No. S-1-SC-37536

In the Supreme Court of the State of New Mexico

TODD FURMAN, ET AL.,
Plaintiffs-Respondents,

and

PATRICK A. CASEY, ET AL.,
Intervening Plaintiffs-Respondents,

v.

THE GOODYEAR TIRE & RUBBER COMPANY,
Defendant-Petitioner,

and

WALTER JAMES BYERS; THE NEW MEXICO DEPARTMENT OF TRANSPORTATION,
Defendants.

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-RESPONDENTS AND AFFIRMANCE

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INTRODUCTION/INTEREST OF AMICI CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in New Mexico. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ is concerned that, particularly in light of recent decisions by the Supreme Court of the United States that have contracted the scope of general personal jurisdiction, the restrictive scope of specific jurisdiction urged by defendants will leave injured victims of unreasonably dangerous products, including residents of New Mexico, without meaningful access to legal redress.

[1] Pursuant to Rule 12-320(D)(1) NMRA, counsel for all parties of record were given timely notice of AAJ's intent to file this Amicus Brief. No party has objected to the filing of this brief. In addition, pursuant to Rule 12-320(C) NMRA, counsel for Amicus states that no party or party's counsel authored this brief in whole or in part. No person, other than amicus curiae, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

AAJ addresses this Court regarding the important issue of personal jurisdiction over the defendant manufacturers or distributors in four product liability cases before this Court. In *Navarrete Rodriguez v. Ford Motor Co.*, 2019-NMCA-023, 2018 WL 6716038 (N.M. Ct. App. Dec. 20, 2018), Edgar Navarrete Rodriguez, a resident of New Mexico, was killed in a single vehicle accident in New Mexico when his Ford F-250 truck, purchased from a private seller in New Mexico, rolled over and the allegedly defective roof collapsed. *Id.* at ¶ 3.

In *Rascon Rodriguez v. Ford Motor Co.*, No. A-1-CA-35910, 2018 WL 7021969 (N.M. Ct. App. Dec. 21, 2018), several Mexican nationals were injured or killed in New Mexico when the rear tire on the Ford E-350 van in which they were travelling failed. The van was initially sold by a dealer in Kentucky; the tire, manufactured by defendant Cooper Tire, was purchased in Oklahoma and installed on the van in Mexico. *Id.* at ¶ 3.

In *Chavez v. Bridgestone Americas Tire Operations, LLC*, No. A-1-CA-36442, 2018 WL 7046630 (N.M. Ct. App., Dec. 21, 2018), a New Mexico resident was killed and his brother injured in an accident in Texas when an allegedly defective tire, manufactured by Bridgestone and purchased as a spare tire from a New Mexico car dealer, failed. *Id.* at ¶ 3.

In each case, the Court of Appeals upheld the district court's assertion of jurisdiction on the ground that defendant had consented to general jurisdiction in New Mexico courts by registering to do business here and appointing an agent for service of process. *See Navarrete Rodriguez*, at ¶ 32; *Rascon Rodriguez*, at ¶ 13; *Chavez*, at ¶ 13.

In *Furman, et al. v. Goodyear Tire & Rubber Co., et al.*, No. D-101-CV-201800697 (N.M. First Jud. Dist. Ct.), nonresident decedents were fatally injured in an auto accident in New Mexico. Plaintiffs filed suit against Goodyear asserting wrongful death claims based on strict products liability for defective design, manufacturing defects, and failure to warn. *See* Brief-in-Chief of Petitioner Goodyear Tire & Rubber Company On Specific Jurisdiction ["Goodyear Br."] 3. The First Judicial District Court ruled that Goodyear was subject to specific jurisdiction in New Mexico based on the company's other activities evincing its purposeful availment of the privilege of transacting business in this state. *Id.* at 9.

This Court granted review in these four cases to address Defendants' contentions that the assertion of jurisdiction violates due process.

AAJ agrees with and supports the position advanced by Plaintiffs that registration to conduct business pursuant to the New Mexico Business Corporation Act may be deemed consent to the general personal jurisdiction of New Mexico courts consistent with due process. AAJ also agrees with NMTLA as amicus curiae

in support of that position. AAJ addresses this Court solely with respect to specific jurisdiction.

AAJ respectfully submits that specific jurisdiction over Defendants in the four cases before this Court is consistent with the settled precedents of the Supreme Court of the United States and with due process. There is no basis for altering or imposing additional restrictions on those principles. Consequently, if this Court determines that jurisdiction may not be based on a defendant's registration to do business in New Mexico, AAJ suggests that the judgment below in *Furman* may be affirmed on the basis of specific jurisdiction. AAJ further suggests that the other three cases be affirmed on that basis or remanded to the district court for a determination of specific jurisdiction consistent with this Court's analysis.

