan B. Morrison is an associate dean at George Washington University Law School, where he teaches personal jurisdiction, as part of his civil procedure course, and the basic constitutional law course. He is filing this brief because he is frustrated by the incoherence of this Court's doctrines relating to personal jurisdiction and with his inability to provide his students with a rationale for the Court's decisions. He has concluded that the Due Process Clause of the Fourteenth Amendment has proven a wholly unsatisfactory answer to the question of whether a state may constitutionally require an out-of-state business to defend a lawsuit brought in that state. Instead, this brief argues that this Court's opinions under the Dormant Commerce Clause, with its focus on possible undue burdens on out-of-state businesses from being forced to defend an action in a particular state court, is a much surer source of a proper balance in this area.

SUMMARY OF ARGUMENT

The Due Process Clause should no longer be used to decide whether a state may bring an out-of-state defendant into its courts. There is no textual basis using that Clause for this purpose, and the

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[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than amicus has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

first case to rely on it, *Pennoyer v. Neff*, 95 U.S. 714 (1877), provided no analysis for its conclusion that the then-recently enacted Fourteenth Amendment had any logical or other connection with the personal jurisdiction question presented.

A further problem with this Court's Due Process approach to personal jurisdiction is the sharp doctrinal divide that this Court has created between general and specific jurisdiction, with no textual basis for it. Moreover, as this case shows, the world of commerce is not so neatly divided, and creating two air-tight categories results in decisions that are inconsistent with the rationale for this Court's decisions following *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The terms "general" and "specific" do not appear in that decision, which properly focuses on the basic question of whether requiring International Shoe to defend itself in the State of Washington would be "an unreasonable or undue procedure." *Id.* at 320.

It is in the application of that distinction, especially in the Court's most recent personal jurisdiction decisions in which it has drawn sharp, and we believe, artificial lines between general and specific jurisdiction, that have produced results that cannot be reconciled with the many cases upholding jurisdiction after *International Shoe.* Perhaps the clearest evidence that the recent decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), are out of step with the understanding of business defendants, as well as plaintiffs and the lower courts, is that the

US corporate parent in *Goodyear*, as well as the wholly-owned subsidiary in *Daimler*, never contested personal jurisdiction over them. *Goodyear*, 564 U.S. at 918; *Daimler*, 134 S. Ct. at 758. However, under this Court's "at home" test enunciated in those cases, there was probably no general jurisdiction over either non-objecting defendant, and there was no possible claim for specific jurisdiction. However, there is nothing in *International Shoe* or elsewhere in the Constitution that would prevent a state court from adjudicating the claims in those cases against the parent in *Goodyear* in North Carolina or the subsidiary in *Daimler* in California, yet that is the seeming result of the recent creation of artificial and unworkable dividing lines between the Court's extra-constitutional categories of general and specific jurisdiction.

Abandoning Due Process would not leave businesses open to being dragged across the country to defend claims in locations where neither they nor the claims against them have any connection. A state that sought to do that would be met with the well-established defense that the Dormant Commerce Clause does not permit a state to impose undue burdens on out-of-state businesses engaged in interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Separating Due Process from Dormant Commerce Clause claims is precisely the approach that this Court took in *Quill Corp. v. North Dakota*, 504 U.S. 298, 309-16 (1992). This Court abandoned the Due Process objection that it had sustained as an alternate ground in the prior, nearly identical case

of *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), but affirmed the prior result on the ground that North Dakota's law violated the Dormant Commerce Clause. As this brief demonstrates, the Dormant Commerce Clause is a correct and more tailored approach to these issues and will provide a clearer, easier to apply, and more coherent basis for deciding whether a state has gone too far in requiring an out-of-state business to defend a claim in its courts.

ARGUMENT

A. THE COURT SHOULD NO LONGER USE THE DUE PROCESS CLAUSE TO DETERMINE THE CONSTITUTIONALITY OF STATE COURT ASSERTIONS OF PERSONAL JURISDICTION.

1. *The Lack of Textual Basis.*

The Due Process Clause of the Fourteenth Amendment provides "nor shall any state deprive any person of life, liberty or property, without due process of law." For almost 140 years, beginning with *Pennoyer v. Neff*, 95 U.S. 714 (1877), this Court has relied on that Clause to adjudicate the efforts of states to expand the reach of their courts. But the assertion that it is the Due Process Clause that forbids states from reaching beyond their borders was an almost offhand conclusion, not justified by the text of the Clause, the opinion, or any of the Court's prior precedents.

This is what the Court said in finding that the Due Process Clause is the basis of the limitation:

> Since the adoption of the Fourteenth Amendment to the Federal Constitution [in 1868], the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.

95 U.S. at 733. According to the Court, the words Due Process "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Id.* But the Court did not further elaborate – based on text or even history – why the substantive power of a state court to exercise judicial authority over a defendant is found in these "rule and principles."

