

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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FORD MOTOR COMPANY, )  
Petitioner, )  
v. ) No. 19-368  
MONTANA EIGHTH JUDICIAL DISTRICT )  
COURT, ET AL., )  
Respondents; )  
- - - - -

FORD MOTOR COMPANY, )  
Petitioner, )  
v. ) No. 19-369  
ADAM BANDEMER, )  
Respondent. )  
- - - - -

Pages: 1 through 68  
Place: Washington, D.C.  
Date: October 7, 2020

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Washington, D.C.

Wednesday, October 7, 2020

The above-entitled matter came on for  
oral argument before the Supreme Court of the  
United States at 11:41 a.m.

1 APPEARANCES:

2 SEAN MAROTTA, ESQUIRE, Washington, D.C.;

3 on behalf of the Petitioner.

4 DEEPAK GUPTA, ESQUIRE, Washington, D.C.;

5 on behalf of the Respondents.

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P R O C E E D I N G S

(11:41 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 19-368, Ford Motor Company versus Montana Eighth Judicial District Court, and the consolidated case.

Mr. Marotta.

ORAL ARGUMENT OF SEAN MAROTTA

ON BEHALF OF THE PETITIONER

MR. MAROTTA: Thank you, Mr. Chief Justice, and may it please the Court:

Specific jurisdiction requires that the defendant have engaged in suit-related conduct in the forum state or that it has engaged in conduct relevant to the plaintiff's claims in the forum state. If those requirements mean anything, it is that the defendant's forum state conduct must be at least a but-for cause of the plaintiff's claim.

Conduct that does not cause a claim is, by definition, irrelevant to the plaintiff's claim. The claims would be the same with or without the conduct. And once the court accepts but-for causation as the minimum, proximate causation follows. A proximate cause standard

1 recognizes that there are some but-for causes  
2 that are too attenuated to be a legal cause of  
3 the plaintiff's claim and keeps those distant  
4 causes from creating jurisdiction.

5 And a proximate cause standard lines  
6 up with this Court's cases since International  
7 Shoe and the principles of federalism, fairness,  
8 predictability, and administrability that have  
9 long governed this Court's analysis.

10 Respondents' primary arguments that  
11 Ford is subject to jurisdiction in Minnesota and  
12 Montana because it carried on similar unrelated  
13 business there is the same argument this Court  
14 rejected in Bristol-Myers Squibb. All that  
15 Respondents add is that they are forum residents  
16 injured in the forum state.

17 But the Court rejected that argument  
18 in Walden, when it explained that an injury is  
19 "jurisdictionally relevant only insofar as it  
20 shows the defendant has formed a contact with  
21 the forum state."

22 And no one claims that Respondents'  
23 forum state injuries show that Ford has formed  
24 contacts with Montana and Minnesota. The  
25 vehicles were brought to the forums through the

1 unilateral actions of third parties, and  
2 Respondents would have been injured wherever  
3 they happened to be when the vehicles crashed.

4 In the end, Respondents press heavily  
5 on the notion that Montana and Minnesota have an  
6 interest in providing a forum to their injured  
7 residents. But that runs afoul of this Court's  
8 cardinal rule that the Due Process Clause  
9 protects defendants, not plaintiffs and not  
10 forum states.

11 The decisions below should be  
12 reversed.

13 CHIEF JUSTICE ROBERTS: Mr. Marotta,  
14 Ford advertises in all 50 states, right?

15 MR. MAROTTA: It does advertise and  
16 market its vehicles to some extent in all 50  
17 states, yes.

18 CHIEF JUSTICE ROBERTS: Right. So, if  
19 somebody is in an accident and they think the  
20 vehicle might have had something to do with it,  
21 is it enough, under your theory, for them to  
22 say, one reason I -- I bought a Ford was because  
23 I saw one of their ads and I was persuaded that  
24 they made good cars?

25 MR. MAROTTA: I think that would

1 satisfy but-for causation, Mr. Chief Justice,  
2 because the purposeful availment through  
3 marketing is in the but-for chain.

4 It may not satisfy proximate causation  
5 depending on the nature of the claim. For a  
6 routine design defect claim, the mere fact that  
7 you saw a Ford ad and were persuaded to buy it  
8 has nothing to do with the substance of the  
9 claim.

10 By contrast, if your claim --

11 CHIEF JUSTICE ROBERTS: Why is that?

12 MR. MAROTTA: -- is that, you know --

13 CHIEF JUSTICE ROBERTS: I mean, you  
14 wouldn't -- you wouldn't be in the car if you  
15 didn't -- weren't persuaded to buy it. Why  
16 doesn't that have a lot to do with the claim?

17 MR. MAROTTA: Well, as -- as Professor  
18 Brilmayer says, if you're telling the story of  
19 this car accident, the fact that they saw a Ford  
20 ad has no substantive relevance to either the  
21 story or to any of the legal elements of the  
22 claim.

23 But, by contrast, if your claim is  
24 that Ford made certain promises to me in that  
25 ad, you know, they warranted that the airbags



1 would deploy, and I relied on that promise in  
2 buying the Ford vehicle and they breached that  
3 promise, that may satisfy proximate cause.

4 But what I think the question shows  
5 is -- but, of course, here, you don't even have  
6 the allegation that they were persuaded to buy  
7 the vehicles by the advertisements in the forum  
8 states.

9 CHIEF JUSTICE ROBERTS: No, but it's a  
10 hypothetical question. And so, if -- if the  
11 Ford ad said, you know, we make the safest cars  
12 on the road, then any claim of a defect, you --  
13 you would satisfy the jurisdictional  
14 requirement?

15 MR. MAROTTA: You would satisfy  
16 but-for cause; it may not satisfy proximate  
17 cause depending on the substantive law that's at  
18 issue. Merely saying we make safe cars might  
19 not rise to the level of a warranty that would  
20 be enforceable. But, again, plaintiffs don't  
21 even satisfy the lower but-for standard in this  
22 case.

23 CHIEF JUSTICE ROBERTS: But, if the --  
24 if the -- if the issue that's going to be  
25 litigated on liability is, say, for example, was

1 the accident caused by a car defect or was the  
2 accident caused by the negligence of the driver,  
3 you've suddenly made that a jurisdictional  
4 question because, if the -- if the accident is  
5 caused -- the proximate cause due to the car,  
6 then you would say, well, there is jurisdiction,  
7 but, if it's the driver's negligence, that  
8 doesn't have anything to do with Ford's  
9 presence.

10 So it seems to me that's a -- a  
11 serious and unfortunate consequence of your  
12 position.

13 MR. MAROTTA: I don't think it is,  
14 Mr. Chief Justice, because we're not asking the  
15 court of personal jurisdiction to decide the  
16 merits of what the cause is. Rather, proximate  
17 cause describes the directness of the connection  
18 between the claims or the allegations that the  
19 plaintiff has made and the defendant's contacts  
20 with the forum state --

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 MR. MAROTTA: -- just as if you'll --

24 CHIEF JUSTICE ROBERTS: Justice  
25 Thomas.

1 JUSTICE THOMAS: Yes. Thank you,  
2 Mr. Chief Justice.

3 Counsel, I'm a little confused. The  
4 -- how do we get from the Due Process Clause to  
5 your proximate cause argument? That seems to be  
6 a long journey.

7 I'd like you to at least trace back  
8 for me, at least as far as International Shoe,  
9 the lineage for this proximate cause  
10 requirement.

11 MR. MAROTTA: Certainly, Justice  
12 Thomas. So World-Wide Volkswagen itself says  
13 that the International Shoe framework is  
14 consistent with the original understanding of  
15 the Constitution and of the Fourteenth  
16 Amendment.

17 So then, when you look back to  
18 International Shoe, is that the specific  
19 jurisdiction is that you engage in certain  
20 conduct in the forum, and then you create  
21 obligations through that conduct, and then you  
22 can be sued for claims that arise out of that  
23 conduct.

24 So that's the base of but-for  
25 causation. But, as the lower courts have

1 recognized, if your base is only but-for  
2 causation, you could have, for instance, the  
3 fact that the designer, you know, went to high  
4 school in a certain state is in the but-for  
5 chain of causation in some sense.

6 So all that proximate causation does  
7 is it takes those attenuated but-for causes out  
8 of the analysis to prevent that absurdity. And  
9 that's how you trace it through.

