

**In the United States Court of Appeals
for the Eighth Circuit**

ELAINE ROBINSON, ET AL.,
Appellees,

v.

PFIZER, INC.
Appellant.

On appeal from the United States District Court
for the Eastern District of Missouri

**BRIEF OF NATIONAL CONSUMER LAW CENTER,
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES,
PUBLIC JUSTICE, AND THE AMERICAN ASSOCIATION FOR JUSTICE
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

GREGORY A. BECK
1250 Connecticut Ave.
Suite 200
Washington DC 20036
(202) 684-6339
greg@beck.legal

MATTHEW W.H. WESSLER
DEEPAK GUPTA
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
matt@guptawessler.com

Counsel for Amici Curiae

November 15, 2016

CORPORATE DISCLOSURE STATEMENT

Amicus National Consumer Law Center has no parent corporations. It has no stock, and hence, no publicly held company owns 10% or more of its stock.

Amicus National Association of Consumer Advocates has no parent corporations. It has no stock, and hence, no publicly held company owns 10% or more of its stock.

Amicus Public Justice has no parent corporations. It has no stock, and hence, no publicly held company owns 10% or more of its stock.

Amicus the American Association for Justice has no parent corporations. It has no stock, and hence, no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Table of authorities.....	iii
Introduction.....	1
Interests of amici curiae	2
Argument.....	4
I. Pfizer’s theory of personal jurisdiction is sweeping and unprecedented.....	4
II. Personal jurisdiction over non-resident plaintiffs is consistent with due process.	13
Conclusion	20

TABLE OF AUTHORITIES

Cases

<i>Action Embroidery Corp. v. Atlantic Embroidery, Inc.</i> , 368 F.3d 1174 (9th Cir. 2004)	10
<i>Arlandson v. Hartz Mountain Corp.</i> , 792 F. Supp. 2d 691 (D.N.J. 2011)	8
<i>Asahi Metal Industries Co., Ltd. v. Superior Court</i> , 480 U.S. 102 (1987)	14, 15
<i>Bradshaw v. Mentor Worldwide, LLC</i> , 2015 WL 3545192 (E.D. Mo. June 4, 2015)	7, 8
<i>Bristol-Myers Squibb Co. v. Superior Court</i> , 377 P.3d 874 (Cal. 2016)	7, 8, 9
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985)	13
<i>Daimler AG v. Bauman</i> , 134 S. Ct. 746 (2014)	5, 6, 7
<i>ESAB Group, Inc. v. Centricut, Inc.</i> , 126 F.3d 617 (4th Cir. 1997)	10
<i>Glater v. Eli Lilly & Co.</i> , 744 F.2d 213 (1st Cir. 1984)	15
<i>Goodyear Dunlop Tires Operations v. Brown</i> , 564 U.S. 915 (2011)	6, 7
<i>Gracey v. Janssen Pharmaceuticals, Inc.</i> , 2015 WL 2066242 (E.D. Mo. May 4, 2015)	8
<i>In re Prempro Products Liability Litigation</i> , 591 F.3d 613 (8th Cir. 2010)	7
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945)	9, 13, 19, 20

<i>IUE AFL–CIO Pension Fund v. Herrmann</i> , 9 F.3d 1049 (2d Cir. 1993)	10
<i>Keeton v. Hustler Magazine</i> , 465 U.S. 770 (1984).....	<i>passim</i>
<i>Oetiker v. Werke</i> , 556 F.2d 1 (D.C. Cir. 1977)	10
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985).....	7, 8
<i>Ratliff v. Cooper Laboratories, Inc.</i> , 444 F.2d 745 (4th Cir. 1971)	15
<i>Remick v. Manfredy</i> , 238 F.3d 248 (3d Cir. 2001)	11
<i>Robinson Engineering Co., Ltd. Pension Plan & Trust v. George</i> , 223 F.3d 445 (7th Cir. 2000)	10
<i>Robinson v. Penn Central Co.</i> , 484 F.2d 553 (3d Cir. 1973)	10
<i>Seiferth v. Helicopteros Atuneros, Inc.</i> , 472 F.3d 266 (5th Cir. 2006)	9, 10, 11
<i>Shaffer v. Heitner</i> , 433 U.S. 186 (1977).....	5
<i>Steinbuch v. Cutler</i> , 518 F.3d 580 (8th Cir. 2008)	13
<i>United States v. Botefuhr</i> , 309 F.3d 1263 (10th Cir. 2002)	10
<i>Walden v. Fiore</i> , 134 S. Ct. 1115 (2014).....	12, 14
<i>World–Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980).....	14, 15, 19

