No. S221038
(Court of Appeals No. A140035)
(San Francisco County Super. Ct. J.C.C.P. No. 4748)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRISTOL-MYERS SQUIBB COMPANY,
Petitioner,

v.

SUPERIOR COURT FOR THE COUNTY OF SAN FRANCISCO,
Respondent.

BRACY ANDERSON, *et al.*,
Real Parties in Interest.

After a Decision by the Court of Appeal,
First Appellate District, Division Two

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONER

INTERESTS OF *AMICI CURIAE*

Washington Legal Foundation (WLF) is a nonprofit public interest law firm and policy center based in Washington, D.C., with supporters in all 50 States.[1] WLF devotes a significant portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared frequently in this and other state and federal courts in cases involving personal jurisdiction issues, to support defendants seeking to avoid being subject to a court's coercive powers when assertion of jurisdiction does not comply with traditional notions of fair play and substantial justice. (*See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 131 S. Ct. 2846; *Novo Nordisk A/S v. Lukas-Werner* (2013), *cert denied*, 134 S. Ct. 423.)

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

In its seminal decision in *Daimler AG v. Bauman* (2014) 134 S. Ct. 746, the U.S. Supreme Court made clear that the courts of a State lack personal jurisdiction over a corporate defendant unless its activities within the State gave rise to the claims being asserted or unless the corporation is "at home"

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

within the forum State. *Daimler* further clarified that a corporation, even one that conducts substantial business in all 50 States, should be deemed "at home" in no more than one or two of the States. *Amici* are concerned that the rationale of the court of appeal, if adopted by this Court, would essentially negate *Daimler* as an effective check on state court jurisdiction over out-of-state corporate defendants. *Amici* are filing this brief to urge the Court to respect *Daimler* and to ensure that businesses are provided a timely means of structuring their conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

INTRODUCTION AND STATEMENT OF THE CASE

Like many large corporations that sell products nationwide, Petitioner Bristol-Myers Squibb Co. ("BMS") sells a large number of products in California. For example, BMS's Plavix sales in California between 2006 and 2012 totaled nearly $1 billion. This case addresses whether those substantial sales are sufficient to justify California's exercise of jurisdiction over claims filed by nonresidents who allege that their purchase and use of Plavix—and their alleged injury from such use—all occurred outside California.

A State's exercise of personal jurisdiction over a corporation based on its very large volume of sales or other business activity within the State is often referred to as an exercise of "general jurisdiction." The U.S. Supreme Court's *Daimler* decision made clear that a State may not exercise general jurisdiction over a corporation when, as here, the corporation is neither incorporated in nor has its principal place of business within the State, even when the corporation has substantial sales within the State. This case will determine whether nonresidents may nonetheless invoke the California courts' personal jurisdiction over such a corporation by citing those very same substantial sales as the basis for "specific jurisdiction."

These products liability actions involve allegations that consumers from across the nation suffered injuries after taking Plavix, a drug approved by the Food and Drug Administration (FDA) for use in preventing dangerous blood clots. A total of 659 plaintiffs—84 California residents and 575 nonresidents–joined together to file eight separate complaints against BMS in March 2012 in San Francisco Superior Court.[2] The 575 nonresident plaintiffs claim no contacts with BMS's California activities or with California generally. Moreover, although BMS derives substantial revenue from California sales, those sales represent but a small fraction of BMS's overall sales, and California is neither the State in which BMS is incorporated (Delaware) nor the State in which it maintains its principal place of business (New York).

The court of appeal nonetheless held that California could maintain personal jurisdiction over BMS with respect to the claims not only of the 84 California residents (an issue that BMS does not contest) but also with respect to the 575 nonresident plaintiffs. When the case first came before the appeals court, it summarily denied BMS's writ petition (seeking review of the superior court's conclusion that it could exercise general jurisdiction over BMS based on the company's substantial business activity in California). Following the U.S. Supreme Court's *Daimler* decision, this Court directed the court of appeal to address the merits of BMS's petition.

