No. 16-405

IN THE SUPREME COURT OF THE UNITED STATES

BNSF RAILWAY COMPANY,
Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,
Respondents.

On Writ of Certiorari
To the Supreme Court of Montana

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development in the nation.

NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. NAM is concerned that courts are creating unwarranted exceptions to this Court's decisions constraining general, all-purpose jurisdiction. As a result, manufacturers may be subject to the jurisdiction of courts in states that have little or no relationship to the lawsuit and that unfairly subject them to liability exposure that is greater than other states.

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[1] Pursuant to Rule 37.6, counsel for NAM certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than the NAM, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Petitioner and Respondents have provided blanket consent to the filing of amicus briefs in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has solidified constitutional limits for general personal jurisdiction to properly reflect a modern economy in which even small businesses regularly engage in commerce throughout the United States. As a matter of due process, a state can exercise general personal jurisdiction over a business only where the business is "at home," namely its place of incorporation or principal place of business. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). This approach properly balances the jurisdictional requirements of the Due Process Clause with the rights of states to adjudicate claims implicating their interests.

Here, the Supreme Court of Montana did not apply these constitutional limits. It created unsupported exceptions to *Daimler* and *Goodyear*, ruling that the "at home" requirement applies only to foreign (outside the United States) defendants and that the Federal Employers Liability Act's (FELA) venue provision supersedes constitutional due process limits on personal jurisdiction. This result conflates general and specific jurisdiction. It also risks unleashing broad general jurisdiction principles that will subject businesses to all-purpose liability in a multitude of states despite having only limited connections in many of them. As this Court has recognized, manufacturers, like people, have a choice of where to locate, and they did not choose to be subject to the laws and courts of all of these states for all purposes.

This Court should reverse the Montana Supreme Court to enforce *Daimler* and *Goodyear* and prevent

states from circumventing the firm constitutional check on where businesses can be subject to broad liability in claims involving their products or operations. First, the Court should make clear that the tightened "at home" requirement for general personal jurisdiction applies to domestic and foreign defendants alike. If domestic corporations cannot avail themselves of the "at home" requirement, manufacturers and other companies based outside the United States will have protections under the U.S. Constitution that are not provided to their domestic counterparts. The Court should not endorse this competitive disadvantage to domestic businesses, including manufacturers, and the Court did not signal any intent in *Daimler* to create such a distinction.

Second, the Court should clarify that personal jurisdiction over a defendant cannot hinge on the legal theory or statutory claim a plaintiff invokes. If the Montana Supreme Court's opinion is upheld, state courts could use FELA or other statutes to weaken a defendant's due process protections in ways that can greatly undermine the central purpose of this Court's general jurisdiction jurisprudence: to assure the location of a lawsuit does not subvert "traditional notions of fair play and substantial justice." *Daimler*, 134 S. Ct. at 754 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1987); *see also Asahi Metal Indus. v. Super. Ct.*, 480 U.S. 102, 114 (1987) (recognizing the "unique burdens placed upon one who must defend oneself in a foreign legal system").

Experience has shown that when plaintiffs engage in forum shopping, justice can be distorted and local judicial resources abused. Here, Montana has become a favored destination for certain FELA cases

because its courts generously interpret FELA's statute of limitations, giving new life to claims that would be untimely in the proper jurisdictions. Other courts have become magnets for other types of claims, such as asbestos litigation, prescription drug product suits, and consumer protection claims. Plaintiffs should not be able to circumvent the courts and laws that are supposed to govern their claims. They also should not burden courts, juries, and taxpayers with cases having nothing to do with anyone, anything, or any event in their communities.

For these reasons, and those explained below, NAM respectfully urges the Court to ensure that Montana and other states adhere to this Court's well-reasoned general jurisdiction jurisprudence. American manufacturers and other businesses should not be subject to doctrines of general jurisdiction that violate their due process rights.

ARGUMENT

I. MONTANA'S ASSERTION OF GENERAL JURISDICTION VIOLATES THE CLEAR, DEMANDING "AT HOME" STANDARD

Specific jurisdiction is the preferred mechanism for a court to exercise personal jurisdiction over a defendant. It "encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum." *Daimler*, 134 S. Ct. at 748-49 (internal quotation and alterations omitted).[2] Because

[2] In products liability cases, for example, "it is the defendant's purposeful availment [of the benefits and protections of state law] that makes jurisdiction consistent with 'traditional notions of fair play and substantial jus-

courts can exercise specific jurisdiction only over claims related to these contacts, it unifies the defendant- and community-based interests in a case. These limits ensure that courts and juries perform their respective responsibilities and expend their finite resources only when the community has a meaningful stake in the alleged wrongdoing.