Other authorities

Linda Sandstrom Simard, <i>Exploring the Limits of Specific Personal Jurisdiction</i> , 62 Ohio St. L.J. 1619 (2001)	6, 10
Charles A. Wright, Arthur R. Miller, et al., <i>Federal Practice & Procedure</i> (4th ed. 2016)	10, 11

INTRODUCTION¹

In its brief on appeal, Pfizer accuses the district court below of adopting a “novel theory” of personal jurisdiction. But it is Pfizer, not the district court, that advances the novel theory. Pfizer’s argument that it would violate due process to hold it accountable to the claims of plaintiffs from multiple states, if adopted, would radically change the law of personal jurisdiction, invalidating countless multi-state cases and significantly narrowing the power of both federal and state courts to adjudicate class actions and other nationwide disputes. Pfizer cannot identify a single appellate decision, federal or state, that has adopted such a position.

The district court was correct to reject Pfizer’s sweeping and unprecedented theory. By marketing and selling allegedly dangerous drugs in Missouri, Pfizer had fair warning that it may be sued there. And, given the company’s concession that it is subject to personal jurisdiction in the state at least on the claims of four Missouri plaintiffs, there is nothing unfair about requiring it to also defend against related injuries of other plaintiffs arising from the same course of conduct. Pfizer does not, and cannot, argue that it would be unduly burdensome to require it to do so. Nor can it contend that the alternative to a single forum—twenty-nine separate cases in

¹ All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than amici, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. *See* Fed. R. App. P. 29(c)(5).

the twenty-nine states where the plaintiffs live—would be fairer or less burdensome.

At its core, adopting Pfizer’s unsupported—and unsupportable—theory would deny many plaintiffs access to justice. Particularly in cases where defendants are large, national entities, and the alleged wrongdoing is widespread, plaintiffs depend on their ability to band together across state lines. Pfizer’s rule would effectively put an end to nationwide efforts to concentrate similar litigation in one forum, leaving in its place a patchwork of numerous state-by-state cases. That would not only be tremendously inefficient for both the defendant and the courts, but would in many cases make plaintiffs’ claims economically infeasible.

Assuming it reaches the question of personal jurisdiction, this Court should therefore affirm the district court’s holding that Pfizer is subject to personal jurisdiction in Missouri.

INTERESTS OF AMICI CURIAE

The **National Consumer Law Center** (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions for low-income and elderly consumers. Since its founding as a non-profit corporation in 1969, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters,

and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support.

The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Enforcement and compliance with consumer protection laws has been a continuing concern of NACA since its inception.

Public Justice is a national public interest law firm that pursues high impact litigation to combat predatory corporate conduct and to enhance the public's access to justice. Public Justice routinely advocates in the public interest in courts across the nation by filing amicus curiae briefs in cases involving these issues of vital public concern.

The **American Association for Justice** (formerly the American Trial Lawyers Association) was established in 1946 to safeguard victims' rights, strengthen

the civil justice system, and protect access to the courts. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar.

Collectively, the amici are dedicated to protecting the rights and interests of the most vulnerable Americans. The issues presented in this case are of substantial importance to the public interest throughout the United States and implicate the fundamental right of consumers and injury victims to hold corporate defendants accountable through the civil justice system. In this case and many others, corporations are attempting to limit injured plaintiffs' access to justice by advocating such a narrow reading of Supreme Court precedent as to effectively deny injury victims access to state courts.