The court of appeal did so, and concluded that although *Daimler*

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[2] The decision by plaintiffs' lawyers to file eight separate complaints (each with less than 100 plaintiffs) was not coincidental. Had any of the complaints included 100 or more plaintiffs, BMS's right to remove the complaint to federal court under the Class Action Fairness Act (CAFA) would have been beyond question. (*See* 28 U.S.C. § 1332(d)(11)(B)(i) (authorizing removal of a "mass action" in which the monetary claims of "100 or more persons are proposed to be tried jointly.").)

precluded assertion of *general* jurisdiction over BMS with respect to the claims of the nonresident defendants, California courts could assert *specific* jurisdiction over BMS. (App. 1-40.) The court held that a state court's power to exercise specific jurisdiction turns on an analysis of three factors: (1) whether the defendant has purposely directed its activities at the forum State; (2) whether "the plaintiff's claims are related to or arise out of these forum-directed activities"; and (3) whether the exercise of jurisdiction is "reasonable." (*Id.* at 18.) The court focused most of its attention on the second factor, which it referred to as the "relatedness test." It concluded that the relatedness test was satisfied in this case "because of the 'substantial connection' between BMS's substantial, purposeful activities in California and the RPI [Real Parties in Interest] claim." (*Id.* at 30.) It added:

> [I]t is undisputed that BMS has had substantial, continuous contact with California for many years, including regarding the sale of Plavix. The evidence indicates that BMS has "deliberately exploited" the relevant market in the State for many years, having sold over 196 million Plavix pills in California between 1998 and 2006 and nearly $1 billion worth of Plavix between 2006 and 2012. Further, plaintiffs allege BMS's Plavix sales in California have led to injuries to California residents that are the same as those suffered by the RPI. . . . Also, although the RPI injuries did not occur in the course of BMS's direct delivery of Plavix to the California market, plaintiffs allege, and the record suggests, that BMS sold products to both resident plaintiffs and the RPI as part of the distribution of Plavix in many states. In other words, the injuries are alleged to have occurred in the course of a common effort, another fact that weighs in favor of finding a "substantial connection" between BMS's contacts with California and the RPI's claims.

(*Id.* at 30-31 (citations omitted).)

The court of appeal also concluded that the exercise of jurisdiction over the claims of the nonresident plaintiffs would be "reasonable." (*Id.* at 34-38.)

In particular, it concluded that exercising jurisdiction would serve the interests of "judicial economy" by relieving judges in the 33 different States in which the nonresident plaintiffs reside of the obligation "to become involved in the discovery, motion, and trial practice that may be necessary to resolve these cases." (*Ibid.*)

SUMMARY OF ARGUMENT

The Fourteenth Amendment's Due Process Clause protects individuals and corporations against burdens imposed by States in which they are not residents, whether those burdens are imposed by rules of conduct or judicial process. (*See, e.g., J. McIntyre Machinery, Ltd. v. Nicastro* (2011) 131 S. Ct. 2780, 2787 (plurality) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.").)

The U.S. Supreme Court has nonetheless recognized that there are specific instances in which a State's exercise of personal jurisdiction over nonresident defendants does not offend traditional notions of fair play and substantial justice and thus is consistent with the Due Process Clause. In particular, when "a corporation exercises the privilege of conducting activities within a state," the State may "require[ ] the corporation to respond to a suit" brought to enforce "obligations [that] arise out of or are connected with the [corporation's] activities within the state." (*International Shoe Co. v. Washington* (1945) 326 U.S. 310, 319.)

The obligations that the RPIs (the 575 nonresident plaintiffs) seek to impose on BMS cannot be said to "arise out of" or to be "connected with" BMS's activities within California. The RPIs each allege that they suffered injury based on Plavix prescriptions written outside of California by nonresident doctors, and that their purchase of, use of, and injury by the drug

all occurred outside the State. The legal obligations they seek to impose cannot be deemed to "arise out of" or to be "connected with" BMS's California-based activities simply because BMS sells its products in California as well as in other States, or simply because it allegedly acted toward some California consumers in a manner that was similar to the manner in which it acted toward the RPIs. If mere factual similarity among discrete tort lawsuits were sufficient to authorize California courts to exercise personal jurisdiction over claims asserted by nonresidents against out-of-state defendants, then manufacturers that market their products nationwide could be sued in each of the 50 States with respect to *any* claim arising out of the sale of their products.

In the absence of a connection between the RPIs' claims and California, the only conceivable basis for haling BMS into California courts to answer those claims is an assertion that BMS's contacts with California are so continuous and systematic as to render it essentially *at home* in the State. But *Daimler* made plain that such an assertion (often referred to as an assertion of "general jurisdiction") can only be sustained in one of two places: the State in which a corporation maintains its principal place of business or else the State of incorporation. Even though BMS conducts considerable business in California, neither of the two bases for exercising general jurisdiction applies here: BMS's principal place of business is New York, and it is incorporated in Delaware.