There is no dispute that the Due Process guarantee assures that protections that are plainly procedural in nature, such as notice and a meaningful opportunity to be heard, fall under it. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). They are procedural because they come within the term "process," and the question in specific cases is whether a party received all the "process," *i.e.* procedural protections, that are due under the circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The question of whether a state court may enter a valid judgment against an out-of-state defendant is of a different variety. No matter whether a defendant has received actual notice of the proceeding and is given every imaginable means of being heard before a lawfully appointed judge, with the right to counsel and to call witnesses and subpoena evidence, the defendant may still object that the state court is attempting to exercise power over that defendant that it does not have. In that situation, the objection is not procedural, but is substantive, because no amount of process can cure it. *See Kerry v. Din*, 135 S. Ct. 2128 (2015) (all Justices agreeing that Due Process must be provided only when there is some recognized substantive right to be protected). When personal jurisdiction is the issue, the proper source of that right is not the Fourteenth Amendment itself, but, as amicus argues below, the Dormant Commerce Clause.[2]

This is not to suggest that *Pennoyer* reached the wrong result. The default judgment against Neff was almost certainly void because the plaintiff

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[2] Over vigorous dissents, the Court has also relied on the Due Process Clause to attempt to control punitive damages, with line drawing difficulties not dissimilar to those for personal jurisdiction. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429-439 (2003) (Scalia, Thomas, & Ginsburg, JJ, dissenting). The one aspect of *State Farm* which did permit sensible law drawing – excluding harms that occurred outside the state from the calculation, *id*. at 421-22 – could readily be achieved through a Dormant Commerce Clause analysis of the kind proposed in Section B.

Mitchell made no effort to assure that Neff had notice of the lawsuit or of the sale of Neff's property following the default judgment against him. 95 U.S. at 719-20. As a result, the attempt at notice was no more than "a mere gesture," because the "means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

The seminal personal jurisdiction case post-*Pennoyer* is *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), where the Court expanded the situations in which a state could exercise personal jurisdiction over an out-of-state party, but provided no further justification that Due Process was the source of that protection. The company had argued "that its activities within the state were not sufficient to manifest its 'presence' there and that in its absence the state courts were without jurisdiction, [and] that consequently it was a denial of Due Process for the state to subject appellant to suit." *Id.* at 315. This Court simply accepted the Due Process premise, but found it was satisfied because defendant had "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice." *Id.* at 316. Again, as in *Pennoyer*, there is no discussion of why the Due Process Clause creates these limits on state power. And, no subsequent case has questioned the applicability of the Due Process Clause to state court personal jurisdiction, nor elaborated on the basis for it.

2. The Current Test is Dysfunctional.

In addition to its questionable pedigree, the Due Process minimum contacts test has been re-formulated into the dubious question of whether the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State. . . ." *J. McIntyre Machinery, Ltd., v. Nicastro*, 564 U.S. 873, 877 (2011) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). In *McIntyre*, a British manufacturer sold a three-ton, shearing machine with a "massive cutting capacity," costing $24,900, to a scrap metal dealer in New Jersey, whose employee was injured by the machine and sued McIntyre in state court there. 564 U.S. at 894 (Ginsburg, J., dissenting). McIntyre UK had sold its products in the United States through an exclusive distributor in Ohio. *Id.* at 878-79 (plurality opinion). The machine in question was one of no more than four that were ever sold in New Jersey, and there was no evidence that McIntyre "targeted" the state for business. *Id.* at 877-79. On those facts, the Court set aside the ruling that the state court had personal jurisdiction over the manufacturer because of a lack of purposeful availment with New Jersey regarding this machine. There are three major problems with the purposeful availment formula and the holding in *McIntyre*.

First, the result is very difficult to reconcile with one aspect of another international products liability case, *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The holding in *World-Wide Volkswagen* – that the dealer in New York who sold the allegedly defective car and the

regional distributor for the New York area cannot be sued in Oklahoma for injuries occurring there – is not problematic. But, like the dog that did not bark for Sherlock Holmes,[3] there were two other defendants in *World-Wide Volkswagen*, the German manufacturer and the importer, who did not contest jurisdiction in Oklahoma, even though there was no claim that there was any direct connection between them, the plaintiffs' injuries, and that state. Those defendants had every incentive to avoid suit in an inconvenient and perhaps plaintiff-friendly state court, but they never claimed that the state court did not have personal jurisdiction over them. That was almost certainly because they concluded that a company that sells its products without geographic restrictions throughout the United States can be sued in any state where their product causes injuries based on a claim that it was defectively designed or manufactured.

The problem is in reconciling that sensible result with a finding of a lack of personal jurisdiction in *McIntyre*. Indeed, applying the rationale of *International Shoe*, most students find the assertion of personal jurisdiction over the manufacturer of an immobile shearing machine for causing an injury in New Jersey at least as appropriate and fair as a plaintiff seeking damages in Oklahoma from a defective automobile that was driven a thousand miles from where it was

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[3] Arthur Conan Doyle, *The Adventure of Silver Blaze*, *in The Complete Adventures and Memoirs of Sherlock Holmes* 184 (Bramhall House ed. 1975) (1892).

purchased and across the ocean from where it was manufactured.