By contrast, general, all-purpose jurisdiction is proper only when the defendant's contacts are so extensive in a jurisdiction that it is eminently fair to require the defendant to answer to any and all allegations in the forum state.[3] This Court has held that general jurisdiction is appropriate for a business only where it is "at home," namely where it is incorporated or has established its principal place of business (or a surrogate principal place of business). General jurisdiction is the exception, not the rule. Courts are not to exercise jurisdiction over a case when, as here, the defendant is not "at home," and the incident, people, and evidence are located hundreds or thousands of miles away.

A. The Court's Exacting Standard for General Jurisdiction Is Based on the Defendant's Choice of Where to "Reside"

This Court has long held that the Due Process Clause of the Fourteenth Amendment prescribes the

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tice.'" *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (quoting *Int'l Shoe*, 326 U.S. at 316).

[3] *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) ("[A] finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.").

circumstances when it is proper for a state to assert both specific and general jurisdiction over a defendant. *See Kulko v. Super. Ct.,* 436 U.S. 84, 91 (1978) (stating the Due Process Clause "operates as a limitation on the jurisdiction of state courts" against defendants). Either type of jurisdiction is appropriate only when the defendant establishes a meaningful relationship with that state. *See Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) ("[I]t is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him."). A state cannot force itself into a dispute when neither the case nor defendant has such a connection. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (holding a state may not exercise jurisdiction over a "corporate defendant with which the state has no contacts, ties, or relations").

For general jurisdiction, the Court's jurisprudence is based on the notion that a defendant makes a conscious choice where to "reside." *See* Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 Fordham L. Rev. 843, 843 (1993) ("[Firms] seek to incorporate in the state whose code best matches their needs."). When a defendant, including a business, chooses a state, it consents to the laws and judgment of that state. *See* Roger Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 Geo. Wash. L. Rev. 849, 905-06 (1989) (linking consent to purposeful availment). General jurisdiction, therefore, is a *quid pro quo*, a reciprocal situation in which a defendant fully submits itself to jurisdiction in exchange for the jurisdiction's benefits. A business cannot be brought into a state's courts for any and all claims if it has not ac-

cepted this bargain. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 416 (1984).

In the past few years, the Court set forth the "at home" standard for general jurisdiction for when a business has accepted this broad *quid pro quo*. *See Daimler*, 134 S. Ct. at 760. This standard provides a clear and demanding test for when a state court is permitted to exercise general jurisdiction over a business. This high bar is needed because general jurisdiction makes a business subject to all manner of litigation in the state. When a court invokes general jurisdiction it does so over a dispute that has not arisen from anything specific to the state; the state is asserting jurisdiction over the business *despite the fact* that the claim arose elsewhere.

In *Daimler*, the Court also made clear that the "at home" test replaced the "continuous operations" test from previous rulings. 134 S. Ct. at 761. It acknowledged that the "continuous operations" terminology sounded similar to the "continuous and systematic" test for specific jurisdiction. *Id.* The Court clarified that the general jurisdiction inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home." *Daimler*, 134 S. Ct. at 761 (quoting *Goodyear*, 564 U.S. at 919) (internal quotes omitted). A business, such as BNSF here, may have "substantial, continuous, and systematic" activities in a state, but it is not "at home" unless its principal place of business or incorporation is there.

It is abundantly clear that this standard has not been met in the case at bar; BNSF is not "at home" in

Montana. It never availed itself of Montana laws such that it could be subject to lawsuits there when a plaintiff does not reside in Montana and the injury and related events occurred outside Montana. It has not come close to the standard of connectedness needed for general jurisdiction.

B. Constitutional Protections Against a State's Improper Imposition of General Jurisdiction Cannot Be Abrogated by Statute or Limited to Foreign Businesses

The Supreme Court of Montana found that a non-resident company that has some operations in Montana may, nonetheless, be subject to general jurisdiction under two exceptions: if a plaintiff brings suit under FELA or if the defendant is a U.S.-based business. *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 6 (Mont. 2016). Since the Court's unambiguous rejection of the "continuous and systematic" test in *Daimler*, basing any general jurisdiction determinations on the level of contacts or operations a business has in a state encroaches into the arena that is now exclusively reserved for specific jurisdiction. Further, neither of Montana's carve-outs comports with this Court's well-established rules of general jurisdiction. Because protections against improper imposition of general jurisdiction are rooted in the U.S. Constitution, they cannot be altered by statute and must be applied to domestic and foreign companies alike.