10 JUSTICE THOMAS: Well, it's -- you  
11 know, the -- that's still a bit confusing to me.  
12 But let me ask you just a practical question.

13 Let's say that, first of all, Ford in  
14 the United States is fairly ubiquitous. So the  
15 -- if I'm in a city like Bristol, Tennessee, and  
16 I notice on the Internet that there is a used  
17 Ford Raptor available for sale at a great price  
18 and great condition in Roanoke, Virginia, so I  
19 drive to Roanoke, I buy it, I keep it a while,  
20 but I -- it -- it -- somehow it fails, and we  
21 can add the facts from -- from these two cases  
22 to that. It fails.

23 Can the resident of Tennessee who  
24 lives in Tennessee and wrecked the car or had  
25 the accident in Tennessee sue in Tennessee --

1 Ford in Tennessee?

2 MR. MAROTTA: I think it would depend  
3 how you came to your awareness that there's a  
4 good value in Roanoke. If somehow Ford  
5 connected you to that through the inventory of a  
6 used car dealer, perhaps. But, if it's just  
7 that you saw on the Internet through, you know,  
8 a classified ad that there's a great value  
9 across the state line, the answer is no, because  
10 that's the action of third parties --

11 JUSTICE THOMAS: Okay. Let me --

12 MR. MAROTTA: -- that can't be imputed  
13 back to Ford.

14 JUSTICE THOMAS: Oh, I understand.  
15 I'm just trying to figure out the sense of this.

16 If I bought the Raptor in Bristol,  
17 Tennessee, could I sue Ford in Bristol, under  
18 the same circumstances, I saw the exact same ad,  
19 but it was Bristol, Tennessee?

20 MR. MAROTTA: If you bought it from,  
21 you know, just a private party, no. If you  
22 purchased it new from your local Ford dealer,  
23 yes.

24 JUSTICE THOMAS: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer.

2 JUSTICE BREYER: Why isn't there  
3 general jurisdiction here? That's just a  
4 preliminary.

5 MR. MAROTTA: There's -- there's no  
6 general jurisdiction -- as has been conceded,  
7 there's no general jurisdiction because Ford is  
8 not at home in Minnesota or Montana. It's not  
9 incorporated there and it's not headquartered  
10 there.

11 JUSTICE BREYER: All right. So the  
12 whole point of this whole doctrine, I take it,  
13 is not to put a defendant to the trouble of  
14 going to a different state, where it's really  
15 unfair.

16 I mean, unfairness underlies all these  
17 cases. And, here, they did send the car in.  
18 Maybe they didn't know it would get there.  
19 Maybe there is no causal connection. But they  
20 do do a lot of business with the same cars  
21 there. And so, since they do a lot of business  
22 with the same kinds of cars there, they have to  
23 be prepared to defend against this kind of suit.

24 So what's unfair about it?

25 MR. MAROTTA: What's unfair about it,

1 Justice Breyer, is Ford cannot expect to be sued  
2 on this particular item. And the argument that  
3 you laid out was the exact argument rejected in  
4 Bristol-Myers Squibb, which is that you sell  
5 lots of Plavix, you have a formula, you have to  
6 defend against these other suits, why not bother  
7 with these tag-along suits as well. There's  
8 nothing unfair about it.

9 But this Court 8-to-1 rejected that  
10 argument in Bristol-Myers Squibb --

11 JUSTICE BREYER: But wasn't that --

12 MR. MAROTTA: -- and that the key  
13 point --

14 JUSTICE BREYER: -- the case where  
15 they were in a different -- the plaintiff wasn't  
16 part of California either, and all the injury  
17 took place outside, and so what -- what was  
18 that?

19 MR. MAROTTA: Well, it's true that the  
20 plaintiff wasn't in California and the injury --

21 JUSTICE BREYER: Well, here, he's in  
22 Montana. He's in Montana.

23 MR. MAROTTA: But -- but this Court  
24 held in Walden unanimously that the location of  
25 the plaintiff doesn't matter and that the place

1 of injury does not matter.

2 As I quoted in my opening statement,  
3 this Court held that injuries are irrelevant  
4 except for the fact that sometimes they shed  
5 light on whether a defendant has contact with  
6 the forum.

7 So trying to take Bristol-Myers Squibb  
8 and appending onto it a forum plaintiff and a  
9 forum injury runs straight into Walden. I don't  
10 think Respondents can get out of the combination  
11 of Walden plus Bristol-Myers Squibb.

12 JUSTICE BREYER: So I think the answer  
13 to my question is some case law, which I bet --  
14 which I will read, and -- but, if I came to the  
15 conclusion the case law didn't govern, what --  
16 what's unfair about it?

17 MR. MAROTTA: Well, I think what's  
18 unfair about it is that Ford has to be subject  
19 to the rulings of Montana and Minnesota judges,  
20 be subject to the verdicts of Montana and  
21 Minnesota juries, be subject to the Montana and  
22 Minnesota Rules of Evidence and Procedure.

23 And even if you don't think that's a  
24 significant burden on Ford because Ford's a big  
25 company, the rule you'll announce in this case



1 applies to much smaller manufacturers. It  
2 applies to regional manufacturers who are  
3 perhaps thinking about expanding into a new  
4 market.

5 So, in crafting the rule today, you  
6 shouldn't just look at the Fords of the world.  
7 Consider the smaller manufacturers who don't  
8 have --

9 JUSTICE BREYER: I'm sorry.

10 MR. MAROTTA: -- a national presence.

11 JUSTICE BREYER: On that, I thought  
12 that -- I thought that the other side says, no,  
13 no, we're talking about a case where the  
14 defendant does a lot of business of the same  
15 kind in the state. Just not this car, but a lot  
16 of other similar cars.

17 MR. MAROTTA: But, if Bristol-Myers  
18 Squibb means anything, Justice Breyer, it's that  
19 there's no sliding scale. You can't just say,  
20 well, if there's a lot of business, there has to  
21 be less relatedness, because that is the exact  
22 holding of Bristol-Myers Squibb.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Justice Alito.

1 JUSTICE ALITO: Let me pick up on a  
2 hypothetical that you have in your reply brief.  
3 I'll modify it slightly for purposes of -- of  
4 simplicity.

5 So suppose a product is sold in a  
6 particular state where the manufacturer  
7 advertises this product as a very safe product,  
8 a person purchases it and is injured by the  
9 product.

10 Would there be personal jurisdiction  
11 there, or would it be necessary for the injured  
12 individual to prove that the advertising as to  
13 the safety of this product was the proximate  
14 cause of the purchase of the product?

15 MR. MAROTTA: In your hypothetical,  
16 Justice Alito, where the purchase occurs in the  
17 forum state, the advertising, I think, is just  
18 icing on the cake. The sale is what provides  
19 the proximate link in our view.

20 JUSTICE ALITO: All right. Suppose  
21 that the -- the sale occurs in a different  
22 state.

23 MR. MAROTTA: In -- in that particular  
24 instance, I think what -- and I -- I don't want  
25 the Court to get hung up on the phrase

1 "proximate cause" because it carries with it  
2 certain weight from the merits inquiry.

3 All we're saying is that it has to be  
4 a sufficiently direct cause of it. So, in that  
5 case, it would depend on the particular claims  
6 that you're bringing. The claims in this case,  
7 I don't think merely saying, I saw an ad, I  
8 bought the vehicle somewhere else, would be  
9 sufficient. For other claims, it may very well  
10 be.

11 JUSTICE ALITO: So, if the person --  
12 the person purchases it in, I -- I don't know,  
13 Idaho, drives it to -- because -- a person from  
14 Montana purchases it in Idaho because of  
15 advertising in Montana regarding the safety of  
16 this product and then is injured in -- in  
17 Montana, what would -- would -- would there be  
18 personal jurisdiction there?

19 MR. MAROTTA: If the particular claims  
20 were only the design and manufacturing claims  
21 that we have here, no. If it were based upon  
22 promises made in the advertising, perhaps yes.

23 But, again, in these cases, there's no  
24 allegation that the advertising caused anyone to  
25 do anything for these decades-old vehicles that

1 were not even, you know, particularly to the  
2 Crown Victoria, were not even being advertised  
3 or sold at the time they were purchased in this  
4 case.

5 JUSTICE ALITO: Well, if we step back,  
6 and this is a little bit like Justice Thomas's  
7 question, we're talking about due process, which  
8 the international court -- court felt --  
9 International Shoe court felt free to say, well,  
10 that just means fair play.

