APL-2018-00037
Appellate Docket No. 2017-00501
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IN THE

Court of Appeals

of the

State of New York

DANIEL WILLIAMS and EDWARD WILLIAMS,

Plaintiffs-Appellants,

– against –

BEEMILLER, INC., doing business as HI-POINT, MKS SUPPLY, INC., INTERNATIONAL GUN-A-RAMA, KIMBERLY UPSHAW, JAMES NIGEL BOSTIC, CORNELL CALDWELL, JOHN DOE TRAFFICKERS 1-10,

Defendants,

– and –

CHARLES BROWN,

Defendant-Respondent.

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

Amicus curiae American Association for Justice ("AAJ") is a national voluntary bar association founded in 1946 to safeguard the right of all Americans to seek legal recourse for wrongful injury. AAJ members practice law in every state in the United States and primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. AAJ works to protect the ability of plaintiffs to vindicate their rights under state tort laws. AAJ has participated before the Supreme Court of the United States as amicus curiae on issues of personal jurisdiction and due process, like those before this Court, in a number of cases, including *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); and *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

Recent Supreme Court jurisprudence on personal jurisdiction has emphasized federalism concerns as the fulcrum upon which traditional concerns about "minimum contacts" and "fair play and substantial justice" are evaluated. It has also left intact the stream of commerce theory that justifies the exercise of personal jurisdiction. The court below failed to give either of these concepts, as currently understood, sufficient heed. This brief seeks to provide this Court with some perspective on the interplay of these concepts under modern jurisprudence and

suggests that the Appellate Division's determination against the exercise of personal jurisdiction should be reversed.

ARGUMENT

Flexibility guides the analysis under today's personal-jurisdiction jurisprudence consistent with the Fourteenth Amendment's Due Process Clause. In this case, the Fourth Department instead applied a rigid standard that relied mechanically on a defunct, purely geographic requirement to reach its disposition. Beyond using the wrong tools to examine the appropriate due-process considerations, the decision below ignored competing due-process concerns that weigh heavily in favor of assuming jurisdiction.

I. "MINIMUM CONTACTS" AND TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE STILL DEFINE THE DUE PROCESS ISSUE PRESENTED HERE AND ARE FULLY SATISFIED UNDER THE FACTS.

International Shoe Co. v. Washington, 326 U.S. 310 (1945), marked the refutation of an inflexible geographic approach that characterized personal jurisdiction under *Pennoyer v. Neff*, 95 U.S. 714 (1877), which depended for its rationale upon service being effectuated through sheriffs to assure an appearance in court for a civil action. Instead, as *International Shoe* explained, "capias ad respondendum has given way to personal service of summons or other form of

notice." 326 U.S. at 316. Thus, the exercise of personal jurisdiction consistent with due process

> requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. The Supreme Court has explained the movement from *Pennoyer* to *International Shoe* as "abandoning the shibboleth that '[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established,'" in favor of a "reasonableness" analysis. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (quoting *Pennoyer*, 95 U.S. at 720).

None of that analysis was rendered infirm by more recent jurisprudence. Contemporary Supreme Court decisions still acknowledge that "'[t]he canonical opinion in this area remains *International Shoe*,'" and minimum contacts, as well as "fair play and substantial justice," remain the standards that due process requires. *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011)). Rather than retreat from *International Shoe*'s approach, contemporary jurisprudence employs it with gusto and recognizes "'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). It therefore "usually

will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." *Id.*

Today, it is even less inconvenient today than it was in 1957, when the Court first made that statement about modern conveniences. *See World-Wide Volkswagen*, 444 U.S. at 293 ("The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided."). Indeed, the advent of online research, face-to-face communications over distances, multi-jurisdictional practice, and ubiquitous travel options allow parties and their counsel to cover the globe, and certainly all domestic jurisdictions. The Supreme Court implicitly recognized as much in *Bristol-Myers Squibb Co. v. Superior Court*, when it first acknowledged that the "primary concern" of due process is any "burden on the defendant" engendered by litigating in a state in which it is not resident, 137 S. Ct. 1773, 1780 (2017), but then elided that question in favor of a different one. It said that "[a]ssessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum," *id.*, but the Court did not undertake that assessment, which was plainly *de minimis* as Bristol-Myers was litigating the same issue in the same state with in-state residents, where the personal jurisdiction was unquestioned.

Even so, the *Bristol-Myers* Court emphasized that the proper inquiry was a flexible one in which a "a court must consider a variety of interests." *Id.* This holding

is consistent with traditional notions of due process, which recognize that "'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,'" but is "'flexible and calls for such procedural protections as the particular situation demands.'" *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citations omitted).