I. NEW MEXICO COURTS CAN EXERCISE SPECIFIC PERSONAL JURISDICTION OVER A NON-RESIDENT CORPORATION BASED ON THE SALE OF THE CORPORATION'S INJURY-PRODUCING PRODUCT IN NEW MEXICO OR ON THE OCCURRENCE OF THE INJURY CAUSED BY THAT PRODUCT IN NEW MEXICO.

A. Settled U.S. Supreme Court Precedent Recognizes that State Courts May Exercise Specific Jurisdiction Over a Non-Resident Corporation Based on Its In-State Contacts Arising From or Related To the Controversy.

1. *The Supreme Court of the United States has consistently applied a two-pronged test to determine whether an exercise of personal jurisdiction comports with due process.*

In the most recent pronouncement by the Supreme Court of the United States regarding the limits of state court personal jurisdiction over nonresident defendants, *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137

S. Ct. 1773 (2017) [“*BMS*”], Justice Alito wrote for the 8-1 majority that the Court was breaking no new ground. Rather the Court’s “settled principles regarding specific jurisdiction control this case.” *Id*. at 1781.

For most of our history, personal jurisdiction was a matter of physical presence: A state could not hale a defendant into court unless the defendant was present within the forum state’s physical borders. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (citing *Pennoyer v Neff*, 95 U.S. 714, 733 (1878)). By the mid-twentieth century, the Court was forced to reckon with “changes in the technology of transportation and communication, and the tremendous growth of interstate business activity,” *Burnham v. Superior Court of California*, 495 U.S. 604, 617 (1990), dominated by corporate entities, whose physical presence is a legal “fiction.” *International Shoe*, 326 U.S. at 316.

In a “momentous departure from *Pennoyer*’s rigidly territorial focus,” *Daimler AG v. Bauman*, 571 U.S. 117, 128 (2014), the Court established that a state may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if that defendant has “certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *International Shoe*, 326 U.S. at 316 (internal quotation marks omitted). The primary focus thus shifted from state boundaries to “[t]he Due Process Clause [which] protects an individual’s liberty interest in not being subject to the

binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe*, 326 U.S. at 319).

The *International Shoe* opinion remains "canonical." *Daimler*, 571 U.S. at 126 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011)). Upon its foundation, the Court has developed a two-part due process test: "First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction." *Daimler*, 571 U.S. at 139 n.20. "Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case." *Id. See also Sproul v. Rob & Charlies, Inc*., 2013-NMCA-072, ¶ 9, 304 P.3d 18, 23 (applying this two-part test).[2]

The four cases before this Court clearly satisfy both prongs of this due process test.

[2] A somewhat simpler taxonomy divides the analysis into three parts: "First, the defendant must have 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State' or have purposefully directed its conduct into the forum State. Second, the plaintiff's claim must arise out of or relate to the defendant's forum conduct. Finally, the exercise of jurisdiction must be reasonable under the circumstances." *BMS*, 137 S. Ct. at 1785-86 (Sotomayor, dissenting) (internal quotation marks and citations omitted). *See also Navarrete Rodriguez v. Ford Motor Co.*, 2019-NMCA-023, ¶ 11 (employing this three-pronged test). The enumeration does not affect the outcome.

2. *The first prong asks whether the defendant has "purposefully availed" itself of the forum's laws and whether its contacts "arise out of or relate to" the litigation.*

In applying the first part of its test, the Court initially looks to "whether there was 'some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Goodyear*, 564 U.S. at 924 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Indeed, as the Court of Appeals of New Mexico has observed, "the requirement of purposeful availment" is the "central feature of minimum contacts" analysis. *Sproul*, 2013-NMCA-072, ¶ 16, 304 P.3d 18, 25.

There is no dispute in the cases before this Court that each of the manufacturing/distributing defendants has substantial contacts with New Mexico such that it has "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) (plurality opinion). The Court has indicated that "a defendant's placing goods into the stream of commerce 'with the expectation that they will be purchased by consumers within the forum State' may indicate purposeful availment." *Id*. at 881-82 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980)). *See also Goodyear*, 564 U.S. at 927 ("Flow of a manufacturer's products into the forum . . . may bolster an affiliation germane to specific jurisdiction."). Advertising directed at forum-state consumers similarly indicates purposeful availment. *Asahi*

Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 112 (1987) (plurality opinion); *cf. BMS*, 137 S. Ct. at 1778 (noting that Bristol-Myers "did not create a marketing strategy for Plavix in California.").