11 If -- if that's what we're talking  
12 about, either fair play for Ford or what was at  
13 issue in Bristol-Myers Squibb, which is a  
14 lawsuit in a suit that has -- in a state that  
15 has little connection with anything involved in  
16 the -- in the suit, what would be the  
17 justification for a ruling in your favor here?

18 MR. MAROTTA: The justification for a  
19 ruling in our favor is that the state -- the  
20 forum states don't have a connection to what's  
21 relevant, which is Ford conduct.

22 In Walden, the Court talked about the  
23 challenged conduct has to occur in the forum,  
24 that the relevant conduct has to occur in the  
25 forum. The relevant conduct here from Ford's

1 perspective -- and, remember, due process is a  
2 defendant-focused perspective -- is the building  
3 of the car, the selling of the car, the  
4 manufacturing of the car, the design of the car.  
5 All of those things occurred outside of the  
6 forums.

7           The connection that the forums have  
8 here is to the injury, which says nothing about  
9 Ford.

10           JUSTICE ALITO: Okay. Thank you.

11           CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13           Justice Sotomayor.

14           JUSTICE SOTOMAYOR: Counsel, I -- I --  
15 in essence, what you are saying is that Ford can  
16 only be liable in its home state --

17           MR. MAROTTA: I would disagree.

18           JUSTICE SOTOMAYOR: -- because only  
19 there, presumably, under general jurisdiction,  
20 and maybe even not even there, because your  
21 but-for requirement would say wherever it  
22 manufactures, produces, if it didn't sell the  
23 car to the customer, there's no proximate  
24 causation, correct?

25           MR. MAROTTA: Although there is

1 proximate causation where the vehicle is built,  
2 because, I mean, let's be clear about what our  
3 proximate cause standard is. It's at page 42 of  
4 the brief -- of the opening brief, and page  
5 22-23 of the reply brief. It's that the  
6 operative facts of the controversy arise from  
7 the defendant's conducts -- contacts with the  
8 state where the defendant's in-state conduct  
9 form an important or at least material element  
10 of proof in the plaintiff's case.

11 So the place where the vehicle is  
12 designed is an element of proof in the case.  
13 The place where the vehicle is built --

14 JUSTICE SOTOMAYOR: And where the  
15 vehicle is so sold by a Ford dealer? Ford sold  
16 it to the dealer. The dealer now sells it to a  
17 customer. Does that also --

18 MR. MAROTTA: It's also an element of  
19 -- it's also an element of proof of the  
20 plaintiff's case because one of the elements of  
21 a product defect claim is that the manufacturer  
22 introduced the article into commerce and that  
23 the vehicle has not changed conditions since  
24 that first sale.

25 JUSTICE SOTOMAYOR: All right. So

1 let's assume that a Ford vehicle was designed in  
2 Michigan, manufactured in Kentucky, sold to a  
3 dealership in Kansas City, Missouri, but  
4 purchased by a resident of Kansas City. They  
5 saw a Ford advertisement in TV.

6 The plaintiff wants to assert various  
7 claims for design defect, manufacturing defect,  
8 false advertising, and negligence. Is there any  
9 single state where the plaintiff could -- could  
10 allege all those torts?

11 MR. MAROTTA: Certainly, Justice  
12 Sotomayor. And I -- I want to, I think, note  
13 something that I think is implicit in your  
14 question, which is we're not saying that design  
15 claims have to be brought somewhere,  
16 manufacturing claims have to be brought  
17 somewhere.

18 It's -- it's the suit as a whole, as  
19 this Court talks about. So you can bring it  
20 where the vehicle was designed, Michigan; where  
21 the vehicle was assembled, Kentucky; I think  
22 where the -- where the advertisements were sold,  
23 which was in Missouri; and where the vehicle was  
24 purchased, in Kansas.

25 JUSTICE SOTOMAYOR: So you would say

1 any one contact would be enough, but how about  
2 if the airbag -- if the defect was in the  
3 airbag? Would Missouri still have jurisdiction  
4 over Ford -- or Kansas, you said Kansas would,  
5 if the defective airbag were not the original  
6 airbag but instead a new replacement airbag  
7 installed by a Ford dealership?

8 And then take it a step further. Is  
9 it the airbag or is it an old sensor in the car  
10 that caused it? How do we determine  
11 jurisdiction then?

12 MR. MAROTTA: You would determine  
13 jurisdiction then because the repair that was  
14 made at a Ford-authorized dealership which is in  
15 contact with Ford, with the forum, and it arises  
16 out of that --

17 JUSTICE SOTOMAYOR: No, that was in  
18 Missouri. Remember the car was bought in  
19 Missouri. The plaintiff was in Kansas. The  
20 plaintiff drove in and lives in Kansas. He saw  
21 the false advertisement in Kansas.

22 MR. MAROTTA: Sorry to the residents  
23 of Kansas and Missouri that I'm -- I'm confusing  
24 their two states, but --

25 JUSTICE SOTOMAYOR: Yeah. The problem



1 is there's two -- that I believe that there's  
2 Kansas, Missouri, and Kansas, Kansas.

3 MR. MAROTTA: But what I would say in  
4 your hypothetical, Justice Sotomayor, is that  
5 where the vehicle was repaired would be proper  
6 jurisdiction. Perhaps not the place they took  
7 it back to.

8 And I understand that if you live on  
9 the border of two states like that, you may  
10 treat them as interchangeable. But, of course,  
11 this Court has repeatedly said that in personal  
12 jurisdiction, state lines matter, even though it  
13 may not seem functionally to matter in the  
14 markets where you exist.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Justice Kagan.

18 JUSTICE KAGAN: Mr. Marotta, going  
19 back to your colloquy with Justice Alito, a  
20 simple hypothetical: I buy a Apple computer in  
21 New York. I -- I -- I -- I move to California.  
22 The computer catches on fire. I get injured.

23 You're saying I can sue in New York,  
24 where I bought the -- the Apple computer, but I  
25 can't sue in California, where I live and where

1 the injury took place. Is that right?

2 MR. MAROTTA: That's right. I mean,  
3 of course, Apple has headquarters in California,  
4 so there's general jurisdiction, but --

5 JUSTICE KAGAN: Yeah, you're right.  
6 That was a bad example for that reason, right?  
7 But, you know, I moved to Illinois. It doesn't  
8 matter. But that's right?

9 MR. MAROTTA: Yeah, understood.

10 JUSTICE KAGAN: Yeah. So -- so,  
11 essentially, you're substituting what I think  
12 people have assumed in these product cases,  
13 which is, if -- if you are in a place and the  
14 injury takes place in a place because of a  
15 manufacturing defect or a design defect, you get  
16 to sue.

17 You're saying, no, it doesn't really  
18 matter where the injury took -- took place; what  
19 matters is where the first sale of the product  
20 took place?

21 MR. MAROTTA: Ours is not a first sale  
22 rule, Justice Kagan. Ours is a --

23 JUSTICE KAGAN: But that would be the  
24 effect of it. I mean, it might -- you might not  
25 label it that, but that would be the effect of

1 it, wouldn't it?

2 MR. MAROTTA: No, it's that any place  
3 that there is a proximate causal link -- that  
4 could be the place of design --

5 JUSTICE KAGAN: I know, but the -- the  
6 first sale, the place of a first sale, you're  
7 saying there is a proximate causal link, and the  
8 place where the injury took place, you're saying  
9 there's not. Is that right?

10 MR. MAROTTA: That's right. But it  
11 doesn't limit jurisdiction to only the place of  
12 first sale.

13 JUSTICE KAGAN: Okay. But you can  
14 also do it where it's manufactured, for example.

15 Okay. Then that's notwithstanding  
16 that this company, and let's go just back to  
17 Ford now, it advertises, it sells, it services  
18 these automobiles in exactly the same way in  
19 these two states.

20 MR. MAROTTA: And that was the same  
21 argument that was made in Bristol-Myers Squibb,  
22 which held that Bristol-Myers --

23 JUSTICE KAGAN: Well, I have to say  
24 you keep saying Bristol-Myers, but, you know,  
25 Bristol-Myers, there was absolutely no

1 connection. The plaintiffs weren't residents of  
2 California. They didn't use the product there.  
3 They hadn't been injured there.