Students are even more perplexed when the Due Process comparison is made with the outcome in *Burnham v. Superior Court*, 495 U.S. 605 (1990). Mr. Burnham, who was recently separated from his wife in New Jersey, went to California for three days, mainly to visit their children. While he was there, he was personally served with process in his wife's suit for divorce, spousal support, and custody of their children. Students accept the Court's unanimous conclusion (albeit with no opinion supported by five Justices) that the California courts had jurisdiction in the case, mainly because of the common law tradition validating in state service, coupled with the fact that every state would reach the same result as a matter of state law. What students cannot accept is that the Court dismissed the suit against McIntyre for lack of personal jurisdiction over the claim based on the sale of its dangerous machine, while allowing the divorce claim against Mr. Burnham to be heard.

Second, the stated purpose of these Due Process protections is to assure 'traditional notions of fair play and substantial justice" are not offended by state court assertions of personal jurisdiction. *International Shoe*, 326 U.S. at 316. Perhaps because of the highly subjective nature of those goals, coupled with similar problems with the "purposeful availment" test, it is very difficult to explain to students why assertions of jurisdiction in cases like *McIntyre* are unfair to the defendant. Although the Court never said where in the United States the defendant in *McIntyre* could be sued

over a defective machine, it would at least be in Ohio where its distributor for the entire country was located and to which the manufacturer presumably sent the machines purchased in this country. 564 U.S. at 878. If this British company could be sued in Ohio, or in other states where it sold more than one machine, or in Nevada where it successfully solicited business from the owner of the plant where Nicastro worked, it is almost impossible to explain why it was "unfair" and contrary to principles of "substantial justice" for it to be sued in New Jersey for damages caused there, even if the machine arrived there via its Ohio distributor. *Id.* at 895. And if it could not be sued anywhere in the United States, students cannot understand how that comports with *International Shoe* and the expansion of personal jurisdiction to fit the modern commercial world.

Third, the purposeful availment approach has transformed what should be a simple threshold inquiry into a major additional round of litigation, almost wholly unrelated to the merits. Consider the facts in *McIntyre* and what a plaintiff must do now in a case in which the defendant moves to dismiss for lack of personal jurisdiction. Plaintiff's lawyer would have no choice but to embark on extensive discovery from the defendant (which was hoping to get out of the case, at least in part to avoid any discovery) to learn about all its connection with the forum state, as well as from the distributor and plaintiff's employer. Given the Court's focus on the lack of facts to support jurisdiction in *McIntyre,* especially in the concurring opinion of Justices Breyer and Alito,

plaintiff's counsel would be wise to leave no stone unturned and would seek to gather at least the following information: all sales in the United States and especially in New Jersey; all McIntyre UK personnel in the United States; all U.S. advertising and promotional activities; the company's service and warranty program for the machine at issue; and by whom and by what route the machine at issue was delivered to the place where the injury occurred. By contrast, as explained in Section B, relying on the Dormant Commerce Clause to decide personal jurisdiction would raise very few factual issues and create very little need for discovery because the question would be a much simpler and essentially generic inquiry: does the exercise of jurisdiction over the manufacturer of a dangerous machine brought into the state impose on an undue burden on interstate or, in *McIntyre,* foreign commerce?

3. The Divide Between General & Specific Jurisdiction Is Without Textual Basis and Is Unworkable.

Finally in an effort to clarify and perhaps simplify the area, the Court has recently divided the world of personal jurisdiction into two rigid categories – general and specific – but that has created far more problems than it has solved. General jurisdiction allows the defendant to be sued on any claim, no matter where the allegedly wrongful conduct occurred, whereas specific jurisdiction applies only if the claim arose in or was related to the jurisdiction in which the case was brought. As set forth in *Goodyear* and *Daimler*, a corporation is subject to general jurisdiction where

it is "at home," which includes its place of incorporation and principal place of business – and possibly nothing more. *Goodyear*, 564 U.S. at 919; *Daimler*, 134 S. Ct. at 760-61. While this at least assures that there is some state(s) where every US corporation can be sued, that will not be true for most non-US corporations.

Under this approach to personal jurisdiction, defendants may not be sued anywhere besides their home, unless there is a specific connection between the claim and the jurisdiction in which the suit was filed. Many cases, such as the auto accident in *Hess v. Pawloski*, 274 U.S. 352 (1927), are easy to decide, but others, such as *World-Wide Volkswagen, McIntyre,* and this case, have no clear answers. The current uncertainty, which has been going on for more than 30 years, is not a temporary problem, but one that is almost certain to continue, given the complexity of our economy and the multiple ways in which businesses are organized. And this does not take into account the impact of the Internet, which will vastly magnify the difficulties of connecting the plaintiff's claim and the forum. *See McIntyre*, 564 U.S. at 890-92 (Breyer, J., concurring); Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs"*, 100 Cornell L. Rev. 1129, 1157-61 (2015).

This division by the Court is also inconsistent with the apparently settled expectations of large corporate defendants and their sophisticated counsel. In three personal jurisdiction cases before this Court – *World-Wide Volkswagen, Goodyear,* and *Daimler* – defendants

did not contest aspects of personal jurisdiction on which they would now have a substantial chance of winning under the new approach. In *World-Wide Volkswagen,* the German manufacturer was plainly not "at home" in Oklahoma, and it is likely that the flaws in design and manufacturing defects that caused the injuries to plaintiffs did not "arise" in Oklahoma. For those reasons, the automobile maker would argue today that there is an insufficient relation to that state for suit to be brought there, even though the accident, in which the plaintiff's car burned its passengers, occurred in Oklahoma. At the very least, defendant manufacturers in similar cases will now have a major litigable issue unrelated to the merits, on which considerable discovery is likely to be required.