The facts alleged by Plaintiffs here more than satisfy the "purposeful availment" requirement. In *Furman*, for example, Goodyear acknowledges that it maintains a company-owned consumer retail tire store in New Mexico and also distributes tires through independent New Mexico retailers. In fact, Goodyear sold 23 tires of the exact model involved in the *Furman* suit in New Mexico during the year prior to filing the Complaint. *See* Goodyear Br. 7. Plaintiffs also alleged that Goodyear advertised its tires to New Mexico consumers. *Id*. at 4, 8. Goodyear has appeared in New Mexico courts as a litigant, including before this Court as a plaintiff suing to recover money owed for merchandise Goodyear supplied to a franchise dealer. *See Goodyear Tire & Rubber Co. v. Williams*, 1966-NMSC-136, 76 N.M. 509, 416 P.2d 521.

In *Navarrete Rodriguez*, Plaintiff provided an affidavit detailing Defendant Ford Motor Co.'s contacts directed at the New Mexico market. They include: (1) at least thirteen official Ford dealerships in New Mexico; (2) an interactive website where New Mexico consumers can purchase Ford automotive parts, search inventory of Ford vehicles in the state, obtain coupons and discounts, find safety recall information, and apply for credit for vehicle purchases; (3) marketing schemes

that target New Mexican consumers, such as sponsorship of local professional bull riding championships; and (4) advertising in New Mexico directed at New Mexico consumers; in addition to which Ford is a "frequent" litigant in New Mexico's courts. *Navarrete Rodriguez*, 2019-NMCA-023, ¶ 5, 2018 WL 6716038, at *2.

Similarly in *Rascon Rodriguez*, Plaintiff's evidence of Defendant Ford's in-state contacts included its official Ford dealerships; its marketing targeted at New Mexico, including the sponsorship of the professional bull riding championship; its interactive website inviting consumers to obtain a purchase price quote; and "in-forum advertising and defense and indemnity contracts with its dealerships." Ford has also been a frequent party to litigation in New Mexico and has registered to conduct business in New Mexico. Defendant Cooper Tire has 62 official Cooper Tire dealers in New Mexico, maintains an interactive web page providing New Mexico consumers with information about services available through Cooper Tire dealers, advertises and conducts marketing events targeting New Mexico consumers, and has appeared as a litigant in New Mexico courts. *Rascon Rodriguez*, No. A-1-CA-35910, ¶¶ 5-6, 2018 WL 7021969, at *2.

Likewise in *Chavez*, where the injury-producing tire was purchased as a spare from a New Mexico auto dealer, that sale was not an isolated contact with this state. Defendant Bridgestone (1) operates 54 official dealers in New Mexico; (2) maintains an interactive website through which New Mexico residents can obtain information

regarding tire availability, recalls, and warranties, as well as apply for employment in New Mexico; (3) targets New Mexico consumers through promotional sponsorships and advertising, and (4) participates in litigation in New Mexico courts. *Chavez*, No. A-1-CA-36442, ¶ 6, 2018 WL 7046630, at *2.

In *BMS*, Bristol-Myers Squibb also had substantial contacts with California amounting to purposeful availment of the privilege of doing business there. The Court held that those contacts, *standing alone*, were not sufficient to support jurisdiction in a suit by nonresidents of California who did not purchase Plavix in the forum state and were not injured there. *BMS*, 137 S. Ct. at 1781. What was missing in *BMS* was "a connection between the forum and the specific claims at issue." *Id.* Such connections, detailed below, are clearly present in the cases before this Court.

B. A Defendant Whose Product Was Sold in New Mexico or Has Caused Death or Injury in New Mexico Has Contacts With this State that Arise Out of or Relate to a Cause of Action for Product Defect.

The first prong of the Court's jurisdictional test also requires that the litigation, "aris[e] out of or relat[e] to the defendant's contacts with the forum." *BMS*, 137 S. Ct. at 1780 (quoting *Daimler* at 127); *see also Burger King*, 471 U.S. at 472-473; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

The phrase "arises out of or relates to" presents two alternatives. The first is causal, but "relates to" is a far broader term. *See Morales v. Trans World Airlines,*

Inc., 504 U.S. 374, 383-84 (1992) (stating that Court has repeatedly emphasized that the phrase "relate to" has "broad scope," "expansive sweep," and is "conspicuous for its breadth."); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 141 (1990); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

Justice Alito in *BMS* suggested the kinds of contacts that would satisfy this element. Quoting Justice Ginsberg's description of specific personal jurisdiction, he stated that due process requires "an affiliation between the forum and the underlying controversy, principally, [an] *activity* or *an occurrence* that takes place in the forum State and is therefore subject to the State's regulation." *BMS*, 137 S. Ct. at 1780 (emphasis added) (quoting *Goodyear*, 564 U.S. at 919).