4 Now that's three differences from this  
5 case.

6 MR. MAROTTA: And I think even going  
7 back further then to Walden and Keeton, Keeton  
8 says the plaintiff's connections to the forum  
9 don't -- doesn't matter. And the plaintiff in  
10 Walden says that injury in the forum doesn't  
11 matter. So --

12 JUSTICE KAGAN: Well, in Walden, the  
13 defendant had absolutely no connection to the  
14 forum state. But, here, as we've just  
15 established, Ford sells cars, services cars,  
16 resells cars, advertises cars in Montana.

17 MR. MAROTTA: But Bristol-Myers Squibb  
18 proceeded as a syllogism. It said that Walden  
19 illustrates the "arise out of or relate to"  
20 requirement, and it said that in Walden we held  
21 that an injury in the forum is not sufficient.  
22 And it said this case is even easier because the  
23 plaintiffs did not even suffer injury in the  
24 forum. But the major premise of Bristol-Myers  
25 Squibb is that an injury in the forum is not

1 sufficient.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 JUSTICE KAGAN: Thank you,  
5 Mr. Marotta.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Gorsuch.

8 JUSTICE GORSUCH: Good morning,  
9 Mr. Marotta. It seems to me this case really  
10 puts into sharp relief the difficulties our  
11 doctrinal tests have created.

12 We've made a firm distinction between  
13 specific and general jurisdiction for many  
14 years. We say specific jurisdiction has to  
15 "arise out of." Everybody seems to know what  
16 that means. Nobody knows what "relates to"  
17 means, the other part of the test.

18 And so I -- I guess -- I guess I want  
19 to take you back to first principles along the  
20 lines of Justice Thomas. What does due process  
21 require? I suppose one could say it's whatever  
22 fair play -- whatever we think fair play means,  
23 in which case you -- you might run into some of  
24 the troubles we've -- we've been hearing some of  
25 the questions about.

1           But it could mean -- due process could  
2 mean a couple of other things. One, it could  
3 mean the law of the land. Are you being haled  
4 into court in accordance with the law of the  
5 land? And, surely, that -- that's met here, the  
6 state long-arm statute. No one contests that it  
7 reaches you.

8           Or it might mean that, as originally  
9 understood, the Due Process Clause and the ideas  
10 behind the due process would not have allowed a  
11 defendant to be haled into court in these kinds  
12 of circumstances.

13           I didn't see a lot in the briefs  
14 addressing that question, so it's really  
15 something I -- I wanted to ask you and -- and --  
16 and your colleagues today about.

17           Do you have anything you want to  
18 comment there?

19           MR. MAROTTA: Sure, Your Honor.

20           There is certainly a wide originalist,  
21 I think, new view on personal jurisdiction, so  
22 Professor Sack that essentially says that  
23 Pennoyer versus Neff was correctly decided. Of  
24 course, Respondents are not urging a return to  
25 Pennoyer versus Neff.

1                   What this Court has said in the past  
2                   is that the International Shoe framework is  
3                   consistent with the original understanding of  
4                   the Fourteenth Amendment. And so, when you  
5                   apply the International Shoe framework, what the  
6                   first principle is, is what distinguishes  
7                   general from specific jurisdiction?

8                   Specific jurisdiction is you go into a  
9                   state and you perform certain acts. You are  
10                  then liable for claims that arise out of those  
11                  acts. But, here, the forum states are seeking  
12                  to hold Ford liable for acts of manufacture, of  
13                  design, and of sale that occurred in other  
14                  states.

15                  Remember, if Ford had done nothing in  
16                  Montana and Minnesota in these cases, the claims  
17                  are exactly the same as they are before you.

18                  And that's the key difference.

19                  JUSTICE GORSUCH: Thank you.

20                  MR. MAROTTA: I think it all --

21                  CHIEF JUSTICE ROBERTS: Justice  
22                  Kavanaugh.

23                  JUSTICE KAVANAUGH: Thank you, Chief  
24                  Justice.

25                  And good morning, Mr. Marotta. Ford

1 litigates lots of cases in Minnesota and  
2 Montana. Why doesn't it want to litigate these  
3 cases in Minnesota and Montana?

4 MR. MAROTTA: Well, I think, in part,  
5 Ford wants cases to go back to where they should  
6 be decided. And, of course, you know, Montana  
7 and Minnesota have particular judges, have  
8 particular juries, have particular evidentiary  
9 rules. There may be some cases where Ford would  
10 otherwise waive an available personal  
11 jurisdiction defense, but that's an option  
12 that's up to Ford and to the defendant.

13 And the fact that Ford may, you know,  
14 litigate in these forums anyway, you know, think  
15 of the smaller manufacturers who sell minimal  
16 amounts of products in the forum who may have  
17 never litigated a product case there before.

18 The rule you announce today is going  
19 to apply to those manufacturers too and should,  
20 I think, be equal, if not greater, in your  
21 consideration.

22 JUSTICE KAVANAUGH: If we -- if we  
23 look at -- there have been a lot of questions  
24 about our precedent, but the -- the sentence  
25 from World-Wide Volkswagen, and you're familiar



1 with the sentence on 297 and 298 of World-Wide  
2 Volkswagen, I guess it ends at the bottom of  
3 297, if we follow that sentence, you lose,  
4 correct?

5 MR. MAROTTA: I don't think so,  
6 Justice Kavanaugh, because that sentence was  
7 about purposeful availment. You have to put  
8 that sentence in context.

9 The sentence before it says, when a  
10 corporation purposefully avails itself --

11 JUSTICE KAVANAUGH: No. Sorry to  
12 interrupt. If we just follow what the sentence  
13 says, though, "if the sale of a product of a  
14 manufacturer/distributor arises from the efforts  
15 of the manufacturer/distributor to serve  
16 directly or indirectly the market for its  
17 products in other states, it's not unreasonable  
18 to subject it to suit in one of those states if  
19 its allegedly defective merchandise has there  
20 been the source of injury to its own or to  
21 others," if we just follow that sentence, you  
22 lose, correct?

23 MR. MAROTTA: I -- I don't think so,  
24 Justice Kavanaugh, because it's unclear and I  
25 think ambiguous from the sentence whether the

1 Court is referring to a sale of the product in  
2 that forum or a sale of the product in another  
3 forum.

4 But, of course, the issue that we're  
5 talking about today wasn't before the Court in  
6 World-Wide Volkswagen because Audi and  
7 Volkswagen hadn't contested personal  
8 jurisdiction in this Court.

9 JUSTICE KAVANAUGH: That sentence has  
10 been quoted in other cases and has formed the  
11 basis for -- well, it's been quoted in several  
12 other cases, correct?

13 MR. MAROTTA: Aspects of that  
14 paragraph have been. I mean, Burger King talks  
15 about -- talks about the sentence after, which  
16 is the personal jurisdiction over a corporation  
17 that delivers the product, which I think, again,  
18 creates that ambiguity.

19 And Keeton, again, talks about, I  
20 think, that same sentence. So the sentence  
21 about Audi and Volkswagen has really never  
22 popped up in this Court's cases, just the  
23 sentences around it.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Do you want a minute to wrap up?

3 MR. MAROTTA: Thank you, Mr. Chief  
4 Justice.

5 Two points I want to make. The first  
6 is that many of the questions I've gotten today  
7 have talked about the alleged problems with the  
8 proximate cause test.

9 But what, you know, the lower courts  
10 have emphasized is that but-for causation is at  
11 least the minimum. And all this Court has to  
12 decide to resolve these cases, as happened in  
13 the Tenth Circuit with then Judge Gorsuch, is  
14 you have to hold -- it's just some causal  
15 standard, and you can leave for another day  
16 whether it's proximate cause or some other  
17 degree of causation.

18 And the second is to take it back to  
19 the first principle, is that Ford should only be  
20 held to account for things it did in the forum  
21 state that are challenged by the suit. And,  
22 here, Ford did not do anything in these forum  
23 states that is challenged by Respondents' suits.  
24 If the conduct didn't happen, the claims are the  
25 same.

1                   And that's how you know it's  
2                   irrelevant forum conduct, which cannot be the  
3                   basis of specific jurisdiction.

4                   Thank you.

5                   CHIEF JUSTICE ROBERTS: Thank you,  
6                   counsel.

7                   Mr. Gupta. Mr. Gupta.

8                   We'll take a brief moment to take a  
9                   recess to address audio issues at Mr. Gupta's  
10                  end.