First, because general jurisdiction's constitutional bounds are dependent on the relationship between the forum state and the defendant, the doctrine cannot be altered by the legal theory a plaintiff invokes, including the one here under the FELA statute. The scope of a defendant's constitutional right to due pro-

cess is not limited by the source of the liability, the elements of a cause of action, or a plaintiff's pleading strategy. The "at home" constitutional standard for general jurisdiction applies uniformly in all cases. Congress cannot, by statute, force parties to surrender their constitutional protections. Otherwise, any number of federal and state laws could be misread to overcome the lack of a connection between the defendant and state needed for general jurisdiction.

Here, the Montana court set aside BNSF's constitutional protections with respect to general jurisdiction based on a FELA venue provision. FELA provides state courts with concurrent subject matter jurisdiction with the federal courts in deciding cases involving injuries to railroad workers. *See* 45 U.S.C. § 56. In determining the appropriate venue for such a case, FELA provides that the action "may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." *Id.*; *see also Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 52 (1941) (recognizing Section 56 "establishes venue for an action in the federal courts"); *Imm v. Union R.R. Co.*, 289 F.2d 858, 859 (3d Cir. 1961) (agreeing with railroad that 45 U.S.C. § 56 "is a venue provision and does not have anything to do with jurisdiction").[4]

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[4] Even if FELA addressed personal jurisdiction, due process rights are not subordinate to statute. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) ("As a general rule, neither statute nor judicial decree may bind strangers to the state."). Congress cannot predetermine the weight a state must give to a defendant's

As this Court has long appreciated, personal jurisdiction and venue are entirely distinct concepts. "[P]ersonal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *See Leroy v. Great Western United Corp*., 443 U.S. 173, 180 (1979) (citing C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3801, pp. 5-6 (1976)). Because personal jurisdiction is based solely on the relationship between a defendant and a state, it "requires a forum-by-forum, or sovereign-by-sovereign, analysis." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011).[5] No precedent of this Court has ever held that Congress can affect the personal jurisdiction of state courts. FELA and other statutes can authorize states to exercise jurisdiction only when consistent with the U.S. Constitution.

Second, the Montana court held the "at home" requirement established in *Goodyear* and affirmed in *Daimler* was intended to apply only to foreign (outside the United States) defendants. *See Tyrrell v. BNSF Ry. Co*., 373 P.3d 1, 6 (Mont. 2016) (limiting the "at home" limitation to "a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States"

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contacts through statute and, thereby, do away with the case-by-case approach in which personal jurisdiction is predicated. *See id.*

[5] Congress's grant of subject matter jurisdiction also cannot be seen as an excuse to "enlarge or regulate the jurisdiction of state courts." *Mondou v. New York, New Haven & Hartford R.R. Co*., 223 U.S. 1, 56-57 (1912).

(quoting *Daimler*, 134 U.S. at 750)). *Goodyear* arose out of a bus accident in France involving an allegedly defective tire made and sold abroad. *Daimler* arose in the context of an Alien Tort Statute claim with Argentinean plaintiffs suing a German corporation. Yet, nothing in these opinions limited the application of constitutional constraints on general jurisdiction to claims arising outside the United States.

If not corrected by this Court, this case will establish a beachhead for states and plaintiffs alike to improperly limit *Daimler* "to overseas, non-American plaintiffs, an overseas corporate defendant, or both." *See* William R. Hanlon & Richard M. Wyner, Commentary: *Daimler Turns Two: Personal Jurisdiction Over Out-Of-State Mass Tort Defendants in the Wake of Daimler AG v. Bauman*, Mealey's Litig. Rep.: Asbestos, vol. 31, no. 5, Apr. 13, 2016. Such a result has no constitutional basis and would put American businesses at a competitive disadvantage. The inquiry into a defendant's affiliation with a forum state for purposes of general jurisdiction is common to domestic and foreign defendants. Domestic manufacturers and other businesses must be given U.S. constitutional protections provided to their counterparts based outside the United States.

In short, Montana cannot assert general personal jurisdiction over BNSF. This case should be heard, preferably where a state can assert specific jurisdiction over the claim, or, if needed, where general jurisdiction actually exists.