In *Goodyear*, Justice Ginsberg suggested two examples that would qualify as "an activity" or "an occurrence." Writing for the Court she held that North Carolina lacked specific jurisdiction over the manufacturer in a defective tire case where neither the manufacture or sale of the tire (an activity) nor the episode-in suit, the bus accident (an occurrence) took place in the forum state. *Goodyear*, 564 U.S. at 919. Either of those conditions – sale of the injury-producing product or injury caused by that product – would be "subject to the State's regulation," *BMS*, 137 S. Ct. at 1780, and thus could serve as the basis for specific jurisdiction. Such connections were absent in *BMS*, where "the nonresidents were not prescribed Plavix

in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California." 137 S. Ct. at 1781.

They are present here. In the cases before this Court where the injury-producing tire or auto was sold in New Mexico (*Navarrete Rodriguez* and *Chavez*) or where the allegedly defective product caused injury or death in New Mexico (*Rascon Rodriguez* and *Furman*), the substantial contacts prong of the specific jurisdiction test is satisfied where defendants have also purposefully availed themselves of the privilege of conducting business in New Mexico.

Goodyear's contention that in *Furman* "the *only* case-specific link between Goodyear and New Mexico is that the accident occurred in the state," Goodyear Br. 1-2, does not defeat jurisdiction. *See also* Amicus Curiae Brief of Product Liability Advisory Council ["PLAC Br."] 19 (The "fortuity of the State where a plaintiff happened to be located when his or her injury occurred cannot be, and is not, sufficient to ground the exercise of specific jurisdiction over a product manufacturer."). The fact that Defendant's product caused Plaintiff's the injury in New Mexico, combined with the fact that defendant has marketed its products here and otherwise "purposefully availed" itself of the privilege of transactive business in this state, distinguishes these cases from *BMS*. Indeed, the Supreme Court has noted that its "substantial contacts" test has resulted in "rapid expansion of tribunals' ability to hear claims against out-of-state defendants *when the episode-in-suit*

occurred in the forum or the defendant purposefully availed itself of the forum." *Daimler*, 571 U.S. at 128 (emphasis added).

C. Specific Jurisdiction Does Not Require Plaintiffs to Show that the Nonresident Defendant's In-State Contacts Were the Cause of Plaintiff's Injury.

Goodyear urges this Court to ignore the U.S Supreme Court's settled precedents and to alter the first prong of its specific jurisdiction test. Goodyear would add a restriction to that test so that a suit "arises out of or relates to the defendant's contact with the forum state [only] if the contact is a 'but-for cause' of the claim, and the claim is a 'foreseeable consequence' of the contact." Goodyear Br. 15. Amicus PLAC also insists that this Court graft onto the substantial contacts test a requirement that there be a "causal link" between a defendant's in-state contacts and the plaintiff's cause of action. PLAC Br. 14.

The U.S. Supreme Court has already rejected this exact proposition. Petitioner in *BMS* argued strenuously in support of a new rule "requiring a causal connection between contacts and claim." Brief for Petitioner, *Bristol-Myers Squibb Co. v. Superior Court of California for the Cty. of San Francisco*, 2017 WL 908857, at 25 (U.S. Mar. 1, 2017). Bristol-Myers laid out an extensive argument to the Court that its proposed causal-connection standard would further a variety of rationales. *Id.* at 25-27. PLAC advanced the same argument to the Supreme Court. Amicus Brief of PLAC in *Bristol-Myers Squibb Co. v. Superior Court of California for the Cty. of*

San Francisco, 2017 WL 956640, at 7 (U.S. Mar. 8, 2017) ("PLAC agrees with BMS that assertions of specific jurisdiction ought to be limited to instances where the defendant's in-forum conduct is also the alleged proximate cause of the plaintiff's alleged injury or loss.").

The Court rejected that causal-connection standard. Justice Alito's analysis adheres to the Court's settled view that the sale of defendant's injury-producing product in-state or injury to the plaintiff there is an activity or occurrence broadly "related to" the product liability litigation. *See BMS*, 137 S. Ct. at 1778. Indeed, Justice Sotomayor, in her dissent, specifically noted that the majority had not adopted "a rigid requirement that a defendant's in-state conduct must actually cause a plaintiff's claim." *Id.* at 1788 & 1783 n.3 (Sotomayor, J., dissenting). There is no reason for this Court to embrace the radical alteration of the due process test that Supreme Court of the United States has already rejected.