Similarly, in *Goodyear*, suit was brought in North Carolina state court against the parent company, an Ohio corporation, as well as three foreign subsidiaries. 564 U.S. at 918. The claim was based an accident in France in which allegedly defective tires, made by the subsidiaries outside the United States, exploded, causing the deaths of the plaintiffs' children, who were North Carolina residents. Amicus agrees with that North Carolina erred in asserting personal jurisdiction over the foreign subsidiaries, under whatever test is proper.

What is more significant is that the parent company made no objection to personal jurisdiction over it, even though it was not at home in North Carolina and it had done nothing in that state that was in any way connected to the claims of the plaintiffs. Not surprisingly, the record in *Goodyear*

does not reflect why the parent company did not ask this Court to find that the North Carolina courts lacked personal jurisdiction over it. The most likely reason is that Goodyear simply assumed that, because it was a major supplier of tires in North Carolina, it could be sued on any claim that anyone had against it relating to its tires, no matter where the claim arose, just like the manufacturer defendant in *World-Wide Volkswagen* assumed that it could be sued in Oklahoma over a defective car that caused injuries in that state. However, under this Court's current general and specific jurisdiction tests, Goodyear USA, the parent corporation, would surely contest personal jurisdiction today, not just in any case where the tires at issue were made by a subsidiary, but even if the defectively designed or manufactured tires that injured the plaintiffs were its own, unless they were actually made or sold in the state where the accident took place.

Daimler is the third case illustrating how the new rigid rules on personal jurisdiction have unsettled prior assumptions of litigants, scholars, and lower courts. At issue there were claims that an Argentine subsidiary of a German corporation, allegedly acting in collaboration with Argentine officials, intentionally inflicted serious physical injuries on plaintiffs, all of whom were citizens of Argentina. 134 S.Ct at 751-52. The plaintiffs sued only the parent and argued that California could assert general jurisdiction over it by treating its wholly-owned U.S. subsidiary as its agent in California. *Id.* at 752. The parent contested personal jurisdiction throughout the case, but

conceded that the U.S. subsidiary, which was incorporated and had its headquarters in New Jersey, was subject to general jurisdiction in California, presumably because it did substantial business in the state. This Court found that there was no jurisdiction over the parent, a holding that is correct and does not create any problems.

The difficulty arises from the Court's division of all personal jurisdiction into two quite constricted departments and its impact on future cases. For example, *Daimler*, read as petitioner does, would rule out general jurisdiction except in the defendant's home states, no matter how much business related to the product causing the injury the defendant did in the forum state. That alone would be harmful enough, but given *McIntyre* and the positions taken by petitioner and its amici in this case, there might also not be specific jurisdiction if, for example, the plaintiff purchased the product from defendant in state A and later moved to State B, where plaintiff's injuries become manifest.

There is one other quite common situation that may make obtaining specific jurisdiction even more difficult if the Court were to agree with petitioner here. Many foreign manufacturers, for legitimate reasons having nothing to do with personal jurisdiction, establish wholly-owned U.S. subsidiaries through which all of their sales are made in this country for products manufactured abroad. Under the Court's current approach, with the parent not at home anyplace in the United States, and with the claim based on defective designs or manufacturing done abroad by the

parent, the parent may not be able to be sued *anywhere* in this country on purely state law claims, even for injuries sustained here. Moreover, even if the plaintiff has a valid claim against the U.S. non-manufacturing subsidiary, over which it *can* obtain personal jurisdiction someplace in the United States, discovery will be needed against the non-U.S. parent, which will be at least very complicated, if it can be done at all.

There is yet another complication that makes personal jurisdiction even more problematic in many of these cases. As the records in *Daimler* and *World-Wide Volkswagen* show, even the U.S. subsidiary (importer) does not sell automobiles to consumers: they are sold through truly independent dealers. Hence, after *McIntyre* and the arguments petitioner is making in this case, the manufacturer's subsidiary may also be able to avoid being sued where the plaintiff was injured. Moreover, although the defendants in *McIntyre, Goodyear,* and *Daimler* were foreign corporations, the principles that the Court has enunciated appear to apply equally to companies incorporated in the United States. *See McIntyre*, 564 U.S. at 885. If the Court follows through on this approach to general and specific jurisdiction, it will have created a roadmap by which major U.S. manufacturers of potentially dangerous products can effectively insulate themselves from suits in state courts except in their home states.