11                  (A recess was taken at 12:12 p.m., after  
12                  which the hearing resumed at 12:14 p.m.)

13                  CHIEF JUSTICE ROBERTS: Mr. Gupta, I assume  
14                  you didn't decide to rest on your briefs.

15                  MR. GUPTA: No, Mr. Chief Justice.  
16                  I'm sorry, there was a technical problem.

17                  ORAL ARGUMENT OF DEEPAK GUPTA ON  
18                  BEHALF OF THE RESPONDENTS

19                  MR. GUPTA: Mr. Chief Justice, and may  
20                  it please the Court:

21                  This Court has never read the Due  
22                  Process Clause to deprive the states of their  
23                  sovereign powers to try cases in their own  
24                  courts and protect people injured within their  
25                  own borders on anything like the facts presented

1 here, that is, where the following two things  
2 are true: the defendant's product injured the  
3 plaintiff in the forum state, and the defendant,  
4 through its in-state activity, has deliberately  
5 cultivated the market for that product in that  
6 state.

7 Over the objection of 40 state  
8 attorneys general, Ford asks this Court to  
9 extinguish the state's traditional authority  
10 even in this paradigmatic scenario based on an  
11 elusive proximate cause standard. And I think  
12 we just heard how elusive it is.

13 Jurisdictional rules should be simple.  
14 The Ford standard would introduce tremendous  
15 uncertainty and generate needless litigation.  
16 It would break up garden-variety accident cases.

17 It would leave innocent local  
18 businesses holding the bag for foreign  
19 companies, as the Home Builders and Main Street  
20 business briefs explain. And it would send  
21 injured plaintiffs on an irrelevant scavenger  
22 hunt to trace the route of the particular pill  
23 or toaster that caused injury just to try to  
24 figure out where to sue.

25 The Constitution does not compel such

1 an arbitrary regime. Ford's standard would  
2 create practical problems without any  
3 countervailing benefits of fairness or  
4 federalism demanded by the Due Process Clause.

5 The plaintiffs here aren't forum  
6 shopping. They sued where everyone would expect  
7 them to sue. And Ford can't even credibly claim  
8 that it would be unfair or burdensome to face  
9 suit there or identify any sovereign with any  
10 greater interest.

11 Ultimately, Ford's position turns  
12 personal jurisdiction into a game. The  
13 defendant can cut off access to the court not  
14 because the forum state overreached or because  
15 fairness compels it but simply because it makes  
16 it harder for people to get access to justice.

17 That is not due process.

18 CHIEF JUSTICE ROBERTS: Counsel, one  
19 of your amici, the National Association of Home  
20 Builders, has a test that relies on the  
21 so-called stream of commerce theory. And I  
22 understand your theory to be different.

23 Could you tell me what you understand  
24 that theory to be and exactly why yours is  
25 different?

1           MR. GUPTA: Yes. Mr. Chief Justice, I  
2 think that the -- the stream of commerce test is  
3 answering a different question from the one  
4 that's presented here.

5           The stream of commerce test tells you  
6 whether there is purposeful availment, whether  
7 there are the requisite contacts. And -- and  
8 that theory relies on the idea that even if the  
9 defendant hasn't done what would subject it to  
10 suit in the -- in the forum otherwise, that the  
11 stream of commerce theory can supply the  
12 requisite contacts because -- either because the  
13 manufacturer has -- has put the -- the goods  
14 into the stream and they end up there or,  
15 depending on whether you accept Justice  
16 O'Connor's view, there's something else that has  
17 occurred.

18           But, here, purposeful availment is  
19 conceded. And so the question is, once you have  
20 the -- the requisite contacts, as Ford does with  
21 the forum, is the suit related enough to the --  
22 the forum and the contacts that the defendant  
23 has in the forum that -- that -- that this is  
24 specific jurisdiction and not general  
25 jurisdiction.

1 CHIEF JUSTICE ROBERTS: Counsel, let's  
2 say there's a -- a retired guy in a small town  
3 up in Maine who carves decoys. And friends say:  
4 These are great, you ought to sell them on the  
5 Internet. And so he gets a site on the  
6 Internet, and it has a little thing that links  
7 to it that says, you know, buy my decoys.

8 Can he be sued in any state if some  
9 harm arises from the decoy? You know, say it --  
10 you know, it has lead paint or something.

11 By putting something --

12 MR. GUPTA: Well --

13 CHIEF JUSTICE ROBERTS: -- an  
14 advertisement on the Internet, is he exposing  
15 himself to suit everywhere in the country?

16 MR. GUPTA: No, and I do think that's  
17 a much harder problem. I think, first, we'd  
18 have to ask, are there isolated sales, or is he  
19 really doing something to inject himself into  
20 the forum state?

21 If he doesn't have any advertising  
22 that's targeted to a particular state, he -- it  
23 may be that his sales are sufficiently isolated  
24 that he's not even going to -- purposeful  
25 availment won't even be satisfied.



1           But -- but assuming that it is,  
2           assuming that there's a -- there are sales in  
3           the forum, and he knows that and expects that  
4           and encourages that, it -- it's possible that --  
5           that that is going to give rise to specific  
6           jurisdiction for that injury. But we would need  
7           to know at the first step whether he's really  
8           doing something to deliberately cultivate a  
9           market in the forum state.

10           CHIEF JUSTICE ROBERTS: In the forum  
11           state, well, they get the --

12           MR. GUPTA: I think that's a big  
13           question there.

14           CHIEF JUSTICE ROBERTS: -- they get  
15           the Internet wherever in the country, and that's  
16           how he's trying to cultivate a market. Is that  
17           enough or not?

18           MR. GUPTA: Well --

19           CHIEF JUSTICE ROBERTS: Is he --

20           MR. GUPTA: -- no. I mean, I think we  
21           would need to know has he ever sold -- let's say  
22           the suit is in California. Has he never sold  
23           something in California? Has he only sold in  
24           New England, but, in theory, they could sell to  
25           California and then there's one sale in

1 California? I'm not sure that's going to be  
2 enough for purposeful availment.

3 But I really do think it is --

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice -- Justice Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief  
8 Justice.

9 Mr. Gupta, I would like to pick up  
10 there too. You used the term "related to" in  
11 the discussion. What is enough -- and -- and  
12 I'm not clear as to, even with the Chief  
13 Justice's hypothetical, what -- how related it  
14 must be.

15 Could you put some contours on that  
16 for us?

17 MR. GUPTA: Sure, Justice Thomas. And  
18 I think you can pick up where you left off in  
19 BMS. And -- and BMS is, I think, the case that  
20 -- that is most on point and about relatedness.

21 And what you said there, that a suit  
22 relates to the defendant's contacts with the  
23 forum where there's an affiliation between the  
24 forum and the underlying controversy,  
25 principally, an occurrence.

1           Well, we know that happened here.  
2       There was an occurrence in the forum that was  
3       subject to the state's regulation.

4           And we think relatedness under your  
5       cases can basically be distilled down to two  
6       inquiries, and it yields a simple test in  
7       products cases. First, you have to ask, would  
8       the defendant be submitting to the coercive  
9       power of a state with little interest in the  
10      controversy?

11          That was the problem in BMS, right?  
12      The -- the -- the State of California had little  
13      interest in that controversy because those  
14      people were injured elsewhere and really had  
15      nothing to do with California.

16          And then, second, I think relatedness  
17      is asking about whether the reciprocal legal  
18      obligations at issue were created by the  
19      defendant's in-state contacts. And -- and does  
20      the -- do the plaintiff's claims really come  
21      within those contacts?

22          And -- and, Justice Thomas, my -- my  
23      friend in -- in answer to your question about,  
24      you know, what does this all have to do with due  
25      process in International Shoe, invoked that

1 concept of reciprocal obligations. We think  
2 that's critical here.

3 What you're really asking when you ask  
4 about the defendant's contacts are, what kind of  
5 legal obligations arose from that? And, here,  
6 the legal obligation's pretty simple. It's the  
7 legal obligation that you've got to compensate  
8 people when you sell all these -- this exact  
9 product in the forum and it hurts somebody.

10 JUSTICE THOMAS: Thank you.

11 MR. GUPTA: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Breyer.

14 JUSTICE BREYER: The other side, I  
15 think, is saying jurisdictional rules must be  
16 clear. A defendant does not do enough business  
17 in a state, say Illinois, to make that defendant  
18 at home in the state. But he does do some.