ARGUMENT

I. Pfizer's theory of personal jurisdiction is sweeping and unprecedented.

Although conceding that it was subject to personal jurisdiction on the claims of Missouri plaintiffs, Pfizer argued below that the district court lacked personal jurisdiction over Pfizer with regard to the claims of *other*, non-resident plaintiffs. *See* Order at 5 n.1. Pfizer contends on appeal that, in rejecting that argument in a footnote, the district court adopted a "novel theory" of personal jurisdiction, which Pfizer calls "jurisdiction by joinder." Pfizer Br. i. The district court's footnote, the company warns, creates a "vast and legally untenable expansion" of personal jurisdiction, "allowing specific jurisdiction to supplant the limited scope of general

jurisdiction” and “subjecting non-resident defendants to claims unrelated to their forum activities simply because they have done business in the forum.” Pfizer Br. 3, 12, 30.²

But nobody, including the district court, contends that plaintiffs can defeat the constitutional requirements of due process “based solely on ... joinder [of non-resident plaintiffs] in a single complaint.” Pfizer Br. 5; *see Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (holding that state laws may not extend personal jurisdiction beyond the limits imposed by due process). Rather, the district court, after noting Pfizer’s concession that it was subject to personal jurisdiction on the claims of Missouri plaintiffs, concluded that the “cause of action as a whole aris[es] out of or [is] related to [Pfizer’s] contacts and conduct in Missouri.” Order at 5 n.1; *see Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (a defendant is subject to specific personal jurisdiction when the “suit arises out of or relates to the defendant’s contacts with the forum.” (internal quotation marks and alterations omitted)). The district court thus did not rely on the non-resident plaintiffs’ joinder to the complaint to find

² Although Pfizer repeatedly puts “jurisdiction by joinder” in quotes, Pfizer Br. i, 3, 9, 12, 30, 33, 38-39, 39, the district court never used the phrase.

personal jurisdiction; it relied on their relationship to the Missouri plaintiffs' cause of action.³

Nor did the district court conflate general and specific jurisdiction or subject Pfizer to personal jurisdiction “simply because [it has] done business” in Missouri. Pfizer Br. 3. It was not Pfizer’s general business connections with Missouri that were relevant to the court’s decision, but Pfizer’s deliberate marketing and selling of a drug *in Missouri* that allegedly injured some of the plaintiffs in the state. Under the district court’s holding, Pfizer thus could not be sued in Missouri on *any* cause of action, as it could if it were subject to general jurisdiction there. Plaintiffs could not, for example, sue Pfizer for breach of contract in Missouri unless the cause of action had some independent relationship with the state. Moreover, there is nothing improper, as Pfizer appears to assume, with subjecting a defendant to specific jurisdiction in a case where courts before *Goodyear* might have applied a

³ The district court’s holding tracks the relevant standard from *Daimler* virtually word for word, except that it uses the phrase “cause of action as a whole” instead of “suit.” The Supreme Court has itself been inconsistent about the wording of its personal-jurisdiction test. It has variously held that specific jurisdiction requires the forum and the defendant’s conduct to be connected with the “suit,” *Daimler*, 134 S. Ct. at 748–49, 754, the “causes of action,” *id.* at 767, the “litigation,” *id.* at 754, 758, and the “underlying controversy,” *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 919 (2011); *see also* Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 Ohio St. L.J. 1619, 1655–56 (2001) (“[P]endent personal jurisdiction is permissible if the pendent count is part of the ‘suit’ that forms the basis for the court’s assertion of jurisdiction over the anchor count.”). While the outer boundaries of those terms are unclear, they each plainly encompass identical claims brought by multiple plaintiffs in the same case—that is, the “cause of action as a whole.”

general-jurisdiction analysis. The Supreme Court in both *Daimler* and *Goodyear* acknowledged that specific jurisdiction fills the gap left by the limited nature of general jurisdiction. *See Daimler*, 134 S. Ct. at 755, 757–58, 758 n.9; *Goodyear*, 564 U.S. at 925. “As [the] Court has increasingly trained on . . . specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme.” *Daimler*, 134 S. Ct. at 758.

In fact, it is Pfizer, not the district court, that advances the novel personal-jurisdiction theory. For decades, state and federal courts have decided multi-plaintiff and class-action cases similar to this one and have routinely asserted personal jurisdiction over defendants on the claims of plaintiffs from more than one state. *See, e.g., In re Prempro Prods. Liability Litig.*, 591 F.3d 613 (8th Cir. 2010); *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016) (citing recent California cases); *Bradshaw v. Mentor Worldwide, LLC*, 2015 WL 3545192, at *2–3 (E.D. Mo. June 4, 2015) (citing recent Missouri cases). Pfizer’s argument would severely hobble the ability of both federal and state courts to decide future national or multi-state cases.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799 (1985), for example, the Supreme Court addressed the claims of a class with members in all fifty states, in a forum that, as here, was neither the defendant’s state of incorporation nor its primary place of business. The Court in *Shutts* rejected the defendant’s argument that out-of-state absent plaintiff class members were not subject to personal