Bristol-Myers establishes that, among the concerns critical to the appropriate inquiry, a court must consider "'the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice.'" 137 S. Ct. at 1780 (quoting *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978)). *See also LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 218, 735 N.E.2d 883, 888 (2000) (citing *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 113 (1987)). Plainly, a plaintiff, as here, has a deep interest in pursuing a case in his home state when that is where the injury occurred. *See, e.g.*, *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947); *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001).

In *Bristol-Myers*, the Court merged the State's interest and the defendant's interest into a single overlapping consideration. Thus, the burden of the litigation on the defendant, besides some practical considerations, "also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers*, 137 S. Ct. at 1780. The

Court expressed its concern that the exercise of jurisdiction as a function of state sovereignty "implie[s] a limitation on the sovereignty of all its sister States" who might also assert authority to try the matter. *Id.* (quoting *World–Wide Volkswagen*, 444 U.S. at 293). The Court called this concern a due process "federalism interest" that could "divest the State of its power to render a valid judgment." *Id.* at 1780-81 (citing *World–Wide Volkswagen*, 444 U.S. at 294). At the same time, a court must assure access to the courts so that defendants engaged in profitmaking interstate activities not "escape having to account . . . for consequences that arise proximately from such activities." *Burger King*, 471 U.S. at 473-74.

II. NEW YORK'S INTEREST IN THE LITIGATION IS UNDENIABLE.

A. Long-Arm Jurisdiction Permits a State to Adjudicate Disputes with Non-Residents Who Distribute their Product within the State.

In a common and unremarkable exercise of long-arm jurisdiction, a seller receives an order for its product and ships it into the jurisdiction. Thus, for example, there was no issue that the 86 California plaintiffs who sued Bristol-Meyers in California state courts, alleging product liability claims, properly invoked personal jurisdiction over the Delaware-incorporated and New York-based pharmaceutical company. *See Bristol-Meyers*, 137 S. Ct. at 1778 (reporting that Bristol-Meyers only challenged personal jurisdiction with respect to the non-California plaintiffs). The theory behind this exercise of personal jurisdiction is that the defendant "purposefully 'reach[ed] out beyond' [its] State and into another by, for example,

entering a contractual relationship that 'envisioned continuing and wide-reaching contacts' in the forum State," or by distributing its product to "'deliberately exploi[t]' a market in the forum State." *Walden v. Fiore*, 571 U.S. 277, 285 (2014) (brackets in original) (citations omitted). When jurisdiction is based on contacts of that nature, even if initiated by someone in-state, it does not constitute the type of "'random,' 'fortuitous,' or 'attenuated' contacts" made with other persons affiliated with the State that has proven fatal in other cases. *See Burger King*, 471 U.S. at 475 (citations omitted).

Similarly, in a case that was before the Supreme Court at the same time as *Bristol-Meyers*, the Court denied certiorari where Texas had exercised jurisdiction over a Mexican television station that allegedly defamed a Texas resident. *TV Azteca v. Ruiz*, 490 S.W.3d 29, 34 (Tex. 2016), *cert. denied*, 137 S. Ct. 2290 (2017). The Texas Supreme Court held that the availability of the allegedly defamatory broadcasts over the air in Texas by themselves were not enough to impart personal jurisdiction over the Mexican defendants in Texas, but, when combined with the television station's substantial and successful solicitation of advertising in the state of Texas and the benefits derived from the fact that the television signals travel into Texas, as well as additional efforts to promote their broadcasts and expand their Texas audience, the due-process requirements for personal jurisdiction were satisfied. *Id.* at 51-52 ("[W]hether Petitioners intentionally directed the signals into

Texas or not, we must look for evidence that each of the Petitioners took specific and substantial actions to take advantage of the fact that the signals reach into Texas and to financially benefit from that fact. We conclude such evidence exists.").

B. Federal Law Establishes New York's Interest in the Distribution of the Firearms at Issue.

Here, Defendant Charles Brown is a federal firearms licensee in Ohio and a distributor for the other defendants. *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 145, 952 N.Y.S.2d 333 (4th Dep't 2012), *opinion amended on reargument*, 103 A.D.3d 1191, 962 N.Y.S.2d 834 (4th Dep't 2013). As such, he must comply with federal law governing the sale of firearms. One such federal statute prohibits licensees from "ship[ping] or transport[ing] in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector," with certain exceptions not relevant here. 18 U.S.C. § 922(a)(2). The statute further prohibits a licensee from selling firearms to a "person who the licensee knows or has reasonable cause to believe does not reside in . . . the State in which the licensee's place of business is located," except for rifles and shotguns, but not handguns, where the licensee meets with that person face-to-face and "the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States." *Id.* at § 922(b)(3). *See also* 27 C.F.R. § 478.99(a).