II. SPECIFIC JURISDICTION OVER DEFENDANTS CAN BE SUPPORTED UNDER THE "STREAM OF COMMERCE" THEORY.

Specific jurisdiction in the cases before this Court not only conforms to the U.S. Supreme Court's "settled precedents," as reaffirmed and applied in *BMS*, jurisdiction is also proper under the Supreme Court's "stream of commerce" theory. The stream of commerce theory is simply a specialized application of the accepted principles discussed above to product liability actions where "a nonresident

defendant, acting *outside* the forum, places in the stream of commerce a product that ultimately causes harm *inside* the forum." *Goodyear*, 564 U.S. at 926.

Almost forty years ago, the Supreme Court confirmed that a "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen*, 444 U.S. at 297-98. In that case, plaintiffs were driving their Audi across country from their home in New York and were rear-ended by a drunk driver in Oklahoma, causing their car to burst into flames. The Court held that Oklahoma courts could not exercise jurisdiction over the New York Audi retailer and distributor who had directed no activities toward Oklahoma. However, if the defendant had made some efforts to serve the forum state market, it should anticipate and insure against possible liability there. The Court explained:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from *the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product* in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Id. at 297-98 (emphasis added) (internal citation omitted).

The Court's two subsequent cases that addressed the stream of commerce theory "have provided no clear guidance regarding [its] scope and application." *Sproul*, 2013-NMCA-072, ¶ 19, 304 P.3d 18, 25. The first, *Asahi Metal Indus.*, 480

U.S. 102 (1987), presented the Court with the question whether a California court could exercise jurisdiction over Asahi, the Taiwanese manufacturer of a motorcycle tube that was a component of a motorcycle sold in California and involved in an accident there. *Id.* at 105-06. The Court held against jurisdiction in that instance, but could not agree on the application of the stream of commerce theory. Justice O'Connor, writing for a four-Justice plurality, insisted that the fact that the nonresident defendant placed its product into the stream of commerce and could foresee its presence in the forum state was not sufficient. To guard against a defendant being haled into a court in which they had no contacts at all, Justice O'Connor would require that where the product has caused injury in the forum state, plaintiffs must also show additional (but not necessarily related) conduct on defendant's part that would "indicate an intent or purpose to serve the market in the forum State." *Id.* at 112 (O'Connor, J., concurring). Such additional conduct could include "advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" *Id.* Justice O'Connor's view has been described as stream of commerce plus. *See, e.g.*, Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 Vand. L. Rev. 1401, 1438 (2018).

Justice Brennan, also writing for a four-Justice plurality, saw "no need" to require a plaintiff to show such additional conduct. *Asahi Metal Indus.*, 480 U.S. at 117 (Brennan, J., concurring). To a manufacturer who is "aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* In addition, a defendant "who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Id.* Justice Stevens, concurring separately, did not retreat from the stream of commerce theory set out in *World-Wide Volkswagen*, but found it unnecessary because, in his view, assertion of jurisdiction over Asahi was "unreasonable and unfair" under the second prong of the due process test. *Id.* at 121 (citation omitted).

The Court next took up the stream of commerce theory in *Nicastro*, 564 U.S. 873 (2011), where a New Jersey resident was injured by a metal-shearing machine manufactured by defendant in England. Justice Kennedy, writing for a plurality of four Justices, espoused the "stream of commerce plus" formulation and would require activity by the defendant specifically directed at the forum state, as distinguished from marketing to the United States generally. *Id.* at 884. Justice Ginsberg, joined in dissent by Justice Sotomayor and Justice Kagan, emphasized that there was no dispute on the Court on the stream of commerce principle

established in *World–Wide Volkswagen*. *Id.* at 899 (Ginsberg, J., dissenting). In the dissenters' view, however, a manufacturer who directs marketing activities to the United States market as a whole necessarily avails itself of the markets of the individual states. *Id.* at 905. Justice Breyer wrote the controlling concurring opinion. Like Justice Stevens in *Asahi*, Justice Breyer took no position on the proper scope of the stream of commerce theory. Rather, he concluded, based upon the record showing that the machine that injured Mr. Nicastro was the only McIntyre machine that had ever been sold in New Jersey, that the case did not fall within the stream of commerce theory at all. *Id.* at 888 (Breyer, J., concurring).