The court of appeal sought to evade *Daimler* by simply renaming its basis for haling BMS into California courts; it contended that jurisdiction on the basis of the extensive business conducted by BMS within California (such as BMS's sale of Plavix to California consumers) was an exercise of *specific* jurisdiction. But the due process constraints imposed by *Daimler* cannot be avoided simply by terming one's exercise of jurisdiction "specific" rather than

"general." *Daimler* made clear that when a claim lacks meaningful connection with a State, the State may exercise jurisdiction over the claim only when the corporate defendant is "at home" in the State, and terming an exercise of jurisdiction "specific" rather than "general" does not alter the prerequisites necessary to establish that BMS is at home in California.

The U.S. Supreme Court stated in *Daimler* that an important goal of its personal-jurisdiction case law is to establish clear rules that will permit out-of-state corporations to structure their business practices with some minimum assurance as to where those practices will render them liable to suit. The decision below undercuts that goal. The court of appeal ruled that corporations whose contacts with California are insufficiently extensive to render them "at home" within the State may nonetheless be haled into California courts to respond to out-of-state claims based on a showing that their contacts with the State rise to some unspecified level of extensiveness. That ruling deprives corporations of the ability to predict how extensive their contacts with California can be before they will be answerable in the State's courts for actions arising in other States.

The court of appeal's ruling is also inconsistent with *this* Court's understanding of when a cause of action is sufficiently connected with California to render an assertion of personal jurisdiction over the defendant consistent with federal due process constraints. The Court has adopted a "substantial connection" test, whereby California courts may exercise specific jurisdiction over a claim against an out-of-state defendant only if "the claim bears a substantial connection to the nonresident's forum contacts." (*Vons Companies v. Seabest Foods, Inc.* (1997) 14 Cal. 4th 434, 452.) The RPIs have not demonstrated a substantial connection between their claims and BMS's contacts with California; factual similarity between their claims and the

separate claims asserted by some California residents against BMS does not suffice to satisfy *Vons*'s substantial-connection test.

The RPIs argue that considerations of efficiency and reasonableness support California's exercise of jurisdiction over their claims. That argument is without merit. Such considerations are never permitted to trump due process constraints; they become relevant only after a court determines that minimum contact requirements are satisfied. Moreover, there is nothing "reasonable" about upholding jurisdiction over the RPIs' claims and thereby ratifying their counsel's blatant manipulation of procedural rules for the purpose of bringing those claims before a tribunal it favors.

ARGUMENT

I. CALIFORNIA COURTS LACK PERSONAL JURISDICTION OVER BMS TO HEAR CLAIMS THAT LACK A SUBSTANTIAL CONNECTION WITH THE STATE

As this Court has long recognized, the Due Process Clause of the Fourteenth Amendment limits the authority of California courts to exercise personal jurisdiction over defendants that do not voluntarily consent to jurisdiction. (*See, e.g.*, *Vons*, 14 Cal. 4th at 444 (stating that "California's long-arm statute authorizes California courts to exercise jurisdiction on any basis not inconsistent with the Constitution of the United States or the Constitution of California. (Code Civ. Proc., § 410.10.)").) Those limitations serve both to protect litigants from inconvenient or distant litigation and to recognize limits on the sovereignty of each State with respect to affairs arising in other States. (*See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).)

Several recent U.S. Supreme Court decisions have served notice that those limitations have real teeth. In particular, the Court has explained that when a claim arises outside of the forum State, the State's courts may not

exercise jurisdiction over the claim simply because a corporate defendant conducts a significant amount of business within the State. (*Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 131 S. Ct. 2846; *Daimler AG v. Bauman* (2014) 134 S. Ct. 746.) Rather, the Due Process Clause permits state courts to exercise personal jurisdiction over such claims only if the non-consenting corporate defendant is "at home" in the forum—meaning that either its principal place of business or its place of incorporation is within the State. (*Id*. at 760-62.) Because BMS does not qualify as "at home" in California—*i.e.*, California is neither its principal place of business nor its place of incorporation—it cannot be haled into California courts to answer claims arising in other States simply because (like all large companies that operate on a nationwide basis) it conducts a considerable amount of business in California.

A. The Court of Appeal Sought to Evade *Daimler*'s Limits on Jurisdiction over Out-of-State Corporations by Simply Renaming Its Basis for Haling BMS into California Courts

When considering due process limitations on the exercise of personal jurisdiction over out-of-state defendants, courts have found it convenient to describe two categories of personal jurisdiction: general jurisdiction and specific jurisdiction. The Fourteenth Amendment does not, of course, contain two separate Due Process Clauses, and thus the rationale for imposing due process limitations on court authority (outlined above) is equally applicable to both categories of personal jurisdiction.