19 Now he sells a product from Maine,  
20 let's say, take the hypothetical that the Chief  
21 Justice gave. And the person who bought it has  
22 never seen his advertising, though he advertises  
23 a lot. The person who bought it didn't use his  
24 dealer, though he even has some there.

25 And you think, under those

1 circumstances, he can bring his lawsuit. Is  
2 that right?

3 MR. GUPTA: No, I'm not sure that he  
4 could, Justice Breyer.

5 JUSTICE BREYER: What would make it --

6 MR. GUPTA: I would need to know more,  
7 but I -- it sounds like that's an isolated sale  
8 in the forum --

9 JUSTICE BREYER: No, it's an isolated  
10 sale --

11 MR. GUPTA: -- in Illinois.

12 JUSTICE BREYER: Wait, it's an  
13 isolated sale in the sense that that particular  
14 sale has no contact except the injured -- except  
15 the injured person and the place of accident in  
16 Illinois.

17 But the defendant does loads of  
18 similar business in Illinois. Does that make a  
19 difference?

20 MR. GUPTA: I see. Yes, Justice  
21 Breyer, that does make a big difference.

22 JUSTICE BREYER: Exactly. That's what  
23 I thought.

24 Now the problem, I think, that the  
25 other side is saying is there is, how much

1 business does he have to do? I mean, if John  
2 Deere has a defective lawn mower or John Deere  
3 has a defective harvester in Illinois, what if  
4 it sells 4 billion lawn mowers in Illinois but  
5 no harvesters? I mean, what kind of business?  
6 It's not enough to be at home there, but it is  
7 some.

8 MR. GUPTA: Right.

9 JUSTICE BREYER: Well, how much? And  
10 under what circumstances?

11 MR. GUPTA: So --

12 JUSTICE BREYER: You say that's  
13 totally unclear. That's why they go to their  
14 rule.

15 MR. GUPTA: Well, Justice Breyer, let  
16 me try to give you some comfort on that because  
17 I think, if this is -- if the fight here is over  
18 whose rule is more predictable and certain, I  
19 think we win hands down.

20 Our test is pretty simple. It's  
21 always going to be possible to know whether the  
22 person was injured in the forum state. And then  
23 I think it's usually quite easy to figure out,  
24 was that exact product sold in the state?

25 So, in your example, if John Deere

1 sells tractors, but it doesn't sell the  
2 harvester in Illinois, then --

3 JUSTICE BREYER: Okay. But it's not  
4 the same product.

5 MR. GUPTA: -- that is not going to  
6 support --

7 JUSTICE BREYER: That's not the same  
8 product. How many of the same product?

9 MR. GUPTA: So -- so that's a question  
10 on purposeful availment, right? Is it -- is it  
11 -- is it isolated? Is it enough? But, once  
12 you've satisfied purposeful availment, which,  
13 again, of course, is conceded here, then the  
14 question is, are those sales that are not  
15 isolated, that have targeted the market, are  
16 they the same and are they of the same product?

17 And I think, if you have the same  
18 make, model, and year, it's going to be the same  
19 product. We're talking about mass-produced  
20 goods. It's not a difficult inquiry. And I  
21 think the inquiry is basically an objective one.

22 The -- the -- the defendant has the  
23 choice to differentiate its products. If it  
24 wants to sell cars in California, but it doesn't  
25 want to sell trucks in California because it

1 doesn't like the way California regulates, it is  
2 free to do that. And then it would not be  
3 subject on our test to specific jurisdiction in  
4 California.

5 JUSTICE BREYER: Thank you very much.  
6 Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Alito.

8 JUSTICE ALITO: What if the product  
9 involved here was a custom-made product? Let's  
10 say it's an antique car that's been rebuilt, and  
11 it is advertised on the Internet and purchased  
12 in one state, driven into another state. An  
13 accident occurs in the other state. The claim  
14 is that the -- the design of this car was  
15 negligent.

16 Would there be personal jurisdiction?

17 MR. GUPTA: I don't think so, Justice  
18 Alito. I think, you know, there's one case of  
19 yours that talks about custom products. In --  
20 in the Goodyear case, you said the problem there  
21 was that the accident hadn't occurred in North  
22 Carolina and also that the same type of tire  
23 wasn't distributed in North Carolina, but there  
24 were custom deliveries of tires for concrete  
25 trucks and various other kinds of trucks there.



1 And the Court distinguished that.

2 So I think, when you have custom  
3 products that are designed -- bespoke products  
4 designed for particular people, that cannot  
5 easily be assimilated into a test that it's  
6 designed for mass-produced products.

7 JUSTICE ALITO: All right. Well,  
8 suppose it's not a custom product. And now  
9 we'll get to a hypothetical that's similar to --  
10 to the Chief Justice's.

11 It is a -- a product that is produced  
12 in somewhat limited quantities by a person in,  
13 let's say, Maine, but advertised on the  
14 Internet. That's the only way anybody learns  
15 about it. And purchases are made over the  
16 Internet. Someone purchases it in another state  
17 and is injured in that state.

18 Would there be jurisdiction?

19 MR. GUPTA: Not unless the seller has  
20 deliberately target -- targeted and cultivated a  
21 market in that forum. And that's not a  
22 relatedness question. That's a purposeful  
23 availment question. But we --

24 JUSTICE ALITO: No, it's an antiquated  
25 -- it's an antiquated question. It's the 1945

1 International Shoe traveling salesman question.

2 So we are in -- we could perhaps  
3 decide this case within the contours of our  
4 existing cases because there's nothing  
5 particularly 21st century about what happened  
6 here.

7 But we're in a strange situation where  
8 we are not purporting to apply what due process  
9 was understood to mean when the Fourteenth  
10 Amendment was adopted. We are applying a 1945  
11 standard adopted by the Court when it put on its  
12 fair play hat and said this is fair play as we  
13 understand the world in 1945.

14 But the world in 2020 is completely  
15 different. So you may just say, well, decide  
16 this on the basis of your -- your existing case  
17 law and not propose anything grander, but, if  
18 you have a solution to the bigger problems that  
19 have been framed by some of the questions, it  
20 would be interesting to hear it.

21 MR. GUPTA: It's a -- it's a very fair  
22 point, Justice Alito. And I think it is true  
23 that the evolution of the cases, particularly in  
24 the early 20th century, reflected changing  
25 market realities, that as we have more of a

1 national economy, a more integrated economy, the  
2 jurisdictional standards began to reflect that.

3 And I think it is fair to say that  
4 there's been some stasis since then. And you  
5 left open a lot of questions in cases like  
6 Nicastro and Asahi about -- about where to draw  
7 the lines. And those -- those can be very  
8 difficult questions for the lower courts, and  
9 they'd appreciate some clarity.

10 But I also think something that --  
11 that the concurrence by Justice Breyer and --  
12 and -- and you, Justice Alito, in Nicastro is  
13 important. And, there, that concurrence  
14 cautioned against trying to write rules with a  
15 broad brush that will apply across different  
16 market contexts with -- and have unanticipated  
17 consequences.

18 And so that's why --

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Sotomayor.

22 JUSTICE SOTOMAYOR: Counsel, I just  
23 have one question about your same product rule.  
24 How about if it's a claim about a defective  
25 airbag, and it wasn't in -- in one car sold by

1 Ford, but it's in another car, millions of cars  
2 that are sold in Minnesota. But this one car is  
3 not sold in Minnesota. Would you still have  
4 jurisdiction?

5 MR. GUPTA: So I think, if -- if Ford  
6 says, look, we didn't sell that airbag in that  
7 state and, you know, they might have done it on  
8 purpose. They might -- for example, in  
9 California, there are emissions standards that  
10 are different.

11 I think the defendant has the ability  
12 -- at least on our test, the defendant has the  
13 ability not to sell that product in that -- in  
14 that forum. But it has to be objectively  
15 discernible to everyone that it's a different  
16 product.

17 And I think, in your hypothetical, it  
18 would be. They would be saying we're not  
19 marketing the same car. We're marketing a  
20 different car.

21 But, you know, it has to be  
22 objectively discernible because I don't think we  
23 want a test that turns on, you know, what's in  
24 the guts of the car. But, if they say: Look,  
25 there's the model X and we sell it in Minnesota,

1 and then there's the model Y and we don't sell  
2 that in Minnesota, then that would not satisfy  
3 our test.