The Supreme Court subsequently reaffirmed its adherence to the stream of commerce theory as initially set forth, without the additional showing that would have been required under "stream of commerce plus." Thus, the *Goodyear* Court reiterated that 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*." 564 U.S. at 927 (internal quotation marks omitted) (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

The New Mexico Court of Appeals recognized this theory in *Sproul*, 2013-NMCA-072, 304 P.3d 18. There, a New Mexico bicycle retailer, facing potential

liability for a consumer's injury, sought indemnity from the foreign manufacturer of allegedly defective bicycle parts. The district court granted the foreign company's motion to dismiss on the ground that the company lacked sufficient contacts in New Mexico. *Id.* at ¶ 5, 304 P.3d at 22. The court of appeals recognized that the fractured decisions in *Asahi* and *McIntyre* had not clarified the Supreme Court's stream of commerce theory. *Id.* at ¶¶ 38-43, 304 P.3d at 30-33. Nor had a majority of the Justices agreed upon any limitation on the scope of the theory. *Id*. at ¶ 44, 304 P.3d at 33. Consequently, the court of appeals held that "the approach set forth in *World-Wide Volkswagen* remains binding in New Mexico." *Id.*

Goodyear nevertheless contends that it is "an open question" whether stream of commerce theory survived *BMS*. Goodyear Br. 25. However, *BMS* did not address the stream of commerce theory at all. The Court there held only that non-California plaintiffs who did not purchase Plavix in California and were not injured by Plavix in California could not sue the manufacturer of Plavix in California courts. *BMS*, 137 S. Ct. at 1778. By contrast, the cases before this Court all involve plaintiffs who purchased the allegedly defective product in New Mexico or were harmed by it in New Mexico.

The fact that the product at issue in some cases was not purchased directly from Defendant or its network of authorized dealers does not defeat jurisdiction. The Supreme Court's formulation of the stream of commerce doctrine includes

marketing to the forum state "directly or indirectly." *World-Wide Volkswagen*, 444 U.S. at 297. Likewise in *BMS*, the Court pointedly noted that the nonresident plaintiffs had not obtained Plavix "from any other California source." *BMS*, 137 S. Ct. at 1778. Additionally, it should be recognized that, unlike the prescription medication involved in *BMS*, automobiles and automobile tires are frequently resold by distributors or dealers who are outside the manufacturer's established chain of distribution.

III. SPECIFIC JURISDICTION BASED ON DEFENDANTS' CONTACTS WITH NEW MEXICO COMPORTS WITH FAIRNESS AND SUBSTANTIAL JUSTICE.

"Once it has been decided that a defendant purposefully established minimum contacts within the forum State," the second prong of the jurisdictional due process analysis requires a court "to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Burger King*, 471 U.S. at 476 (internal quotation marks and citation omitted). In that second step, "the court is to consider several additional factors to assess the reasonableness of entertaining the case." *Daimler*, 571 U.S. at 138 n.20.

The Supreme Court has enumerated those factors: (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5)

the shared interests of the several States in furthering fundamental substantive social policies. *World-Wide Volkswagen*, 444 U.S. at 292. *See also Burger King*, 471 U.S. at 477; *BMS*, 137 S. Ct. at 1780. The cases before this Court clearly pass muster.

A. Specific Jurisdiction Does Not Impose an Undue Burden on Defendants Who Otherwise Conduct Substantial Business in New Mexico.

The Supreme Court has indicated that "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum," is of "primary concern." *World-Wide Volkswagen*, 444 U.S. at 292.

None of the Defendants seeking to deny the jurisdiction of New Mexico courts here have indicated that defending in New Mexico against claims by Plaintiffs who purchased the injury-causing product in New Mexico or who were injured in New Mexico would be at all burdensome. New Mexico is not a "distant or inconvenient forum" for these Defendants. It is a state where they all conduct substantial business, market to New Mexico consumers, enjoy the protections of New Mexico law, and even invoke the jurisdiction of New Mexico courts to assert their own rights. *See* Part I(A)(2), above. Consequently, the most important reasonableness factor weighs heavily in favor of asserting jurisdiction over these defendants.

B. New Mexico Has a Strong Interest in Adjudicating These Disputes.

In *BMS*, the Supreme Court denied California courts' jurisdiction in an action by non-California plaintiffs who did not purchase the injury-producing product in California and who were not injured there. In that case, due process protected the

defendant from "the coercive power of a State that may have little legitimate interest in the claims in question." *BMS*, 137 S. Ct. at 1780. However, the Court also indicated that the converse principle is also true: Jurisdiction is appropriate where there is "an affiliation between the forum and the underlying controversy" such as "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* (internal quotation marks omitted) (quoting *Goodyear*, 564 U.S. at 919). The sale of the injury-producing product or occurrence of the injury in New Mexico is clearly such an affiliation, connecting these cases to a strong state interest in adjudicating such claims in the courts of New Mexico.