The U.S. Supreme Court in *Daimler* provides a detailed explanation of its use of the terms general and specific jurisdiction. It explained that "general jurisdiction" describes:

> [S]ituations where a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from

> dealings entirely distinct from those activities." [*Int'l Shoe*], 326 U.S., at 318. As we have since explained, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."

(*Id.* at 754 (quoting *Goodyear*, 131 S. Ct. at 2851).)

It explained that "specific jurisdiction," on the other hand, describes exercises of jurisdiction under the circumstances outlined in *Int'l Shoe*, which "held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the 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." (*Ibid.* (citations omitted).) The specific jurisdiction inquiry focuses on "the relationship among the defendant, the forum, and the litigation." (*Ibid.*) As its name implies, "specific" jurisdiction depends on the specific facts of the claim before the court; it is limited to cases in which the defendant's forum contacts "gave rise to the liabilities sued on," (*ibid.* (quoting *Int'l Shoe*, 326 U.S. at 317)), and "in which the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.'" (*Ibid.* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall* (1984) 466 U.S. 408, 414 n.8)).

Acting through a subsidiary, the defendant car manufacturer in *Daimler* each year shipped cars worth hundreds of millions of dollars for sale to California consumers. *Daimler* nonetheless held that California-based courts lacked personal jurisdiction over the manufacturer in connection with claims that arose outside the State. It held that specific jurisdiction was unavailable because, although the manufacturer's and/or its subsidiary's contacts with California were "continuous and systematic," they did not "give rise to the liabilities sued on" and, indeed, had "nothing to do with anything that occurred

or had its principal impact in California." (*Id.* at 761-62.) It held that general jurisdiction was unavailable because the manufacturer was not "at home" in California—given that neither the manufacturer nor the subsidiary had either its principal place of business or its place of incorporation within the State. *Id.* The Court rejected the plaintiffs' request that it approve "the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business," characterizing the plaintiff's proposed formulation as "too grasping." (*Id.* at 761.)

The court of appeal correctly recognized that, in light of *Daimler*, the trial court had erred in ruling that BMS was subject to the general jurisdiction of the California courts. The court nonetheless held that BMS could be haled into California courts via specific jurisdiction. (App. 30-31.) It reached that conclusion on the basis of BMS's "substantial, continuous contacts with California for many years, including regarding the sale of Plavix." (*Id.* at 30.) But by defining "specific jurisdiction" as jurisdiction based on "substantial, continuous contacts with California for many years," the court of appeal has simply applied a new name to the trial court's determination that BMS's extensive contacts with California justified an assertion of "general jurisdiction." *Daimler*'s holding—which rejected the assertion that a nonresident corporation's "substantial, continuous, and systematic course of business" in California was a sufficient basis for asserting personal jurisdiction over claims involving events not connected to California—cannot be so easily evaded. Among other reasons, in the context of assertions of jurisdiction based on the extensiveness of the defendants' overall contacts with the forum, the court of appeal's trick would render specific jurisdiction *broader* than general jurisdiction, which has never been the case. "Specific jurisdiction" has always been understood to refer to exercises of jurisdiction in instances in

which the defendants' contacts with the forum are insufficient to maintain general jurisdiction but are nonetheless directly related to the claim being asserted.

B. The Court of Appeal's Expansive Definition of Specific Jurisdiction Ignores *Daimler*'s Admonition That Rules Governing Jurisdiction Be Kept Simple in Order to Promote Greater Predictability

The U.S. Supreme Court explained in *Daimler* that it adopted its rule governing general jurisdiction over corporations in part because of its simplicity. Ascertaining a corporation's principal place of business and its place of incorporation—the attributes that *Daimler* held are determinative in assessing where a corporation is "at home"—is a relatively straightforward exercise:

> Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. Cf. *Hertz Corp. v. Fried*, 559 U.S. 77, 94 (2010) ("Simple jurisdictional rules . . . promote greater predictability."). These bases afford plaintiffs at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.

(*Daimler*, 134 S. Ct. at 760.)

By upholding personal jurisdiction under its expansive definition of specific jurisdiction, the court of appeal has adopted a jurisdictional rule that is anything but simple. As a result, out-of-state corporations are left with no guidance regarding what activity in California will render them subject to the jurisdiction of California courts. That result is inconsistent with *Daimler*.