C. The Court's Grant of *Certiorari* Here Has Already Positively Impacted State Courts

The Montana Supreme Court ruling here is quickly becoming a minority, disfavored view of this Court's general jurisdiction jurisprudence. In the week between the filing of Defendant's brief and this *amicus* brief, the Supreme Courts of Missouri and Oregon issued rulings directly disagreeing with Montana's unfounded exceptions to the Court's general jurisdiction jurisprudence. *See State ex rel. Norfolk Southern Ry. Co. v. Dolan*, -- S.W.3d --, 2017 WL 770977 (Mo. Feb. 28, 2017); *Barrett v. Union Pacific R.R. Co.*, 361 Or. 115 (Or. Mar. 2, 2017).

These cases remarkably parallel the case at bar. They both involved plaintiffs who are seeking to subject out-of-state defendants to general jurisdiction under FELA. The Oregon court specifically took notice of the Court's grant of *certiorari* in this case. *Barrett*, 361 Or. at 132 (stating it "reach[ed] a different conclusion from the Montana Supreme Court, which relied on earlier 'doing business' cases"). The Missouri court concurred, finding that arguments akin to ones here "blur the distinction between general and specific jurisdiction as well as between jurisdiction and venue." *Dolan*, 2017 WL 770977, at *8. Overturning the ruling below would be fully within the settled expectations of most state courts.

II. INTERCONNECTIVITY IN THE MODERN ECONOMY UNDERSCORES THE NEED TO LIMIT GENERAL JURISDICTION

This Court has a long tradition of tailoring constitutional general jurisdictional safeguards to the economic realities of its time. *See Burnham v. Super.*

Ct., 495 U.S. 604, 617 (1990) (recognizing that jurisdiction jurisprudence has historically reflected "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity"). The "at home" standard in *Goodyear* and *Daimler* properly embraces the manner in which manufacturers and other companies are doing business today.

The U.S. economic marketplace is global in nature, allowing manufacturers of all sizes to purchase materials, as well as make and sell products across the country. There are more than 250,000 manufacturers in the United States and, in 2015, they collectively generated more than $2 trillion. *See* Nat'l Ass'n of Manufacturers, United States Manufacturing Facts, Oct. 2016.[6] Three-quarters of manufacturing firms have less than twenty employees. *See* Anthony Caruso, Statistics of U.S. Businesses Employment and Payroll Summary: 2012, at 7 (2015). Only about six percent of manufacturers exceed one hundred employees. *See id.* Further, the trend is for manufacturers to make products in America in small quantities in small facilities. *See* Dmitry Slepov, *Micromanufacturing the Future*, Tech Crunch, Apr. 3, 2016.[7] Although a manufacturer's operations may be centered in one or two states, in today's internet era, most manufacturers—large or small—buy parts and make volumes of sales throughout the country.

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[6] http://www.nam.org/Data-and-Reports/State-Manufacturing-Data/State-Manufacturing-Data/October-2016/Manufacturing-Facts--United-States/.

[7] https://techcrunch.com/2016/04/03/micromanufacturing-the-future/.

Thus, a manufacturer or other business may have "substantial, continuous, and systematic" activities in a state, but not be "at home" there. The case at bar involves a railroad company that operates in 28 states. In the Missouri case decided last week, the court found that Norfolk, which is a Virginia-based company, had "substantial and continuous business" in 22 states. *Dolan*, 2017 WL 770977, at *2. The Oregon case found that Union Pacific, which is incorporated in Delaware and based in Nebraska, has operations in 23 states. *Barrett*, 361 Or. at 118. A business is not to be subject to general jurisdiction in all of the places wherever its goods or services routinely flow. *See Nicastro*, 564 U.S. at 882; *Daimler*, 134 U.S. at 760-61.

For example, a manufacturer that makes computers in California should not be subject to general jurisdiction in New York simply because consumers there purchase its laptops. A company making airplanes in Washington should not be compelled to appear in an Illinois court based on planes regularly flying into Chicago. A food producer in Iowa should not be subject to jurisdiction in Florida because people buy its food in supermarkets there. A pharmaceutical maker based in Indiana should not face lawsuits in Pennsylvania solely based on the quantity of prescriptions filled in the state. A company that makes cars in Michigan should not face all-purpose jurisdiction in any state in which its cars are sold. They should be subject to liability in these places only when the courts can exercise specific jurisdiction with regard to a specific claim, *i.e.*, when the claim has some connection to the forum.