1. *New Mexico has a strong interest in regulating the sale of unreasonably dangerous products in New Mexico.*

It is beyond dispute that New Mexico has a strong interest in adjudicating cases that arise out of the sale of unreasonably dangerous products in New Mexico. Historically, states have been accorded "great latitude" in imposing tort liability for wrongful injury in the exercise of "their police powers to protect the health and safety of their citizens." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). In defective product cases, such as those before this Court, "the central event upon which a products liability claim is normally based is the sale of the goods," *Mitchell v. McNeilus Truck & Mfg., Inc.*, No. 304124, 2012 WL 5233630, at *11 (Mich. Ct. App. Oct. 23, 2012) (quoting *Cheatham v. Thurston Motor Lines*, 654 F Supp. 211,

214 (S.D. Ohio 1986)), and the state's primary interest lies in "deterring the sale of unsafe products to consumers within its boundaries." *Id.* at *12.

2. *New Mexico has a strong interest in adjudicating disputes arising out of accidents occurring in New Mexico.*

New Mexico also has a strong interest in regulating activity that may result in automobile accidents in this state. That interest includes adjudicating wrongful injury claims, regardless of whether that victims are New Mexico residents. *See Helicopteros Nacionales*, 466 U.S. at 412 n.5 ("[Plaintiffs'] lack of residential or other contacts with [the forum state] does not defeat otherwise proper jurisdiction."); Note, *Products Liability and the Choice of Law*, 78 Harv. L. Rev. 1452, 1461 (1965) (noting "the oft-repeated statement that since the injured are likely to be hospitalized in the state of injury, that state has a paramount interest in assuring them compensation").

3. *New Mexico has a strong interest in providing its residents with a means of legal redress for wrongful injury.*

The U.S. Supreme Court has repeatedly declared that every state "has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King*, 471 U.S. at 473 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)); *see also Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951) (A state has "unquestioned power to protect the health and safety of its people."). *See also Zavala v. El Paso Cty. Hosp.*

Dist., 2007-NMCA-149, ¶ 31, 143 N.M. 36, 46, 172 P.3d 173, 183 ("New Mexico certainly has an interest in providing its residents with a forum to allow resolution of conflicts" and "a forum state has a significant interest in obtaining jurisdiction over a defendant who causes tortious injury within its borders." (internal quotation marks and citation omitted)).

In short, all states, including New Mexico "have a legitimate interest in providing a forum for redress to residents injured in and out of state . . . and [also for] nonresidents injured in state." John F. Preis, *The Dormant Commerce Clause As A Limit on Personal Jurisdiction*, 102 Iowa L. Rev. 121, 143 (2016).

C. Plaintiffs' Interest in Obtaining Convenient and Effective Relief.

Although the first factor in the Supreme Court's reasonableness analysis inquires into whether jurisdiction imposes an unfair burden on defendants required to defend in a distant forum, it must be remembered that the "Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property *or as plaintiffs attempting to redress grievances*. *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 429 (1982) (emphasis added). In *Logan*, the Court held that plaintiff's cause of action was a property interest protected by due process, *id.* at 431-32, and that he was deprived of due process by a state procedural rule that effectively made it impossible for plaintiff to meet the filing deadline for his state-law employment discrimination claim. *Id.* at 437.

The Supreme Court has recognized that plaintiffs "would be at a severe disadvantage if they were forced to follow the [defendant] to a distant State in order to hold it legally accountable." *McGee*, 355 U.S. at 223. Plaintiffs who cannot afford the cost of doing so – including the costs of attending proceedings, retaining local representation, securing the attendance of witnesses, the travel expenses of experts, and other substantial costs – may find that the defendant is effectively immune from accountability. *Id*.

Due process is not satisfied by a merely theoretical right of access to a legal remedy. Rather, "*meaningful* access to the courts is a fundamental right within the protection of the First Amendment." *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (emphasis added). *See also Christopher v. Harbury*, 536 U.S. 403, 415 & n.12. (2002) ("[A] separate and distinct right to seek judicial relief for some wrong" is a fundamental right grounded in multiple provisions of the Constitution).

Even if cost barriers may be overcome, Defendants' restrictive view would foreclose to injured Plaintiffs access to redress in the forum with substantial connection to the litigation, leaving them to attempt litigation instead in States "that may have little legitimate interest in the claims in question." *BMS*, 137 S. Ct. at 1780.