4 JUSTICE SOTOMAYOR: Thank you,  
5 counsel.

6 CHIEF JUSTICE ROBERTS: Justice Kagan.

7 JUSTICE KAGAN: Mr. Gupta, on -- on  
8 this same product rule again, I mean, first, let  
9 me make sure I understand the rule.

10 So, if I'm Ford and I come up with a  
11 special kind of pickup truck and I decide really  
12 the market for this pickup truck is the  
13 southeast part of America and I only advertise  
14 it there and I only sell it there, then, if  
15 somebody takes the pickup truck to Washington  
16 State and something happens, then you're saying  
17 I cannot sue you in Washington State. Is that  
18 right?

19 MR. GUPTA: I'm saying that it fails  
20 our test, Justice Kagan. I don't think that  
21 that means that it forecloses some alternative  
22 possibility of specific jurisdiction. And I  
23 think this goes to Justice Alito's question and  
24 some of the other questions about stream of  
25 commerce.

1           If -- you know, when the Court -- if  
2           the Court picks up the stream of commerce  
3           question and decides what constitutes purposeful  
4           availment when you don't have the kind of -- the  
5           same kinds of sales in the forum as you do here,  
6           then I think you could answer that question and  
7           you could conclude there would be specific  
8           jurisdiction, but it would be on an alternate  
9           theory.

10           It wouldn't be on our test that --  
11           that we think decides these cases and I think  
12           decides a whole lot of products liability cases.

13           JUSTICE KAGAN: I see what you're  
14           saying. And on your test, focusing on your  
15           test, how about if Ford does something, you  
16           know, a little bit different? It -- it -- it  
17           says we have this pickup truck and mostly we're  
18           going to market it in the southeast, but we  
19           can't say we do nothing in the northwest, you  
20           know, we do a little bit. There's one dealer  
21           who's out there selling these pickup trucks.

22           What happens then?

23           MR. GUPTA: Well, if that one dealer  
24           is really selling those pickup trucks in the  
25           state, I think that that would satisfy our test

1 pretty easily. I mean, I think -- but I do  
2 think -- the reason why I say that, you know, it  
3 matters whether they're selling the same thing  
4 in the state is because the defendant has the  
5 ability to structure their primary conduct.

6           If they say, you know, we want to sell  
7 some stuff somewhere, we don't want to sell some  
8 -- and -- and to take the cold -- the southern  
9 states example, maybe they sell a car that  
10 doesn't work very well in cold climates and they  
11 know that and they don't want to be sued in  
12 Alaska for the car that they only sell in -- in  
13 Florida and Arizona.

14           So they have the right to do that.  
15 Your cases have always acknowledged that. You  
16 can exit a market. You can exit a market  
17 partially. But --

18           JUSTICE KAGAN: Okay. Sorry, if I  
19 could just interrupt, Mr. Gupta.

20           Final question is we talked a lot  
21 about fairness in this argument. My  
22 understanding of our law is that federalism has  
23 become an at least equivalent concern in the due  
24 process cases as -- as fairness. So how does  
25 that cut with respect to your theory?

1           MR. GUPTA: Yes, I think you're  
2 absolutely right, Justice O'Connor, and I think  
3 federalism cuts very strongly in our favor. I  
4 mean, it's why you have 40 states coming in and  
5 urging you not to do what Ford urges. And  
6 that's because the states have a manifest  
7 interest in -- in trying cases within their  
8 borders, applying procedures to their own law,  
9 and protecting people within their own borders.

10           And -- and you dealt with this in BMS.  
11 I think the -- the driving force of the opinion  
12 in BMS was a concern for interstate federalism  
13 and, in particular, a concern about one state  
14 meddling in the affairs of another state, say  
15 California saying we want to hear the claims of  
16 Ohioans when Ohio has a right to apply its own  
17 procedures to its own laws.

18           You don't have any kind of meddling  
19 like that here.

20           CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22           Justice Gorsuch.

23           JUSTICE GORSUCH: Good morning, Mr.  
24 Gupta. I think the Chief Justice and others  
25 have pointed out the difficulty of our



1 purposeful availment test in an Internet age,  
2 and some of it was cabined by a rise out of when  
3 that had some causal link, but now we're blowing  
4 past that and we're adorning "relate to" to mean  
5 something more, which I -- I totally understand.

6           And I get your same product test is a  
7 limiting way, though I think there -- there are  
8 issues there. What if, for example, Ford didn't  
9 sell Explorers in Montana, but the part that  
10 allegedly failed in the Explorer by your client  
11 in Montana is also sold by Ford in lots of other  
12 models in Montana? Which is the relevant  
13 product? Is it the Explorer or is it the part?

14           And -- and I -- I foresee a lot of  
15 difficulties there, all of which, again, takes  
16 me back to, at least -- at least me, to these  
17 first principle questions. We seem to be  
18 blurring the line between specific and general  
19 jurisdiction. If specific jurisdiction says  
20 fair play, I -- I get that this seems like fair  
21 play, but then where is the limiting factor  
22 there?

23           Do you have anything about the  
24 original meaning of the Due Process Clause that  
25 you want to argue here that might provide some

1 helpful guidance?

2 MR. GUPTA: Okay, Justice Gorsuch,  
3 that was a lot. We've got the Internet, the  
4 components, blurring the lines between specific  
5 and general, and the original meaning. Let me  
6 try to take them really quickly.

7 First, on the Internet, I --

8 JUSTICE GORSUCH: I threw it all out  
9 there for you to have at it.

10 MR. GUPTA: Thank you.

11 You know, on the Internet, again, I  
12 just think that is probably the most vexing  
13 issue in personal jurisdiction. And I do think,  
14 if you had a case that was about personal  
15 jurisdiction on the Internet, you'd have a whole  
16 lot of amicus briefs. You would -- you would --  
17 you would get some sense of the unanticipated  
18 consequences.

19 JUSTICE GORSUCH: All right. You can  
20 pass that one. I don't want to waste my time on  
21 that.

22 MR. GUPTA: Okay. Okay. Okay. The  
23 component one is -- I want to make sure I answer  
24 that. I do think that products liability turns  
25 on the finished product that's sold, if you

1 think about your Air & Liquid case, which was  
2 all about that. And I think, again, it has to  
3 be objectively discernible.

4 So, if there's some component in  
5 there, but we don't know that the -- that the  
6 defendant has made a decision about how it's  
7 going to submit itself to the market, I don't  
8 think it's a good idea to have --

9 JUSTICE GORSUCH: Well, we know -- we  
10 know Ford sells this defective component in  
11 millions of cars in Montana. Let's say we know  
12 that.

13 MR. GUPTA: Right.

14 JUSTICE GORSUCH: I would think the  
15 next case, you -- you -- you -- you may not be  
16 arguing it, but your -- a friend of yours will  
17 be here right fast saying that that's the same  
18 product.

19 MR. GUPTA: Right. Well, I think the  
20 way our test works is the -- the -- the  
21 defendant gets to choose how it assembles the  
22 product and what it puts out into the world and  
23 what it's -- how it's submitting to the states.  
24 So I would say I would not want the test to turn  
25 on -- on just the components.

1           I don't think what we're proposing  
2 blurs the lines of specific and general at all.  
3 I hope it promotes clarity and continues the  
4 project that this Court has had of separating  
5 these two different bases for jurisdiction,  
6 because, you know, what could be more specific  
7 than the place where the person had the injury  
8 and the specific make, model, and year of  
9 product.

10           And then -- and then, finally, on  
11 original meaning, Justice Gorsuch, I think, you  
12 know, the framers would have been pretty  
13 surprised by a lot of the personal jurisdiction  
14 jurisprudence.

15           I think my friend on the other side is  
16 asking you to -- to announce a constitutional  
17 rule that turns on the first sale of a widget  
18 five sales ago to somebody else in a state that  
19 has --

20           JUSTICE GORSUCH: I -- I --

21           MR. GUPTA: -- no interest in the  
22 controversy.

23           JUSTICE GORSUCH: -- I -- I guess I  
24 agree with you. I was just curious what you  
25 would have us say, but that's okay. I've run

1 out of time. I'm sorry.

2 MR. GUPTA: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Kavanaugh.

6 JUSTICE KAVANAUGH: Thank you, Chief  
7 Justice.

8 And welcome back, Mr. Gupta. First of  
9 all, can you explain under your test what you  
10 think you have to show to satisfy purposeful  
11 availment and then what else you need to show to  
12 satisfy "relates to," just so I'm clear on  
13 those?