These provisions, enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 ["Crime Control Act"], and

the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, implement a congressional finding that "the existing Federal controls over [widespread traffic in firearms] do not adequately enable *the States* to control this traffic within their own borders through the exercise of their police power." Crime Control Act § 901(a)(1), 82 Stat. at 225 (1968) (emphasis added). The provisions addressed a "serious problem of individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State," and these interstate purchases were accomplished "without the knowledge of . . . local authorities." S. Rep. No. 89-1866 (1966), at 19. The problem was particularly acute because the lack of controls enabled firearms to be acquired by "large numbers of criminals and juveniles." S. Rep. No. 90-1097 (1968), at 80. That type of unregulated commerce in arms, Congress found, had "materially tended to thwart the effectiveness of State laws and regulations, and local ordinances." Crime Control Act § 901(a)(4), 82 Stat. at 225 (1968).

In enacting the provision, Congress established a federally cognizable interest in each State in which firearms are transported and specifically foreclosed the lawful sale of firearms intended for distribution into a state with its knowledge. The longstanding nature of these requirements and the Defendants' status as licensed firearms dealers provides them with knowledge of both the requirement and of state interests where firearms are to be distributed. Because the essence of due process is

notice followed by an opportunity to be heard, *Mathews*, 424 U.S. at 348, no due process violation is presented by these facts. If there had been ambiguity in what federal law required and its relationship to state interests, there might have been a due-process argument to be made. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("'[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'" (citation omitted)); *see also F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (explaining that due process requires that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.").

Here, however, there is no reason to attribute vagueness to the law. Federal law establishes appropriate conduct and a recognition of state interests in firearm sales that occur outside the state when those sales are both intended to bring the firearms into the state and evade state and local laws and regulations. Applying that consideration is consistent with traditional judgments about the "reasonableness of asserting jurisdiction over the defendant[, which] must be assessed 'in the context of our federal system of government,' and . . . the 'orderly administration of the laws.'" *World-Wide Volkswagen*, 444 U.S. at 293-94 (citations omitted). That context establishes New York's unassailable interest in the subject of this litigation.

C. The Gun at Issue Was Delivered into the Stream of Commerce with Knowledge that It Would be Sold in New York.

World-Wide Volkswagen established a beachhead in personal jurisdiction that plainly applies here. It held, "the 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." 444 U.S. at 297-98. According to the Court, the stream of commerce referred to both formal or informal distribution networks that a defendant uses to "serve directly or indirectly, the market for its product in other States." *Id.* at 297. The Court further explained that if a sale of a product

> arises from the efforts of the manufacturer or [defendant] to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject [defendants] 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.

These holdings from *World-Wide Volkswagen* should decide this case in favor of personal jurisdiction over the defendants. In applying this concept, the Supreme Court has established two competing but similar tests for the stream of commerce, though both tests are met here. In *Asahi Metal Indus.*, although one set of justices would have permitted a state to assume jurisdiction when "the regular and anticipated flow of products" reaches the forum state with no additional conduct

needed, 480 U.S. at 117 (Brennan, J., concurring), a plurality of the Court would have adopted a more stringent "stream of commerce" test, which requires some "[a]dditional conduct of the defendant [that] may indicate an intent or purpose to serve the market or the forum State." *Id.* at 112 (plurality).

The facts alleged in this case demonstrate that the guns sold in Ohio had a known destination in this State, were intended for this State, and were distributed through illegal straw purchases in a failed attempt to avoid compliance with New York law. All of this renders New York's interest preeminent and an interest that no other state could possibly vindicate.

In contrast, in *Bristol-Meyers*, the due-process issue arose solely because it was impossible to discern a legitimate state interest in the sale of a problematic pharmaceutical that involved delivery from outside the state to non-residents, where the only connection to the state of California was the lawsuit itself – not the intention to send the product into the forum state and not the occurrence of the injury within the state. *Bristol-Meyers* made clear by its application of due-process principles to the facts of the case that specific jurisdiction does not depend upon the product's purchase within the forum. The Court found no "adequate link" between the nonresidents' claims and the California forum where the nonresident plaintiffs "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." *Bristol-*

Meyers, 137 S. Ct. at 1781. Thus, purchase location was just one of four potential grounds for establishing the requisite forum-claim "affiliation" or "connection." *Id.*

Moreover, unlike the facts in *World-Wide Volkswagen*, the presence of the firearms in New York was not merely fortuitous. The *World-Wide Volkswagen* plaintiffs sued, among others, two New York defendants in Oklahoma in a products liability action even though the car purchased in New York by then-New Yorkers, after the car burst into flames while traveling through Oklahoma. The mere happenstance of passage through Oklahoma was characterized by the Supreme Court as "a total absence of those affiliating circumstances" necessary to allow the exercise of jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 295. Hence, as *Bristol-Meyers* put it, "there must be '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.'" 137 S. Ct. at 1780 (brackets in original) (citation omitted). Specific jurisdiction thus "'is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Id.* (citation omitted).