If the Due Process Clause, or some other part of the Constitution, contained the words general and specific, modifying personal jurisdiction, or if the Court had used that method

of adjudicating constitutional defenses to assertions of personal jurisdiction from the outset, the Court might be justified in retaining them. But neither is true, and in fact, the terms first appeared in an opinion of this Court in footnotes 8 & 9 in *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 (1984), which cited to law review articles that used them. Moreover, the stringent limits on general jurisdiction embodied in the "at home" test for general jurisdiction date only from 2011 in *Goodyear*. The current dichotomy between specific and general jurisdiction used in determining whether personal jurisdiction over a business defendant is permitted, and the implications for the specific jurisdiction cases that will flow from those rulings, further demonstrate why the Due Process Clause is not a proper basis on which to decide constitutional questions relating to personal jurisdiction.

B. THE COURT SHOULD DETERMINE THE CONSTITUTIONALITY OF STATE COURT ASSERTIONS OF PERSONAL JURISDICTION UNDER THE DORMANT COMMERCE CLAUSE.

Abandoning the Due Process Clause in personal jurisdiction cases will not result in the end of limits on state court assertions of personal jurisdiction. In its place, amicus urges the Court to utilize the tests developed under the Dormant Commerce Clause that prevent states from imposing unreasonable burdens on interstate and foreign commerce. Although subjecting a business to suit in the courts of a state in which it is not regularly doing business is not generally described

as the state attempting to regulate the conduct of that business, that is the impact of a judgment against an out-of-state defendant in a lawsuit: the state is effectively ordering the defendant to conduct its business in a certain manner or, as in this case, to pay for failing to have done so. *See* United States Brief 22, recognizing regulatory impact of state court adjudications. Thus, because California may constitutionally regulate petitioner's sale of Plavix in California, there should be no Commerce Clause barrier to a California court entering a judgment against petitioner that has that regulatory effect regardless of where the Plavix was sold or used.

The idea that the Dormant Commerce Clause is relevant to the issue before the Court is hardly a new concept. Indeed, prior to *International Shoe,* defendants that objected to state courts entertaining suits against them relied principally on claims of undue burden under the Dormant Commerce Clause. *See Denver & R. G. W. R. Co. v. Terte*, 284 U.S. 284 (1932) and the cases cited therein. Although the Due Process Clause was mentioned in that case, this Court found undue burden under the Formant commerce Clause for one railroad, but not the other, in resolving the issue of personal jurisdiction there.

Similarly, in *International Shoe* itself, the Dormant Commerce Clause was part of the basis of the company's objection:

> Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not

> detain us. For 53 Stat. 1391, 26 U.S.C. § 1606(a) . . . provides that 'No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.' It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it.

326 U.S. at 315. The "statute" in the quoted passage refers to the law imposing substantive liability for unemployment taxes on International Shoe, which was also a question resolved against the company as was its personal jurisdiction defense. *Id.* at 320-21. Having found that the state had the power to assess unemployment taxes against International Shoe, it is almost inconceivable that the Constitution would not permit the state to collect that tax in its own courts, rather than having to sue the taxpayer in the company's home state courts. Put another way, if there was no Dormant Commerce Clause objection to a state statute imposing an unemployment tax on International Shoe, and seeking to collect it in that state's courts, it is amicus's position that there can be no constitutional objection to suing an out-of-state defendant in other cases in which the state

may regulate the conduct of the defendant consistent with the Dormant Commerce Clause.

The proper relation between the Due Process Clause and the Dormant Commerce Clause can be seen in two cases in which states sought to impose an obligation on out-of-state mail-order businesses to collect the use tax that is payable by the in-state purchaser for goods sent from out-of-state. In both cases, *National Bellas Hess Corp. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), it was agreed that neither the state in which the purchases were made, nor the state into which the product was sent, could constitutionally collect a *sales* tax on the product. It was also agreed that the state into which the product was sent may collect a *use* tax from the purchaser in an amount equal to the sales tax that the state would have collected if the sale had been made by an in-state merchant. The question presented in both cases was whether the state seeking to collect the use tax could require the out-of-state seller to collect that tax for it under both of those Clauses.

In *National Bellas Hess*, the Court discussed the relationship between the two Clauses as follows:

> National argues that the liabilities which Illinois has thus imposed violate the Due Process Clause of the Fourteenth Amendment and create an unconstitutional burden upon interstate commerce. These two claims are closely related. For the test whether a particular state exaction is such

> as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar.

386 U.S. at 756. The Court then agreed that the state could not constitutionally impose such a requirement, without differentiating between the two grounds. *Id* at 758. Although the Court does not use either "procedural" or "substantive" to characterize the Due Process defense, the context makes it quite clear that the constitutional flaw was not procedural because the company made no complaints about a lack of notice or opportunity to contest the tax. *Id.* at 756. It simply argued that the state had no power to coerce it into collecting the tax, the precise kind of claim made in the Due Process personal jurisdiction cases in Section A. The three dissenting Justices disagreed with the majority on whether the state tax collection law had imposed a substantial burden on interstate commerce, without separately addressing the Due Process claim, although the language that it used to determine the lawfulness of the burden on commerce is reminiscent of language from personal jurisdiction decisions.[4] Yet nothing in the majority

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[4] "As the [majority] says, the test whether an out-of-state business must comply with a state levy is variously formulated: 'whether the state has given anything for which it can ask return'; whether the out-of-state business enjoys the protection or benefits of the State; whether there is a sufficient nexus: 'Some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'." 386 U.S. at 765 (Fortas, J., dissenting) (footnotes omitted).

opinion suggests that a purchaser who was unhappy with the quality of National's products, or was injured by them, could not sue the company in the courts of Illinois to recover the sales price or the damages for any resulting harm.