In this national economy, the Court has appreciated, "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *See Daimler*, 134 S. Ct. at 762 n.20. Many companies cannot afford the cost, business interruptions, and liability exposure of trying cases in far-away jurisdictions. *See Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 114 (1987) (recognizing the "unique burdens placed upon one who must defend oneself in a foreign legal system"). By contrast, a business's state of incorporation and principal place of business will ordinarily be only one or two places. The Court has called these locations the "paradigm all-purpose forums" for general jurisdiction. *Id.* at 760. They are "easily ascertainable" and the only ones appropriate for subjecting a company to liability regardless of the cause of action. *Id.*

The predictability that this standard provides is also in concert with the notion discussed above that a defendant can choose which jurisdiction to be subject to all-purpose liability. When manufacturers and other businesses consider where to incorporate and locate their principal place of business, the certainty of legal exposure and risks have now become significant factors. *See* U.S. Chamber Inst. for Legal Reform, 2015 Lawsuit Climates Survey: Ranking the States 3-4 (2015) (finding 75 percent of respondents reported that a state's litigation environment is likely to impact important business decisions, such as where to locate or do business).[8] Businesses "structure their primary conduct with some minimum as-

[8] http://www.instituteforlegalreform.com/uploads/sites/1/ILR15077-HarrisReport_BF2.pdf.

surance as to where that conduct will and will not render them liable to suit." *Daimler,* 134 S. Ct. at 762 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)); *see also Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment) (recognizing due process requires a defendant to have "fair warning" as to where it may be subject to jurisdiction).

When the Montana Supreme Court unhinged general jurisdiction from the "at home" requirement, it created a recipe for national general jurisdiction. Such an expansive notion of general jurisdiction could quickly become the norm, leading companies large and small to be haled into courts all across the nation regardless of any meaningful connection to the forum. Such a result would undermine the ability of manufacturers and other companies to manage their businesses and contravenes this Court's admonition that subjecting a business to general jurisdiction in a multitude of states would be an "exorbitant exercis[e] of all-purpose jurisdiction." *Daimler*, 134 S. Ct. at 761. The Court must reassert that the boundaries established in *Daimler* apply in all cases, and cement the predictability of jurisdiction in furtherance of fairness and the American economy.

III. EXPANDING GENERAL JURISDICTION FACILITATES FORUM SHOPPING

The Court should also overturn the Montana Supreme Court's ruling to send a clear message against improper forum shopping. This ruling exemplifies the jurisdictional gamesmanship threatening "traditional notions of fair play and substantial justice." *Daimler,* 134 S. Ct. at 754 (quoting *Int'l Shoe*, 326 U.S. at 316). Montana has become a destination for

FELA claims because the Montana Supreme Court has adopted a more liberal interpretation of the statute of limitations than several federal circuits. *See Anderson v. BNSF Ry.*, 354 P.3d 1248 (Mont. 2015), *cert. denied*, 136 S. Ct. 1495 (2016). Montana courts also have a reputation for "empathizing with injured railroad workers" compared with courts in other states. Paul Bovarnick, *On the Tracks: Helping Injured Railroad Workers*, Trial Lawyer, at 33 (Fall 2012) ("[O]nce the railroad realized we could file . . . in Great Falls, they offered a generous settlement.").[9]

Such forum shopping has become all too common. In violation of fair play and justice, manufacturers and other businesses are routinely sued in jurisdictions with little or no connection to the lawsuits. One former plaintiffs' lawyer called these "magic jurisdictions." Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5 (quoting Richard Scruggs). A tort reform group is less diplomatic in naming these jurisdictions "Judicial Hellholes." *See* Am. Tort Reform Found., Judicial Hellholes (2016).[10]

The quintessential example of forum shopping is in asbestos litigation. Any manufacturer with a remote historic connection to an asbestos-containing product or workplace faces lawsuits in Madison County, Illinois, which hosts one-quarter of the nation's asbestos litigation. *See* KCIC, Asbestos Litiga-

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[9] http://www.rsblaw.net/beta/wp-content/uploads/2015/06/On-the-tracks_helping-injured-rr-workers.pdf.