The court of appeal did not dispute the highly attenuated nature of any relationship between California and the RPIs' claims.[3] It nonetheless

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[3] *See, e.g.*, App. 31 (conceding that "the RPI injuries did not occur in the course of BMS's direct delivery of Plavix to the California market"); *id.*

concluded that California courts could exercise specific jurisdiction over the RPIs' claims, finding that those claims by nonresidents "arise out of or relate to" BMS's contacts with California because: (1) "BMS has had substantial, continuous contact with California for many years, including regarding the sale of Plavix"; (2) both the injuries that are alleged to have occurred in California and the injuries that are alleged to have occurred in the RPIs' States are alleged to be part of a "common effort" by BMS to market Plavix in all of those States; and (3) the injuries suffered by the California plaintiffs are alleged to be the same as the injuries suffered by the RPIs, suggesting that perhaps some elements of proof "will be common for all plaintiffs." (App. 30-31.) In other words, the court held that corporations whose contacts with California are insufficiently extensive (per *Daimler*) to render them "at home" within the State may nonetheless be haled into California courts to respond to out-of-state claims based on a showing that their contacts with the State rise to some unspecified level of extensiveness.

A rule so amorphous provides corporations with no guidance whatsoever. The court of appeal insists that the RPIs' claims "arise out of or are connected with" BMS's contacts with California (*Int'l Shoe*, 326 U.S. at 319), but it never adequately explains just what that connection consists of. It is untenable to suggest a mere factual similarity among discrete tort lawsuits constitutes the requisite connection. If that were the rule intended by *Int'l Shoe*, then manufacturers that market their products nationwide could be sued in each of the 50 States with respect to *any* claim arising out of the sale of their

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at 30 (conceding that the record demonstrated that "BMS'[s] work on the development, manufacture, labeling, and marketing of Plavix was performed or directed from BMS's New York headquarters and/or its New Jersey operating facilities. [¶] . . . None of the work to develop Plavix took place in California. Nor has BMS ever manufactured Plavix in California.").

products. BMS is hardly unique among manufacturers in distributing its products pursuant to a nationwide distribution and marketing plan.

As *Daimler* explained in rejecting the Ninth Circuit's expansive understanding of personal jurisdiction over nonresident defendants based on claims arising outside the forum, "Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" (*Daimler*, 134 S. Ct. at 761-62 (quoting *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472).)

C. The Court of Appeal's Decision Is Inconsistent with This Court's Understanding Regarding When a Defendant's Forum Contacts Should Be Deemed Sufficiently Connected to a Plaintiff's Claim to Warrant Personal Jurisdiction

The U.S. Supreme Court has consistently held that a state court may not exercise specific jurisdiction over a nonresident defendant simply because the defendant has engaged in continuous and systematic activities within the State. Rather, specific jurisdiction also requires a showing that the defendant's activities are sufficiently connected to the claim. (*See, e.g., Daimler*, 134 S. Ct. at 757 ("a corporation's 'continuous activity of some sort within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity'") (quoting *Int'l Shoe*, 326 U.S. at 318); *Helicopteros*, 466 U.S. at 414 n.8; *Shaffer v. Heitner* (1977) 433 U.S. 186, 204 ("the central concern of the inquiry into personal jurisdiction" is "the relationship among the defendant, the forum, *and the litigation*") (emphasis added).) As *Daimler* explained, personal jurisdiction may not be exercised over nonresident defendants based on claims "having nothing to do with anything that occurred or had its principal impact in California." (*Daimler*, 134 S. Ct. at 762.)

The U.S. Supreme Court has not articulated a precise test for

determining whether a defendant's contacts with the forum are sufficiently connected to the plaintiff's claims to give rise to specific jurisdiction over the defendant. (*See Helicopteros*, 466 U.S. at 415 n. 10 (expressly reserving the question).) State supreme courts and federal appeals courts that have addressed the issue have generally adopted one of three tests for measuring the sufficiency of the connection: (1) the proximate-cause test; (2) the but-for-cause test; or (3) the substantial-connection test. (*See, O'Connor v. Sandy Lane Hotel Co.* (3d Cir. 2007) 496 F.3d 312, 318 (stating that "three approaches predominate" and explaining each approach).) Importantly, application of any one of those three approaches leads to the conclusion that BMS's activities in California are insufficiently connected to the RPIs' claims to warrant exercise of specific jurisdiction.

The most exacting standard is the proximate-cause test, adopted by (among other courts) the First Circuit. Under that test, "[t]he action must directly arise out of specific contacts between the defendant and the forum state." (*Sawtelle v. Farrell* (1st Cir. 1995) 70 F.3d 1381, 1389.)