Here, the allegations satisfy this requirement. Brown sold 181 guns to James Nigel Bostic and his associates, aware that Bostic was a gun trafficker who traveled to Ohio and used straw purchasers to obtain substantial quantities of guns to resell on the streets of Buffalo, New York. *Williams v. Beemiller, Inc.*, 159 A.D.3d 148,

150-51, 72 N.Y.S.3d 276 (N.Y. App. Div. 2018). For that conduct, Bostic pleaded guilty to federal firearms trafficking violations. *Id.* at 151. As the Appellate Division acknowledged, plaintiffs alleged that defendants *intentionally* supplied the handguns in this manner because "because they profited from sales to the criminal gun market." *Id.* In fact, the First Amended Complaint alleged that, over a twelve-year period preceding the sale of the gun at issue in this case, the federal Alcohol, Tobacco and Firearms Bureau notified both Defendant Beemiller and Defendant MKS Sales, owned by Defendant Brown, of more than 10,000 guns they sold having been used in crimes. First Amended Complaint, *Williams v. Beemiller, Inc.*, Index No. I2005-007056, at 3, ¶ 11 (Oct. 17, 2005).

By making sales to a known gun trafficker, for distribution within the New York market, defendants were engaged in a form of purposeful availment that seeks the "privilege of conducting activities within the forum." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). That knowing action satisfied the minimum-contacts requirement. Once minimum contacts are established, the remaining inquiry involves whether the litigation results from alleged injuries that "arise out of or relate to" those activities. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). This second requirement assures that a "defendant's conduct and connection with the forum . . . are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297. Here, it was

entirely foreseeable that guns sold for distribution in New York would open potential liability in New York. Brown, and by extension the other defendants participating in this black market, plainly avoided compliance with the Crime Control Act and Gun Control Act, knowing that they were in violation of these federal requirements because the guns were headed illegally to New York. Because they had no authority to send the guns into New York directly, straw purchase sales were utilized to attempt to avoid detection with much the same effect and legal consequences as direct sales. After all, where, as here, the defendants

> 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.

Burger King, 471 U.S. at 473-74 (citation omitted).

Where courts have denied personal jurisdiction, the common denominator is a highly attenuated connection to the forum state. For example, in *Daimler*, the case involved Argentinian plaintiffs who sued Daimler for actions taken by Daimler's Argentinian subsidiary by relying on the California presence of the German company's independently incorporated U.S. subsidiary. 571 U.S. 117 (2014). The "Rube Goldberg" approach to connecting a U.S. company to an Argentinian one through a German parent was what doomed the enterprise in the U.S. Supreme

Court. Similarly, *Bristol-Myers* found no California connection between non-resident plaintiff-buyers and the non-resident defendant-manufacturer.

Here, New York has a direct and substantial interest in guns that are sold with intent to distribute them in the state. Federal law both recognizes and facilitates that state interest, and defendants plainly distributed the handguns to "'deliberately exploi[t]' a market in the forum State." *Walden*, 571 U.S. at 285 (brackets in original) (citation omitted). Moreover, New York also has a direct and substantial interest in the injury that occurred within its borders, involving a weapon that evaded state and federal legal requirements.

It should further be recognized that due process is not a one-way concept that only considers the reasonableness of an adjudication to a defendant. It protects all parties in a legal action. The Supreme Court "has held 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). Thus, the value of litigating the case in New York to the plaintiffs cannot be overlooked. The injury, evidence relating to the injury, and many of the transactions that caused this tragedy occurred in New York.

In sum, New York has the necessary affiliation to meet the requirements for specific jurisdiction, has an overriding interest in this litigation, recognized in state

and federal law, that meets due process "federalism interest" that *Bristol-Myers* emphasized, and should adjudicate this case.

CONCLUSION

For the foregoing reasons, this Court should hold that New York's courts have personal jurisdiction over the defendants and the Appellate Division should be reversed.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I, Robert S. Peck, hereby certify pursuant to 22 N.Y.C.R.R. § 500.13(c) that this brief contains 3,926 total words for all printed text in the body of the brief.

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