[10] https://goo.gl/GqgU2Q.

tion: 2016 Mid-Year Update (2016), at 3.[11] Very few of these claims, though, have any connection to Madison County. In 2015, only 75 of 1,224 asbestos cases filed there were on behalf of Illinois residents with only six cases involving Madison County residents. *See* Heather Isringhausen Gvillo, *Madison County Asbestos Filings Total 1,224; Only 6 Percent Filed on Behalf of Illinois Residents,* Madison-St. Clair Record, Mar. 23, 2016. Warehousing of claims in chosen jurisdictions is a major reason asbestos litigation, which should have been in decline, is growing in scope and intensity and has driven numerous companies into bankruptcy. *See generally* Mark D. Plevin, et al., *Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11-7 Mealey's Asb. Bankr. Rep. 24 (2012).

For a number of years, Philadelphia, Pennsylvania became the prime location to file lawsuits against pharmaceutical manufacturers. In 2009, the Common Pleas President Judge undertook a "public campaign to lay out the welcome mat for increased mass torts filings." Amaris Elliott-Engle, *Common Pleas Court Seeing More Diabetes Drug Cases*, Legal Intelligencer, Mar. 19, 2009, at 1; *see also* Amaris Elliott-Engle, *Philadelphia Courts May See Substantial Layoffs*, Legal Intelligencer, Jan. 29, 2009 (reporting the plan to make the Complex Litigation Center for mass torts more attractive to attorneys to "tak[e] business away from other courts"). In 2015, out-of-state plaintiffs accounted for 81 percent of new pharmaceutical cases filed in the Philadelphia

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[11] http://riskybusiness.kcic.com/wp-content/uploads/2016/09/KCIC-Asbestos-Mid-Year-Report-2016-1.pdf

courts, with that number dipping to 65 percent in 2016. *See* Max Mitchell, *Out-of-State Pharma Filings Dip as Phila. Mass Torts Remain Steady*, Legal Intelligencer, July 25, 2016.[12] Local lawyers attribute this decrease to *Daimler*. *See id.*

The City of St. Louis, notwithstanding *Daimler*, is emerging as a new jurisdiction of choice for lawsuits; this is in part due to the state's refusal to adopt the Court's gatekeeper standards for expert evidence. *See* Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists*, Bloomberg Businessweek, Sept. 29, 2016 (reporting that hundreds of out-of-state plaintiffs have brought claims against pharmaceutical and other companies in St. Louis, which has "developed a reputation for fast trials, favorable rulings, and big awards").[13] The Missouri Office of State Courts Administrator's statistics show that filings in St. Louis have increased from about 3,000 to more than 13,000 claimants from 2014 to 2016. *Compare* FY 2014 Profile 22nd Circuit, Missouri Courts[14] *with* FY 2016 Profile 22nd Circuit, Missouri Courts.[15] It is too soon to determine whether last week's ruling in *Dolan* will have an impact in curbing this activity, but it should.

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[12] http://www.thelegalintelligencer.com/latest-news/id=1202763506813 /OutofState-Pharma-Filings-Dip-as-Phila-Mass-Torts-Remain-Steady

[13] http://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis

[14] http://www.courts.mo.gov/file.jsp?id= 83194.

[15] https://www.courts.mo.gov/file/2016%20-%20Circuit%2022.pdf.

In addition, a handful of states host most of the unfair trade practices claims against manufacturers. *See*, *e.g.*, Cary Silverman & James Muehlberger, The Food Court Trends in Food and Beverage Class Action Litigation 8 (U.S. Chamber Inst. for Legal Reform 2017) (finding that over 75% of consumer lawsuits targeting food makers are filed in four states). *Daimler* has proven effective in dismissing or narrowing claims where there is no connection to the state. *See*, *e.g.*, *Weisblum v. Prophase Labs, Inc.*, 88 F.Supp.3d 283 (S.D.N.Y. 2015) (dismissing consumer class action fraud claims by California residents for lack of general jurisdiction over defendant while retaining such claims by New York residents).

The impact of faithfully applying *Daimler* can be seen in Delaware, which has abided by the constitutional limits set forth by this Court. Before *Daimler,* out-of-state plaintiffs with no meaningful connection to Delaware had increasingly filed asbestos claims there. *See In re Asbestos Litig.*, 929 A.2d 373, 378 (Del. 2006) (finding out-of-state asbestos claims filed in Delaware courts began in May 2005 and quickly reached 129 claims). *Daimler* reversed that trend. *See* KCIC, Asbestos Litigation, *supra*, at 5 (finding asbestos claims filed in New Castle, Delaware fell from 219 in 2014 to 124 in 2015, a decline of 43.4%). The Delaware Supreme Court has properly found that "it is not tenable" after *Daimler* to exert personal jurisdiction over a manufacturer where the claims "had nothing to do with its activities in Delaware," merely because the corporation registered to do business and appointed a registered agent to receive service of process in that state. *Genuine Parts Co v. Cepec*, 137 A.3d 123, 125-26 (Del. 2016) (finding no personal jurisdiction over manufacturer incorporated

in Georgia with principal place of business in Atlanta in asbestos claim brought by Georgia plaintiff who worked in Florida warehouse).