D. The Interstate Judicial System's Interest in Obtaining the Most Efficient Resolution of Controversies.

The interest of the interstate judicial system also favors assertion of jurisdiction over defendants in these cases. "Key to this inquiry are the location of witnesses, where the wrong underlying the lawsuit occurred, what forum's substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation." *TH Agric. & Nutrition, LLC v. Ace European Grp. Ltd.*, 488 F.3d 1282, 1296 (10th Cir. 2007) (quoting *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1097 (10th Cir. 1998)). *See also Meier v. Sun Int'l Hotels, Ltd*., 288 F.3d 1264, 1276 (11th Cir. 2002) (The "interstate judicial system [has] an interest in [Florida] adjudicating disputes arising from injuries which occur at or as a result of [Caribbean resorts], particularly when the injured are flown into Florida for medical treatment as a result.").

In the cases before this court, personal jurisdiction over a particular defendant must necessarily be decided "on a case-by-case basis." *Sproul*, 2013-NMCA-072, ¶ 17, 304 P.3d 18, 25. However, it is clear that in cases where the injury-producing product was sold in New Mexico or the injury occurred in this state, the location of witnesses, the applicable substantive law, and the prevention of piecemeal litigation will, on balance, favor adjudication in New Mexico.

E. The Shared Interests of the Several States in Furthering Fundamental Substantive Social Policies.

Goodyear opens its jurisdictional argument with the contention that "the Due Process Clause, acting as an instrument of federalism, may sometimes act to divest the State of its power to render a valid judgment." Goodyear Br. 13 (quoting *World-Wide Volkswagen*, 444 U.S. at 294). But that passage of the Court's opinion was addressed to the due process prohibition against a state entering "a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *World-Wide Volkswagen*, 444 U.S. at 294 (quoting *International Shoe*, 326 U.S. at 319).

In the cases before this Court, where Defendant's product was sold in this state or the product harmed the Plaintiff in this state, Goodyear does not suggest another state whose sovereign prerogatives would be transgressed by an adjudication in New Mexico's courts. That is certainly the case where the plaintiffs are also residents of New Mexico. But it is also true where plaintiffs are residents of a state or foreign sovereign that has no case-related contacts with defendant.

It is a central feature of our system of federalism that the States, while sovereign, depend on their sister states to further important substantive social policies. One such fundamental policy is the due process obligation of every state to provide legal redress for wrongful injury. Chief Justice John Marshall declared this bedrock principle:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Following the adoption of the Fourteenth Amendment, the Supreme Court pronounced it "the duty of every state to provide, in the administration of justice, for the redress of private wrongs" under the Due Process Clause. *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). States that have few or no litigation-related contacts with the defendant depend upon sister states to fulfill the obligation to provide judicial remedy for wrongs to their citizens occurring in the forum state. States would "rather have the injuries of [their] citizens litigated and compensated under another state's law than not litigated or compensated at all." *In re Pizza Time Theatre Sec. Litig*., 112 F.R.D. 15, 20 (N.D. Ca1. 1986).

Similarly, every state has a strong interest in protecting its own residents from unreasonably dangerous products. Strict products liability for placing unreasonably dangerous products into the stream of commerce, as formulated in Restatement (Second) of Torts § 402A, received "rapid and widespread acceptance" by the vast majority of states. Philip H. Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 Tenn. L. Rev. 1043, 1050-51 (1994). *See also* American Law Of

Products Liability 3d § 16:9 (rev. 2019) (listing states that have adopted § 402A judicially).

As potentially dangerous products are often distributed nationally and frequently transported across state borders, the effectiveness of tort liability as a deterrent that keeps products safe for all consumers in all states depends upon the ability of those states where such products are sold or cause injury to exercise jurisdiction over product liability claims. Such adjudications do not undermine the sovereignty of other states, but rather advance the shared interest of all the states by furthering fundamental substantive policies.

Thus, assertion of specific jurisdiction over defendants in the four cases before this court comports with both prongs of the due process test: (1) sale of the injury-producing product or occurrence of the injury in New Mexico, accompanied by purposeful availment of New Mexico's market fulfills the substantial contacts test and (2) the interests of the forum state, the plaintiffs, and federalism support the reasonableness of asserting jurisdiction in these cases.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the court below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to NMRA 12-318, I hereby certify that this brief complies with the type-volume limitation of NMRA 12-318(F)(3) because this brief contains 7,020 words, excluding the parts of the brief exempted by NMRA 12-318(F)(1). I further certify that this brief complies with the typeface and type style requirements of NMRA 12-305(C) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

Date: August 19, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2019, I electronically filed the foregoing document through the Court's File and Serve system, which will cause service on all counsel of record in the matter listed below.

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