jurisdiction in the forum court and thus could not be bound by the proceeding. *Id.* at 806, 814. If Pfizer’s theory were correct, however, the defendant could have prevailed by slightly reframing its argument—instead of arguing that the district court lacked jurisdiction over the non-resident *plaintiffs*, it could have argued, like Pfizer here, that the court lacked jurisdiction over the non-resident plaintiffs’ *claims*. It stretches credulity to assert that the result in *Shutts*—and thousands of similar cases—would have been different if the defendants had only thought to raise the argument that Pfizer advances here.

Given the far-reaching implications of its theory, it is remarkable that Pfizer cites *no* controlling authority, or appellate decisions of any kind, in support of its position. In fact, the only appellate decision directly on point reached the opposite result. *Bristol-Myers Squibb*, 377 P.3d 874. All Pfizer can identify as authority is a smattering of recent and mostly unpublished district-court decisions.⁴

To be sure, appeals from remand orders are ordinarily foreclosed by 28 U.S.C. § 1447(d), and a scarcity of appellate decisions arising in that context is therefore not particularly surprising. That scarcity is presumably why Pfizer calls

⁴ Other district courts have rejected Pfizer’s position. See *Arlandson v. Hartz Mountain Corp.*, 792 F. Supp. 2d 691, 698 (D.N.J. 2011) (“Specific jurisdiction is evaluated on a claim-by-claim basis. However, there is no requirement that the evaluation be done for each plaintiff individually.” (citations omitted)); see also, e.g., *Bradshaw*, 2015 WL 3545192, at *2; *Gracey v. Janssen Pharm., Inc.*, 2015 WL 2066242, at *3 (E.D. Mo. May 4, 2015).

this appeal (at 3) “a rare opportunity to provide guidance to the district courts.” But § 1447(d) cannot explain the total lack of appellate authority here. It would not, for example, foreclose a *plaintiff* from appealing a decision *denying* a remand under Pfizer’s theory. And, even more significantly, Pfizer’s personal-jurisdiction argument could just as easily arise in regular federal-question and diversity cases filed in federal court, or, indeed, in state-court cases that are never removed. *See, e.g., Bristol-Myers Squibb*, 377 P.3d 874. It thus *is* surprising—indeed, it defies belief—that an issue as basic to the question of personal jurisdiction as the one Pfizer asserts here, if correct, has never been adopted by an appellate court in the more than seventy years since the Supreme Court enunciated the modern personal-jurisdiction standard in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Pfizer does cite some authority holding that separate *claims* (as opposed to separate *plaintiffs*) must be analyzed separately for purposes of determining specific personal jurisdiction. Pfizer Br. 26–27 (citing, e.g., *Seifert v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274–75 (5th Cir. 2006)). To the extent those cases reject any concept of “supplemental” personal jurisdiction, *see* Pfizer Br. 30 (quoting *Seifert*, 472 F.3d at 275 n.6), they are in the minority. Although this Court has yet to decide the question, “most federal courts that have dealt with the subject” have held that legitimate exercise of specific jurisdiction over one claim *does* justify its exercise over another, at least when the claims arise from the same nucleus of operative facts. 4A

Wright & Miller, *Federal Practice & Procedure* § 1069.7 (4th ed. 2016) (calling the doctrine “pendent personal jurisdiction”).⁵

The majority view makes sense. As the Wright & Miller treatise explains, “a defendant who already is before the court to defend a federal claim is unlikely to be severely inconvenienced by being forced to defend [another] claim whose issues are nearly identical or substantially overlap.” *Id.* In those circumstances, “[n]otions of fairness to the defendant simply are not offended.” *Id.*; see also Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 Ohio St. L.J. at 1661 (“In most instances, requiring the defendant to defend a pendent count will not be unfair because the defendant already will be properly before the court on one count, and therefore, the adjudication of the factually related pendent count will not pose an unreasonable burden.”).⁶

⁵ See, e.g., *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004); *United States v. Botefuhr*, 309 F.3d 1263, 1272–75 (10th Cir. 2002); *Robinson Eng’g Co., Ltd. Pension Plan & Trust v. George*, 223 F.3d 445, 449–50 (7th Cir. 2000); *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 628–29 (4th Cir. 1997); *IUE AFL–CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056–57 (2d Cir. 1993); *Oetiker v. Werke*, 556 F.2d 1, 5 (D.C. Cir. 1977); *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 555–56 (3d Cir. 1973).