Amicus appreciates that this Court cannot completely eliminate forum shopping or the resulting injustices that occur in these jurisdictions. But, there are clear cases, such as the one at bar, that have no connection to the forum state or where the defendant is "at home." This type of litigation tourism must be stopped. These lawsuits violate this Court's jurisdictional safeguards, and affirmance will encourage this unconstitutional practice.

IV. EXPANDING GENERAL JURISDICTION BURDENS COURTS AND JURIES

Finally, the preference for specific jurisdiction coupled with the "at home" requirement for general jurisdiction assures that judicial resources, including jury service, are preserved for resolving issues of importance to local communities. When a court hears a case involving an out-of-state plaintiff, defendant, and injury, justice can be distorted, judicial resources burdened, and jury service undermined.

Attracting out-of-state claims is often not in concert with the interests of a local community. *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 242 (2016) ("For diverse motives, such as prestige, local benefits, or re-election, some judges want to hear more of certain types of cases."). A troubling consequence of stockpiling hundreds or thousands of claims in a jurisdiction, especially when a vast majority of them have no connection to the locale, is the increased pressure to shift a court's focus from dispensing justice to disposing of cases. Some-

times well-intentioned judges take shortcuts to temporarily fix a clogged docket. *See* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997) ("Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings.").

Even when a case is heard individually and on its merits, the commitment of ensuring that the nonresident business receives a fair trial can wane. *See Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994) (identifying "the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences"); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) (identifying "prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"). Concerns of injustice go to the heart of the fair play and substantial justice reasons this Court imposed the "at home" standard for general jurisdiction.

In addition, an expansive view of general jurisdiction will cause states to spend their limited judicial resources, including the jury service of their citizens, on cases where their communities have insufficient interests. A jury's mission is to provide a voice for its community, establish facts of a case, and ensure parties are treated neutrally and equally. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (explaining in the criminal context, juries guard against overreaching prosecutors and judges). While an overwhelming majority of Americans have high regard for the jury system, many citizens avoid jury service whenever possible. *See* Mark A. Behrens & Cary Silverman,

Improving the Jury System in Virginia: Jury Patriotism Legislation is Needed, 11 Geo. Mason L. Rev. 657 (2003). They see jury service as a solemn civic responsibility but do not want to make professional and personal sacrifices. *See*, *e.g.*, *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 231 (1946) (Frankfurter, J., dissenting) ("[I]t cannot be denied that jury service by persons dependent upon a daily wage imposes a very real burden.").

A citizen's personal sacrifice to serve on a jury is supposed to be counterbalanced by the ability of jurors to address an alleged wrong committed in their communities. *See* Restatement (Second) of Conflict of Laws § 36, Comment (c) (1971). To facilitate such service, some states have spent significant resources improving jury systems, creating a one-day, one-trial rule, and developing lengthy trial funds to subsidize jurors who lose incomes when at trial. When a case has no connection to the community, these resources are wasted, jurors may resent showing up for service, and the rationale for the jury pool to be a cross-section of the community is undermined.

Further, many local courts are already seeing an increase in claims and a reduction in resources. After the recent economic downturn, the deep budget cuts some systems faced "threaten[ed] the basic mission of state courts." Richard Y. Schauffler & Matthew Kleiman, *State Courts and Budget Crisis: Rethinking Court Services,* The Book of the States 2010, 290. State courts became "an easy target," for slashing budgets. Andrew Cohen, *At State Courts, Budgets Are Tight and Lives Are in Limbo*, The Atlantic, Sept. 23, 2011. The result, some feared, would be lo-

cal citizens having difficulty accessing their courts to have contract, tort, and other claims heard. *See id.*

The Court should reinforce that the "at home" requirement for general jurisdiction applies to all cases and for all U.S.-based business. Doing so protects the interest of justice and integrity of local courts.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court reverse the decision below.

Respectfully submitted,

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