14 MR. GUPTA: Sure. Yeah. And -- and  
15 -- and this is a feature of the weird way that  
16 this case comes to you, where purposeful  
17 availment is conceded. I think it was -- Ford  
18 was right to concede it because, you know, this  
19 is an easy case for purposeful availment. As  
20 some of the questions have shown, it can be more  
21 difficult.

22 But I think you -- your cases talk a  
23 lot more about what constitutes purposeful  
24 availment. And I think what you've said is  
25 you've got to target the market. You've got to

1 be, you know, deliberately cultivating the  
2 market.

3 As I've said, there are difficult  
4 questions about the stream of commerce, and can  
5 we just bracket those for -- for the moment and  
6 say as long as you have, you know, purposeful  
7 availment that doesn't rely on a stream of  
8 commerce test.

9 The distinct thing that relatedness  
10 does that's different is that it says once  
11 you've got those contacts, we're now going to  
12 try to figure out are those contacts  
13 sufficiently related to the claim here, the --  
14 the person's injury, where it occurred --

15 JUSTICE KAVANAUGH: And I think --

16 MR. GUPTA: -- and the -- and the  
17 obligation --

18 JUSTICE KAVANAUGH: I'm sorry to  
19 interrupt. I think you're saying, if purposeful  
20 availment's been satisfied, then so long as the  
21 injury was in the forum state, that's going to  
22 be good enough?

23 MR. GUPTA: No, Justice Kavanaugh, not  
24 quite. I mean, I think, yes, you have to have  
25 the injury in the state, but then you've got to

1 figure out is the plaintiff's claim coming  
2 within the scope of the legal obligations that  
3 the defendant has subjected itself to in the  
4 forum.

5           So like, for example, if -- if a  
6 company sells, you know, computers in the state,  
7 they may be purposefully availing themselves,  
8 but, if my claim is really about the software  
9 that they haven't sold in the state, you're  
10 going to have purposeful availment, but you  
11 won't have relatedness.

12           JUSTICE KAVANAUGH: Okay. You heard  
13 the response to World-Wide Volkswagen. You had  
14 emphasized that case quite heavily in your  
15 briefs, and you heard the response from the  
16 other side. Your response to that?

17           MR. GUPTA: Well, I -- I -- I think  
18 what that colloquy showed is, you know, it's --  
19 it's hard to answer the question on the other  
20 side. I think World-Wide Volkswagen had  
21 precisely this kind of situation in mind.

22           The reason they did is because  
23 Volkswagen and Audi hadn't raised a  
24 jurisdictional objection, but there were four  
25 Audi dealerships in the state in Oklahoma in

1 1980 and they were selling these cars.

2           And my friend below -- in the courts  
3 below referred to that passage as a description  
4 of -- of what would have happened if Audi or  
5 Volkswagen had raised this jurisdictional  
6 objection. Frankly, I just think everyone has  
7 always assumed that that's the easy case.

8           And that's why you've referred to it  
9 over and over, that passage, as kind of the  
10 paradigmatic example of -- of specific  
11 jurisdiction. And you did so most recently in  
12 your unanimous opinion in Goodyear.

13           So I -- I get that, you know, you can  
14 say that it's dicta, but it's very important  
15 dicta that's been repeated over and over again,  
16 relied on by the lower courts, and reflects kind  
17 of a core scenario of specific jurisdiction that  
18 I -- I think is satisfied here.

19           JUSTICE KAVANAUGH: Thank you.

20           CHIEF JUSTICE ROBERTS: A minute to  
21 wrap up, Mr. Gupta.

22           MR. GUPTA: Thank you.

23           At the end of the day, I think any  
24 sensible resolution of these cases is going to  
25 have to be grounded in some combination of



1 interstate federalism, fairness to the  
2 defendant, predictability, and -- and -- and,  
3 frankly, common sense. Those are the -- the  
4 things that I think the Due Process Clause are  
5 -- is trying to accomplish in this area.

6 And I think Ford's approach flunks all  
7 three tests. When it comes to federalism, they  
8 just can't get around the fact that their  
9 approach extinguishes the sovereign power of the  
10 states that have the greatest interest in -- in  
11 cases like this and shuffles it arbitrarily to  
12 states that may have no interest, all in the  
13 service of a -- a extremely-difficult-to-apply  
14 proximate test -- cause inquiry.

15 When it comes to fairness, Ford claims  
16 no unfairness, if you really press them, and  
17 tried -- if -- if you -- if you were to try to  
18 explain to the public how this result is  
19 grounded in fairness, I think it would be very  
20 difficult to do.

21 And, finally, their approach would  
22 inject tremendous uncertainty and  
23 unpredictability into the American litigation  
24 system. We urge you to affirm both judgments.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Three minutes, Mr. Marotta.

3 REBUTTAL ARGUMENT OF SEAN MAROTTA

4 ON BEHALF OF THE PETITIONER

5 MR. MAROTTA: Thank you, Your Honor.

6 Three points I'll make on rebuttal.

7 The first is to administrability. Their  
8 relatedness test has no basis in common law or  
9 in the courts below. Consider the questions we  
10 pose at page 19 and 20 of the reply brief, and  
11 they've been the ones that were discussed today,  
12 for product sale. So it has to be the same type  
13 of product, the same make and model. Is a  
14 similar product sufficient? Does it have to be  
15 the same features that are alleged to be  
16 defective in the case?

17 Or take advertising, which has been  
18 posited as one of the contacts that can create  
19 jurisdiction. Does it have to propose a sale of  
20 the product directly, mere technical support or  
21 warranty support? How about merely raising  
22 brand recognition? And how long does this have  
23 to take place? One year of sales, many years of  
24 sales?

25 These are the questions that are going

1 to trouble the lower courts for years if you  
2 adopt that test.

3 A causal test, by contrast, has a rich  
4 history in the common law and it's, in fact, the  
5 majority rule in the courts that have applied --  
6 that have confronted this question. And they  
7 carry out the application of a causal test  
8 without any real trouble. And that's because,  
9 as this Court noted in *Lexmark*, these are  
10 principles that have -- are widely known to  
11 judges and can be applied easily even if there  
12 are odd corner cases.

13 And, finally, our rule is  
14 transsubstantive. You can apply our causal test  
15 in all kinds of cases, from contracts to torts  
16 to otherwise, whereas Respondent's test only at  
17 most solves a subset of product cases. The  
18 courts have been crying out for a clear rule on  
19 "arise out of or relate to," and a causal test  
20 is the appropriate one.

21 Second, the discussion confirms that  
22 Respondents' argument is essentially just  
23 *Bristol-Myers Squibb* plus the occurrence of  
24 injury in the forum, in other words, a sale of a  
25 sufficient number of the same product plus the

1 occurrence of the injury.

2           But going back to first principles,  
3 all the way back to Helicopteros, which  
4 announced "arise out of or relate to," the Court  
5 made clear that even regular purchases of a  
6 product in the forum are not sufficient to  
7 create jurisdiction where the claims do not  
8 relate to those purchases.

9           And it goes back to Hanson versus  
10 Denckla, that the mere presence of the plaintiff  
11 in the forum or even the center of gravity in  
12 the forum is not sufficient to create personal  
13 jurisdiction. Their limiting principle goes  
14 contrary to every principle this Court has laid  
15 out in its cases, which it allows the  
16 plaintiff's claims to direct the analysis.

17           And, finally, the interest analysis  
18 and the weighing analysis that Respondents  
19 propose has been rejected by Hanson. It -- this  
20 Court said in Hanson the forum does not acquire  
21 jurisdiction by being the center of gravity of  
22 the controversy or the most convenient location  
23 for litigation. The issue is personal  
24 jurisdiction, not choice of law.

25           And as this Court said all the way

1 back in World-Wide Volkswagen, there can be  
2 cases where it is not unfair to the defendant  
3 from a practical standpoint, where perhaps the  
4 state even has the greatest interest from a  
5 choice-of-law standpoint, but yet still  
6 federalism, acting as an instrument of  
7 interstate -- of interstate federalism can still  
8 deny personal jurisdiction to the forum state.  
9 That is this kind of case because the forum  
10 states are not regulating something that Ford  
11 has done in the forum.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel. The case is submitted.

15 (Whereupon, at 12:46 p.m., the case  
16 was submitted.)

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## Official - Subject to Final Review

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