⁶ The Fifth Circuit’s claim in *Seifert* that “[t]here is no such thing as supplemental specific personal jurisdiction,” 472 F.3d at 275 n.6, is a quote from a portion of Wright & Miller summarizing a district court decision. Wright & Miller, *Federal Practice & Procedure* § 1351. Wright & Miller’s summary of the case ignores, and directly contradicts, its earlier section on pendent personal jurisdiction. *Id.* § 1069.7.

Even Pfizer's cases are not really to the contrary. In those cases, the courts analyzed claims separately for personal jurisdiction when those claims *did not share the same set of operative facts*. In *Seiferth*, for example, the Fifth Circuit analyzed the plaintiff's claim for failure to warn, which occurred primarily in the forum state, separately from his claim for defective design, which lacked any connection to the forum. 472 F.3d at 274–75; see *Remick v. Manfredy*, 238 F.3d 248, 255–56 (3d Cir. 2001) (holding that separate analysis of claims “may not be necessary ... in every multiple claim case”). Under *Seiferth* and similar cases, due process would thus require separate forums only when plaintiffs bring largely unrelated claims in the same case. But claims that rely on similar or overlapping facts will typically share the same forum contacts and can be brought together.

That result is consistent with pendent personal jurisdiction's requirement that claims arise from the same nucleus of operative facts. See Wright & Miller, *Federal Practice & Procedure* § 1069.7. Under either approach, a court with personal jurisdiction over one claim also has personal jurisdiction over other, closely related claims. Pfizer's theory, in contrast, would require separate forums whenever plaintiffs reside in separate states, and would require them even when the plaintiffs' claims are, as here, identical. Neither fairness nor case law supports, let alone requires, that result.

Pfizer also relies on *Walden v. Fiore*, 134 S. Ct. 1115 (2014), for the proposition that the requirements of personal jurisdiction are not satisfied “[e]ven where a defendant’s contacts with the forum are ‘intertwined with his transactions or interactions with . . . other parties.’” Pfizer Br. 12, 26 (quoting *Walden*, 134 S. Ct. at 1123). But Pfizer misreads *Walden*, getting its meaning backward. In the quoted passage, the Court made clear that “a defendant’s contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties.” *Walden*, 134 S. Ct. at 1123. That circumstance, the Court explained, *would* be enough for personal jurisdiction over the defendant. “*But*,” the Court went on, “a defendant’s relationship with a plaintiff or third party, *standing alone*, is an insufficient basis for jurisdiction.” *Id.* (emphasis added).

Walden cuts directly against Pfizer’s view. *Walden* stands for the principle that a defendant’s relationship with plaintiffs and third parties *does* create personal jurisdiction when that relationship is “intertwined” with the defendant’s forum contacts, but not necessarily otherwise. Here, of course, the claims of non-resident plaintiffs are heavily intertwined with the claims of forum residents. Indeed, the claims are identical. Far from contradicting the district court’s decision, *Walden* thus supports the exercise of personal jurisdiction here.

II. Personal jurisdiction over non-resident plaintiffs is consistent with due process.

Due process imposes limits on personal jurisdiction to ensure that the defendant has “certain minimum contacts with [the forum] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Int’l Shoe*, 326 U.S. at 316 (internal quotation marks omitted). In particular, due process requires “fair warning that a particular activity may subject [one] to the jurisdiction of a foreign sovereign.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). The “fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities.” *Id.* (internal quotation marks and citations omitted).⁷

As the district court recognized, it is the *defendant’s* activities related to the forum, not the *plaintiffs’*, that are determinative for due process purposes. *See* Order at 5 n.1. “[H]owever significant the plaintiff’s contacts with the forum may be, those

⁷ This Court uses a five-factor test to determine whether a defendant’s contacts meet the due process minimum: “1) the nature and quality of the defendant’s contacts with the forum state; 2) the quantity of such contacts; 3) the relation of the cause of action to the contacts; 4) the interests of the forum state in providing a forum for its residents; and 5) the convenience of the parties.” *Steinbuch v. Cutler*, 518 F.3d 580, 586 (8th Cir. 2008). Pfizer appears to challenge only the third factor, arguing that the case does not “arise out of or relate to” its contacts with the forum. *Burger King*, 471 U.S. at 472.

contacts cannot be decisive in determining whether the defendant's due process rights are violated." *Walden*, 134 S. Ct. at 1122 (internal quotation marks omitted).