The most permissive of the three predominant standards is the but-for-cause test, adopted by (among other courts) the Ninth Circuit. (*Ballard v. Savage* (9th Cir. 1995) 65 F.3d 1495, 1500.) Under that test, a plaintiff need only show that "the plaintiff's claim would not have arisen in the absence of the defendant's contacts." (*O'Connor*, 496 F.3d at 319.)

The third standard, the substantial-connection test, falls somewhere in the middle. It "looks for a 'substantial connection' or 'discernable relationship" between the plaintiff's allegations and the defendant's contacts with the forum State. (*Ibid.*) Not only did this Court adopt the substantial-connection test in *Vons*, but it did so with explicit recognition that the substantial-connection test fell somewhere between the proximate-cause test

and the but-for-cause test in terms of its rigor. (*Vons*, 14 Cal. 4th at 475 ("[W]e have rejected the proximate cause test as too narrow, and the 'but for' test as too broad and amorphous.").) The Court cited criticism of the but-for-cause test "as permitting a virtually unlimited exercise of jurisdiction" and observed that "one's birth is a historical 'but for' cause of one's every action, yet the location of one's birth normally should not determine personal jurisdiction." (*Id.* at 467.)

Even if evaluated under the lax but-for-cause test, the RPIs' claims are insufficiently connected to BMS's contacts with California to support a claim of specific jurisdiction. Suppose, hypothetically, that BMS operated as it does today except that none of its California business activity had ever occurred. Even under that extreme hypothesis, the causal chain that led to the nonresident plaintiffs' injuries would not be broken. BMS's work on the development, manufacture, labeling, and marketing of Plavix (which was performed or directed from BMS's New York headquarters and none of which occurred in California) still would have gone forward; the delivery of Plavix to the States in which the RPIs reside still would have occurred (none of the RPIs live in California); the RPIs' doctors, their pharmacists, and BMS's sales representatives all would have performed their usual functions within the RPIs' States of residence; and the RPIs would have suffered the same alleged injuries after taking Plavix.

Because nothing that BMS has done within California is even arguably a but-for cause of the alleged injuries, BMS's contacts with California are insufficiently connected to the RPIs' claims to warrant exercise of specific jurisdiction over BMS under the but-for-cause test. *A fortiori*, exercise of specific jurisdiction is also unwarranted under the stricter "substantial-connection test" adopted by this Court in *Vons*.

The Court's analysis of the jurisdictional facts in *Vons* confirms that the substantial-connection test is not the infinitely malleable test that the RPIs would like it to be. At issue in *Vons* was a cross-complaint filed by a California meat supplier against two out-of-state restaurant franchisees after meat sold by the supplier (and served by the franchisees) caused serious illness and death. The meat supplier claimed that the injuries arose because the franchisees had improperly prepared the meat. The franchisees had significant contacts with California: they regularly conducted business with their California-based franchisor. The Court ultimately determined that a "substantial connection" existed between the franchisees' California contacts and the meat suppliers' claims, pointing to the substantial business relationships among the franchisees, the franchisor, and the meat supplier. (*Vons*, 14 Cal. 4th at 458-60.) While conceding that the franchisees' California contacts were not the *proximate* cause of injury (rather, those injuries arose in Washington State when the franchisees served improperly prepared meat in Washington), the Court concluded that the franchisees' activities in California played a major role in the course of dealing that led up to the improper meat preparation and subsequent injuries. (*Ibid.*) No similar course of dealing occurred here; nothing that BMS did in California led either directly or indirectly to the RPIs' alleged injuries in other States.

The only evidence to which the RPIs can point to support their "substantial connection" claim is the factual similarity between the tort claims filed by the California plaintiffs (claims that are based on BMS's actions within California) and the tort claims filed by the RPIs. But *Vons* makes clear that such factual similarity is insufficient to demonstrate a substantial connection between the plaintiffs' claims and the defendant's contacts with the forum.