The same two objections to collecting a use tax were made 25 years later in *Quill*, with the same result, although only on Dormant Commerce Clause grounds. 504 U.S. at 318. In describing its prior decision on this issue, the majority observed that it ruled against the state in the earlier case because the out-of-state seller "lacked the requisite minimum contacts with the State," 504 U.S. at 301, the very terms used in *International Shoe*, 326 U.S. at 316, but not satisfied in *National Bellas Hess.* The majority then disagreed with the conclusion in *National Bellas Hess* that the two Clauses completely overlapped, in part because it noted that Congress can cure a Dormant Commerce Clause violation, but cannot fix the problem if there is a Due Process objection – at least when the issue is the power of the state to require an out-of-state business to comply with its laws. 504 U.S. at 305. It then went on to overrule the Due Process basis for striking down the law at issue in *National Bellas Hess*, relying in part on *International Shoe,* and *Burger King v. Rudzewicz*, 471 U.S. 462 (1985). *Id.* at 308. It nonetheless declined to overrule *National Bellas Hess* on Dormant Commerce Clause grounds, in part for reasons of stare decisis and in part because Congress was now able to deal with the situation once the Due Process basis was removed. *Id.* at 318; *see also id.* at 320 (Scalia, J., concurring). Thus, *Quill* establishes that a state

law can be consistent with Due Process, but violate the Dormant Commerce Clause because the inquiries are related, but separate.

The validity of a state law like that in *Quill* requiring the collection of taxes owed by others is, to be sure, different from the question of whether a state may require an out-of-state defendant to respond to a claim filed in its courts. Nonetheless, there are two sets of reasons why the answers to both questions can and should be determined by application of Dormant Commerce Clause jurisprudence and not under the substantive aspect of the Due Process Clause on which this Court has traditionally relied. First, as demonstrated in Section A, *supra,* the Due Process personal jurisdiction doctrine is without basis in the Constitution, and it has produced (a) decisions that are difficult to apply, (b) results that are difficult to justify in light of the stated purposes of the limits on personal jurisdiction, and (c) the need for extensive discovery on the threshold issue of whether there is specific jurisdiction, which will be required in all but the most routine cases. Second, as we now demonstrate, the Dormant Commerce Clause is a proper constitutional fit, it is relatively easy to apply, it produces sensible results in personal jurisdiction cases, and it generally will require little or no discovery to resolve.

Although this Court's decisions in cases such as *Goodyear, Daimler, World-Wide Volkswagen,* and *McIntyre* focus on the extent of the defendant's contacts with the forum state, each of the opinions makes clear that the Court's underlying concerns are with the potential adverse impact of upholding

personal jurisdiction on the ability of the defendant to engage in foreign or interstate commerce. *See also* United States Brief 2. That concern is at the heart of this Court's Dormant Commerce Clause jurisdiction, which, unlike the Due Process approach to personal jurisdiction, is derived from the words of the Commerce Clause itself. Within the strands of Dormant Commerce Clause jurisprudence, the proper Dormant Commerce Clause test to determine whether a forum state can exercise jurisdiction over a particular defendant is that in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Accordingly, to demonstrate that this approach is doctrinally sound, produces fair results, and can be applied with a minimal amount of discovery, amicus will apply it to this Court's most recent

significant personal jurisdiction cases, whether falling under general or specific jurisdiction. [5]

In *World-Wide Volkswagen*, there were four defendants, but for simplicity, focusing on the manufacturer and the dealer will illustrate how the Dormant Commerce Clause can properly resolve the personal jurisdiction question for both of them. Under the Dormant Commerce Clause, a court would ask whether Oklahoma could constitutionally regulate the conduct that was the basis of the claim in that case, for example, by passing a law prohibiting automobiles from operating in the state with certain design or manufacturing defects, regardless of where the car was manufactured or purchased. Under that law, the state could seek monetary penalties or a court order directing the recall or repair of non-conforming vehicles. Based on *Pike,* that law would not create an excessive burden on foreign commerce, as long as the covered defects were similar to those imposed on the manufacturer in other jurisdictions in which its products were sold. In that situation, a suit to collect those penalties, or obtain an injunction, could be brought against

[5] States may also violate the Dormant Commerce Clause by discriminating against out-of-state businesses under laws that literally or practically only disadvantage out-of-state businesses. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Although long-arm statutes apply only to out-of-state defendants, they do not fit within the Court's anti-discrimination rationale because their goal is to put in-state and out-of-state defendants on the same footing, not to disadvantage out-of-staters.

the manufacturer in the Oklahoma courts without violating the Dormant Commerce Clause.[6]

However, if Oklahoma sought to apply that law to a New York auto dealer who sold the car to the person driving it there, that would create very significant burdens on the dealer. Thus, in order to comply with that law, the dealer would have to, in effect, re-make and re-design every vehicle that it sold, no matter where it went in the United States. Under a Dormant Commerce Clause analysis, that burden would be clearly excessive, and the law could not be enforced against an out-of-state dealer. Returning to the personal jurisdiction issue, and using the Dormant Commerce Clause analysis in this brief, the state court would not have personal jurisdiction over tort or other claims against the dealer, but it would against the car's manufacturer. And, unlike under the *McIntyre* approach, there would appear to be little or no need for discovery to decide the motions to dismiss for want of personal jurisdiction by either the dealer or the manufacturer. Moreover, this approach would lead to results that are readily predictable, a goal that petitioner and its amici espouse.