And the converse is likewise true. Just as the *presence* of a plaintiff in the forum cannot create jurisdiction, the *absence* of the plaintiff cannot destroy it. "[P]laintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." *Keeton v. Hustler Magazine*, 465 U.S. 770, 780 (1984). "The proper question," therefore, "is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Walden*, 134 S. Ct. at 1125. Put another way, the inquiry is whether the defendant could, based on its forum contacts, foresee *this kind of suit* being filed in the forum, not whether the defendant could foresee *which plaintiffs* would file suit.

Here, the goal of fair warning is fully served by suing Pfizer in a forum where it marketed and sold allegedly dangerous products and where it injured at least some of the plaintiffs. This is not a case where the defendant's products reached Missouri through the stream of commerce or the independent acts of third parties. *See Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 105 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980). Quite the opposite: Pfizer intentionally marketed and sold its drug in the state. By doing so, Pfizer knew that it might face litigation there over injuries caused by the drug. Where, as here, "a

corporation purposefully avails itself of the privilege of conducting activities within the forum State, it has clear notice that it is subject to suit there.” *Asahi Metal Indus.*, 480 U.S. at 110 (internal quotation marks and citation omitted).

That is true even though Pfizer allegedly injured some of the plaintiffs in states *outside* Missouri. “[I]f the sale of a product . . . 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.” *World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added). Under that rule, a defendant marketing and selling a defective product in several states can reasonably expect to be called to account in any one of them. *See Keeton*, 465 U.S. at 775–76 (holding that a plaintiff could recover damages suffered in *all* states in a single forum where the defendant had sufficient minimum contacts to satisfy due process).⁸

Consider *Keeton*. There, the Supreme Court held that a New Hampshire court had personal jurisdiction over a non-resident plaintiff’s libel claims for damages suffered throughout the United States, even though only a tiny fraction of

⁸ The result may well be different if none of the plaintiffs was injured in the forum state, as in two of the cases Pfizer cites. *See* Pfizer Br. 27–28 (citing *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 214–15 (1st Cir. 1984) and *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 746 (4th Cir. 1971)). But, of course, if that were true, the litigation would have *no* relationship with the forum.

the damages was sustained in the forum state. *See id.* If the defendant “is carrying on a part of its general business in” the forum, the Court held, “that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in [the forum].” *Id.* at 779–80. And, because the magazine produced “a national publication aimed at a nationwide audience,” there was “no unfairness in calling it to answer for the contents of that publication *wherever* a substantial number of copies [were] regularly sold and distributed.” *Id.* at 781 (emphasis added).⁹

The lack of any unfairness to Pfizer is especially evident here given Pfizer’s concession that it is subject to suit in Missouri on at least the claims of four forum residents. As long as Pfizer is already required to appear in Missouri to defend against those claims, there is nothing unfair about requiring it to also defend against the identical claims of additional plaintiffs—even if those plaintiffs were injured in other states. Indeed, Pfizer does not even attempt to argue, other than with formulaic invocations of due process, that it would be unduly burdened in a Missouri forum. How could it? Pfizer is a major national corporation that has

⁹ Pfizer tries to distinguish *Keeton* on the ground that the plaintiff there suffered at least some of her injury in the forum state. But regardless, the principle is the same. Here, some of the plaintiffs suffered injury in the forum state. In either case, a fraction of the total damages arising from the case as a whole is tied to the forum state. And in either circumstance, personal jurisdiction over the defendant is proper.

permanent facilities in Missouri and regularly litigates cases there. *See* Compl. ¶¶ 3, 68, 69; *see also* <http://on.pfizer.com/2ftVirO> (“[T]wo locations with 250,000-square-foot laboratory & manufacturing space and 70,000-square-foot office space.”). Defending itself in Missouri could be no more burdensome on the company than attending to its extensive operations in the state.