II. EFFICIENCY AND REASONABLENESS ARE NOT RELEVANT CONSIDERATIONS IN DETERMINING JURISDICTION; IF CONSIDERED, THESE FACTORS WOULD CUT AGAINST EXERCISING JURISDICTION

The court of appeal sought to bolster its decision to exercise specific jurisdiction by pointing to a number of factors that, it concluded, rendered the exercise of jurisdiction "reasonable." (App. 34-38.) It concluded that: (1) BMS would not be "unduly burdened" by being required to defend the RPIs claims in California state court, given that it would in any event be required to appear in California state court to defend Plavix claims filed by California residents; (2) California has an interest in providing a forum for the RPIs' claims; (3) the RPIs' choice of forum (San Francisco Superior Court) ought to be respected, absent a compelling reason to the contrary; and (4) hearing all of the claims in a single proceeding would promote judicial economy. (*Ibid.*)

But such considerations are never permitted to trump due process constraints; they become relevant if, and only if, a court initially determines that minimum contact requirements have been satisfied. The U.S. Supreme Court has directed that *after* a court has determined that those requirements have been satisfied, it may undertake a reasonableness inquiry to determine whether the exercise of personal jurisdiction over the defendant would nonetheless offend "traditional notions of fair play and substantial justice." (*Burger King*, 471 U.S. at 477-78 (stating that "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction" even if the defendant has purposely engaged in forum activities related to the cause of action); *Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 113-14.) As explained above, the RPIs have failed to demonstrate a substantial connection between their claims and BMS's California activities, and thus efficiency and reasonableness

considerations do not come into play.

A. Granting the Real Parties in Interest Their Requested Forum Would Be Unreasonable in Light of Their Manipulation of Procedural Rules in Order to Have Their Claims Heard in Their Forum of Choice

If reasonableness factors nonetheless are taken into account, the grounds for declining to exercise personal jurisdiction over BMS are strengthened. Counsel for the RPIs kept their claims before the San Francisco Superior Court by engaging in blatant manipulation of procedural rules. There is nothing "reasonable" about haling BMS before a California court to answer claims lacking any connection with California when doing so would tacitly ratify counsel's strategic manipulation.

The suits filed in superior court brought together 659 plaintiffs asserting Plavix-related claims—84 California residents and 575 nonresident plaintiffs. Instead of joining the 659 plaintiffs in a single complaint, counsel divided their clients into eight separate complaints, each with less than 100 plaintiffs. That division was not coincidental; had any of the complaints included 100 or more plaintiffs, BMS's right to remove the complaint to federal court under the Class Action Fairness Act (CAFA) would have been beyond question. (*See* 28 U.S.C. § 1332(d)(11)(B)(i) (authorizing removal of a "mass action" in which the monetary claims of "100 or more persons are proposed to be tried jointly.").) Thus, by dividing the plaintiffs into eight separate complaints, counsel significantly improved the chances that they could defeat removal and thereby keep their claims in their desired state-court forum.[4]

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[4] In another move designed to thwart removal, counsel added a superfluous defendant, McKesson Corp. Because McKesson is a citizen of California, its inclusion in the eight complaints destroyed complete diversity of citizenship and thus eliminated BMS's ability to remove the complaints under 28 U.S.C. § 1441(b).

Later events demonstrated that counsel had no genuine interest in litigating their clients' claims as eight separate lawsuits but instead had been motivated to divide up the claims solely by a desire to keep the number of plaintiffs in each lawsuit below 100. After successfully resisting BMS's efforts to remove the eight complaints to federal court, counsel for plaintiffs supported a petition to coordinate the complaints for all purposes. Chief Justice Cantil-Sakauye granted the coordination petition (filed pursuant to California Code of Civil Procedure § 404.1), and the eight cases were re-assigned to a single coordination judge. (App. 4.)

The RPIs now assert that reasonableness considerations support the appeals court's conclusion that BMS can be haled into San Francisco Superior Court to face the coordinated claims of 659 Plavix plaintiffs (and perhaps an additional 3,200 Plavix plaintiffs). For the reasons explained above, that assertion is without merit. There is nothing reasonable about rewarding counsel's deliberately manipulative filing practices by allowing the RPIs to proceed against BMS in a coordinated proceeding in their forum of choice, a forum that would have been unavailable to them but for their manipulation.

B. California May Not Erase Territorial Limits on Its Courts' Jurisdiction in the Name of Efficiency

The court of appeal also sought to bolster its specific jurisdiction finding by arguing that "judicial economy" would be served by permitting the consolidated complaints to proceed in California courts, rather than requiring the 575 RPIs to file their factually similar claims in 33 separate States. (App. 38.)[5] The court concluded that coordinating all of the claims in one California

[5] Of course, counsel for the RPIs could avoid the problem of multiple state-court forums simply by filing all of their lawsuits in either Delaware or New York, the two States in which BMS is "at home" and thus subject to the general jurisdiction of the courts.

court would permit common issues to be resolved more efficiently. (*Ibid.*) The RPIs go further, arguing that preventing their claims from being tried together "would unequivocally violate each of the nonresident RPIs due process rights." (RPI Br. at 28.)