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[6] The United States (Br. 24-25, n. 3) correctly observes that Plavix as well as many other consumer products are subject to federal rules that preempt different state laws. That observation is not a reason to deny California's assertion of personal jurisdiction here, but one to permit it, because the federal standards would eliminate the danger that California would apply a different substantive standard than would apply elsewhere.

In *Burger King v. Rudzewicz*, 471 U.S. 462 (1985), the out-of-state defendant was required to litigate a claim involving a contract that it signed with a Florida franchisor. To test the Dormant Commerce Clause approach, suppose that Florida passed a law imposing modest monetary penalties on all parties to a franchise agreement for failure to comply with its material terms without good cause. Under *Pike,* that law would not create any special burdens on interstate commerce that it did not impose on local businesses, and so would not be subject to a Dormant Commerce Clause objection. In such a case, the out-of-state party would have to defend the claim in the Florida courts, just as did the defendant in the actual *Burger King* case.

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987), is another personal jurisdiction case that could have been readily resolved in a sensible and fair manner under *Pike*, with much less difficulty than in the actual case, for which there was no majority opinion. The objecting party there was the maker of valves used in tubes for motorcycle tires. It was located in Taiwan and had sold its valves to a Japanese tube making company which in turn had sold them to the tire maker, which in turn had sold the tires that were the alleged cause of the plaintiff's injuries while riding his motorcycle. *Id.* at 106. The Due Process question in *Asahi* was whether the tube maker could continue with its cross-claims against the valve maker in the California state courts after all other claims and cross-claims had settled. Under *Pike,* the question would be, whether, under a hypothetical California law, the state could

dictate the standards which the Taiwan valve maker had to follow in California or be subject to monetary penalties or an injunction for failing to do so. The answer would surely be that the burden on that foreign company of following California law would be clearly excessive, although perhaps a different answer might be given if the valve maker was a US company whose products were sold to tube and tire makers throughout this country. Under the *Pike* approach, if that substantive burden could not be imposed under the Dormant Commerce Clause (domestic or foreign), then the valve maker could not be sued on that unenforceable obligation, even if the claim arose in a tort instead of a penalty enforcement case.

On the other hand, if *McIntyre* were viewed with a *Pike* lens, the result would almost certainly have been different. Thus, if New Jersey established substantive safety standards for shearing machines that were not preempted by federal law, McIntyre could not have objected to complying with them for its machines that ended up in New Jersey. That would be true whether it sold the machine directly or through a subsidiary or an independent distributor because either way any burdens would not be excessive in light of New Jersey's interests in protecting its citizens against all dangerous machines, no matter where they were manufactured. And if McIntyre had no Dormant Commerce Clause objection to the substantive standard, it could be sued in New Jersey state courts if its failure to comply with New Jersey's rules injured the plaintiff.

Goodyear and *Daimler* would have reached the same result under *Pike*, albeit by a different and much more direct route. Surely, North Carolina could not dictate the safety standards for foreign manufacturers applicable to tires not sold in North Carolina. *Goodyear*, 564 U.S. at 921. Nor could California dictate to the employees of an Argentine subsidiary of Daimler, what they may and may not do in Argentina, no matter how offensive California may find their conduct to have been. In neither case would any discovery be needed, and a motion to dismiss might not even need to be made because the excessiveness of the burdens that a California substantive standard would impose on Daimler would be obvious to all.

Of course, invoking the Dormant Commerce Clause will not automatically answer all personal jurisdiction cases involving a commercial defendant because there are still disputes about how to apply the Dormant Commerce Clause even if it is clear that it supplies the applicable governing rule of law. But compared to the difficulties that this Court, many other courts, law professors, and law students have with the current Due Process jurisprudence, using the Dormant Commerce Clause would be a vast improvement.

The superiority of a Dormant Commerce Clause approach to that of a Due Process focus on contacts and purposeful availment can be seen from the facts of a recent state sales tax case, which could easily be present in a personal jurisdiction context. In *American Business USA Corp. v. Florida Department of Revenue,* 191 So. 3d 906 (2016), *cert denied*, 2017 WL 670227 (2017), an

online flower business fulfilled its orders through independent flower shops in various states for delivery to the person designated by the purchaser. The issue in the actual case was whether the Dormant Commerce Clause precluded Florida from imposing a sales tax on flowers delivered out of state, and the Florida court upheld the tax. Suppose that instead of a tax dispute, the disputes were over (1) the quality of the flowers, (2) whether the flowers contained insects that infected the house of the recipient, and/or (3) the non-payment by the purchaser of the amount due. The purchaser and the recipient may not know whose flowers were delivered and/or the location of the online company (or its website operators) or the flower shop. Similarly, the online company may only know the name of the purchaser, but have no idea where that person lives or where the person was when the order was placed.