Nor does Pfizer argue that forcing the plaintiffs to file twenty-nine separate cases in the twenty-nine states where they live would be a fairer or less burdensome alternative. After all, the purpose of joinder rules is in part to promote efficiency, and thus to “protect defendants from harassment resulting from multiple suits.” *Keeton*, 465 U.S. at 777. Missouri’s joinder rules—like the single-publication rule at issue in *Keeton*—“reduce[] the potential serious drain . . . on judicial resources” that would arise from multiplicative litigation and serve the state’s “substantial interest in cooperating with other States . . . to provide a forum for efficiently litigating all issues and damage claims . . . in a unitary proceeding.” *Id.* The inefficiencies that would flow from accepting Pfizer’s theory, in contrast, would extend well beyond this case. Future multi-state class actions and large joinder cases, under Pfizer’s theory, would have to be broken into multiple state cases. The burden on parties and courts would be enormous.

In its amicus brief in support of Pfizer, the Chamber of Commerce argues, paradoxically, that the decision below would *burden* the court system, “because it

would give plaintiffs’ lawyers free rein to consolidate the claims of any number of plaintiffs in any forum, so long as just one plaintiff resides or was injured there.” Chamber Br. at 4; *see also id.* at 18–19. But the Chamber does not explain how *consolidating* cases in a single forum could seriously create a *greater* burden on courts, regardless of the forum where they are consolidated. The Chamber also argues that the decision “would interfere with the workings of the federal system, by empowering Missouri (and every other State) to adjudicate claims even when nearly all of the relevant events took place in a different jurisdiction.” *Id.* at 4; *see also id.* at 19–20. But *Keeton* makes clear that a state has a valid interest in providing a forum for resolution of claims even when only a small fraction of the harm occurred there, as well as an interest in coordinating with other states to efficiently resolve cases. 465 U.S. at 777.

The Chamber’s real complaint appears not to be that Pfizer is a defendant in a Missouri case—which it concededly would be, at least as to the claims of four plaintiffs—but that Pfizer is a defendant in a *large* case. *See* Chamber Br. at 4 (the district court’s decision makes it “impossible for companies to predict where they might face large product-liability suits”); *id.* at 18 (companies “will have no way of avoiding being trapped in mass actions in any forum in the country”). This case has a large number of plaintiffs because Missouri law allows joinder of a large number of plaintiffs in a single complaint. But neither Pfizer nor the Chamber identifies any

principle of due process that protects defendants from large, multi-plaintiff cases. The number of plaintiffs on the complaint “has nothing to do with the contacts among” Pfizer, Missouri, and the litigation. *Keeton*, 465 U.S. at 779.

Moreover, given that Pfizer has done extensive business in Missouri and has faced numerous past lawsuits in the state, the company cannot credibly claim surprise at Missouri’s joinder laws. *Id.* (holding that the defendant could be “charged with knowledge” of forum law when the defendant did regular business in the state). It thus “must anticipate that such a suit will seek nationwide damages.” *Id.* at 781. And given that it is on notice, Pfizer can “act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.” *World-Wide Volkswagen*, 444 U.S. at 297. What it cannot do is intentionally do business in Missouri only to later complain about being subject to that state’s laws. *See Int’l Shoe*, 326 U.S. at 319 (“[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state” such that an “obligatio[n] arise[s]” to respond there to suit.).

Pfizer may well prefer to litigate against certain plaintiffs in another forum. But the victim of a tort “may choose to bring suit in any forum with which the defendant has . . . minimum contacts.” *Keeton*, 465 U.S. at 780. If plaintiffs here

chose a jurisdiction with favorable law, that “is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations.” *Id.* In short, it “does not offend traditional notions of fair play and substantial justice,” and thus does not implicate due process. *Int’l Shoe*, 326 U.S. at 316.

CONCLUSION

Assuming it reaches the question of personal jurisdiction, this Court should affirm the district court’s decision that Pfizer is subject to specific personal jurisdiction in Missouri on the claims of both resident and non-resident plaintiffs.

Respectfully submitted,

/s/Matthew Wessler

Matthew W.H. Wessler
Deepak Gupta
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741

Gregory A. Beck
1250 Connecticut Ave.
Suite 200
Washington DC 20036
(202) 684-6339

November 15, 2016

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,964 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Baskerville font. The brief has been scanned for viruses and is virus free.

/s/Matthew Wessler
Matthew Wessler

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2016, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/Matthew Wessler

Matthew Wessler