Those arguments are without merit.[6] The U.S. Supreme Court has never authorized a state court to exercise personal jurisdiction over nonresident defendants in the name of judicial efficiency, if doing so would subject the defendants to claims having little or no connection to the defendant's contacts with the forum. Indeed, the Court has made clear that the U.S. Constitution imposes territorial constraints on the jurisdiction of state courts, and that such constraints do more than simply ensure fairness to an out-of-state defendant. As the Court said in *World-Wide Volkswagen*, the concept of minimum contacts also "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system. . . . [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." (*World-Wide Volkswagen*, 444 U.S. at 292-93.) Those federalism principles impose enforceable limits on a State's authority to project its laws outside of its own boundaries:

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[6] Assertions by counsel for the plaintiffs that their clients have a constitutional right to have all claims tried together ring particularly hollow when one considers that they initially filed the claims in eight separate lawsuits. Moreover, no one has contested the right of the 84 California plaintiffs—the one group of plaintiffs to which California law is applicable—to promote efficiency by having their claims heard together. Indeed, because there are fewer than 100 California plaintiffs, counsel could have joined them all in a single complaint without fear that BMS could have removed the complaint to federal court under CAFA's mass action provision.

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its laws to the controversy; even if the forum state is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

(*Id.* at 294.)

Although recognizing that *Int'l Shoe* marked a departure from the rigid territorial-based rules of personal jurisdiction that prevailed in the late nineteenth and early twentieth centuries, the Court has warned that:

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states.

(*Hanson v. Denckla* (1958) 357 U.S. 235, 251.)

It is no answer to respond: if the federal courts are permitted to transfer lawsuits filed throughout the country to a single federal district court (in connection with multidistrict litigation (MDL) proceedings authorized by 28 U.S.C. § 1407), California should be permitted to do likewise. The federal courts do not operate under the same conflicting-sovereignty constraints applicable to state courts. Because the sovereign territory of the United States extends nationwide, Congress does not exceed its sovereign powers when it subjects anyone located in the United States to the jurisdiction of a federal district court of its choice. (*Oxford First Corp. v. PNC Liquidating Corp.* (E.D. Pa. 1974) 372 F. Supp. 191, 199-200 (Becker, J.).)

This is not to suggest that due process constraints do not apply to the federal government; *Daimler* demonstrates that they clearly do. *Daimler* held that due process considerations prohibited a federal court in California from

exercising personal jurisdiction over a claim alleging violation of federal law. But federal courts face somewhat fewer constitutional constraints on their power to exercise personal jurisdiction over non-consenting defendants than do state courts. The Fifth Amendment's Due Process Clause protects federal-court defendants against the burdens of litigating in a distant or inconvenient forum but does not impose the sorts of federalism-based constraints also imposed on state courts by the Fourteenth Amendment's Due Process Clause. (*See* Robert A. Lusardi, *Nationwide Service of Process: Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 48 (1988).)

Even so, the federal government has been careful to use its multi-state jurisdictional powers sparingly—thereby avoiding imposition of undue burdens on non-consenting out-of-state litigants. The consolidated proceedings envisioned by the court of appeal's decision impose far greater burdens on BMS than do any of the proceedings authorized by the federal MDL statute. For example, 28 U.S.C. § 1407(a) authorizes transfers of civil actions from one federal district court to another district court "for coordinated or consolidated pretrial proceedings" only; the transferee court must remand the case back to the initial district court for trial once pretrial proceedings are completed. (*See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach* (1998) 523 U.S. 26.) In contrast, the RPIs are urging this Court to impose far greater burdens on litigants than anything contemplated by the federal MDL statute. The RPIs ask that the San Francisco Superior Court be permitted to conduct not only pre-trial proceedings but also trials of hundreds of cases with no connection to California. Such trials not only will impose undue burdens on BMS but also will impose undue burdens on the already overburdened California judicial system.

CONCLUSION

Amici curiae respectfully request that the judgment of the Court of Appeal be reversed and that the RPIs' claims be dismissed for lack of personal jurisdiction over Petitioner.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Richard Samp, hereby certify that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed Brief of Washington Legal Foundation, *et al.*, as *amici curiae* in support of Petitioner is produced using 13-point Times New Roman type including footnotes, and contains approximately 6,952 words. I rely on the word count of the computer program (WordPerfect X5) used to prepare this brief.

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PROOF OF SERVICE

I am employed in Washington, District of Columbia. I am over the age of 18 and not a party to the within action. My business address is 2009 Massachusetts Ave., NW, Washington, DC 20036.

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