In that situation, asking whether any of the potential defendants "purposefully availed" themselves of any of the fora where they might be sued is a quest bound to fail because that question is meaningless and ill-suited for deciding whether the defendant can be sued in a particular jurisdiction. On the other hand, using the Dormant Commerce Clause would lead to the conclusion that there would be no barrier – no excessive burden – if the online seller were sued in the state court of the purchaser or recipient, or if the non-paying purchaser were sued where the online seller is located. And in answering those questions, the existing lines between general and specific jurisdiction would become irrelevant, and the issue

of personal jurisdiction could be resolved without the kind of extensive and costly factual discovery that *McIntyre* seems to compel plaintiffs to undertake.

Turning to this case, petitioner does not dispute that it can be sued in California for Plavix purchased and used there, even though it did not itself make the sale directly to those consumers and the drug was not manufactured there. It presumably makes that concession because it directed a significant portion of its efforts to sell Plavix to California residents and thus could be sued there by them, even after *McIntyre*. In addition, the parties agree, at least for these purposes, that the substantive standard that California will apply to determine whether petitioner's drugs are defective is the same for both the resident and non-resident plaintiffs. Therefore, petitioner's obligations to design, label, and manufacture Plavix do not vary depending on where the drug was sold or consumed. Moreover, petitioner does not argue that the existence of intermediaries who actually sell Plavix to consumers alters its legal obligations because it has exclusive control over the alleged causes of the drug being defective. The company nonetheless objects to being sued in California by persons who consumed the drug elsewhere.

Petitioner admits, indeed embraces, the fact that it can be sued in other states, where the non-California plaintiffs ingested Plavix. Thus, the question under *Pike* is whether forcing the company to defend against the 575 non-California plaintiffs in California, instead of in the many

other states where it would be sued, is a clearly excessive burden on commerce. However, because petitioner will have to defend against 86 claims in California, and therefore means being subjected to very significant discovery and probably several trials there, it is hard to understand how the additional burden of responding to the remaining claims there, rather than in other fora outside its home jurisdictions, can be considered "excessive."

But if the determination of excessive burden depends in part on the state's reasons for supporting the joinder of these claims in its courts, two are apparent. First, and most prominent, is California's desire to help its residents in their cases in its courts, by enabling them to join forces with plaintiffs from other states, who will also be benefitted by the joinder of these claims. That will create greater efficiency in discovery and in the briefing of the legal and factual issues that must be decided. Second, consolidating more cases in a single state, as California allows here, may eliminate the need for litigation elsewhere over where injured consumers may sue. For example, given petitioner's narrow view of where injured plaintiffs can sue, a consumer who lived in one state when Plavix was first prescribed, and moved to another during the course of the treatment, may be met with personal jurisdiction objections that only serve to delay the case and impose burdens on the plaintiff and the courts – no matter in which state the suit was filed.

Moreover, although petitioner does not acknowledge the potential impact of its position, a ruling adopting its theory could make it impossible

to bring nationwide class actions for economic damages, even those that meet the requirements of Rule 23. Thus, a victory for petitioner here would re-open *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which considered only Due Process objections from the plaintiff's perspective. Under petitioner's theory, because the defendant in had no connection with the forum for the claims of many, if not most, of that class, the case could not be maintained there. Because California's interests in joinder are reasonable and proper, and because petitioner is already defending 86 claims in this case, the burden from defending all these claims here may be less than defending them separately and surely cannot be considered as "clearly excessive" under *Pike*.

There is one final reason why a Dormant Commerce Clause approach is preferable to one relying on Due Process. As the *Quill* Court recognized, a ruling that Due Process permits or precludes a state from acting, leaves no role for Congress when the claims are all based on state laws. By contrast, as *Quill* also recognized, under the Commerce Clause, Congress has very significant powers to prevent states from imposing undue burdens on interstate and foreign commerce, or it can impose conditions on a state's exercise of powers that have an impact on commerce. That fact is quite significant in this situation where petitioner and its amici express concerns not simply over California's exercise of personal jurisdiction over non-resident plaintiffs, but over how it applies some of its rules and practices to the alleged unfair disadvantage of out-

of-state defendants. Unlike a Due Process approach, which is all or nothing, a Commerce Clause approach would enable Congress to condition state court jurisdiction over out-of-state defendants on compliance with reasonable rules and practices, if it concluded that these objections had merit.

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Amicus recognizes that he is asking the Court to make a major change in its personal jurisdiction jurisprudence based on his conclusion that a shift from a Due Process to a Dormant Commerce Clause analysis would produce fairer, simpler, and more coherent results. However, if the Court is not prepared to go that far, at least it should ask whether the Dormant Commerce Clause would preclude the forum state from directly regulating the conduct at issue if it had occurred in that state. If the answer to that question is "No," as it would be in this case, then there should be no bar to a state adjudicating a lawsuit raising the propriety of that same conduct even when it has injured the plaintiff elsewhere.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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