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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRISTOL-MYERS SQUIBB COMPANY,
Petitioner,

v.

SUPERIOR COURT FOR THE COUNTY OF SAN FRANCISCO,
Respondent.

BRACY ANDERSON, *ET AL.*,
Real Parties in Interest.

PETITIONER'S OPENING BRIEF ON THE MERITS

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The order granting review specifies the issues to be addressed as "(1) whether after *Daimler AG v. Bauman* (2014) 571 U.S. ___ [187 L. Ed. 2d 624; 134 S. Ct. 746], general jurisdiction exists; and (2) whether specific jurisdiction exists." More specifically, can California courts exercise general or specific jurisdiction over an out-of-state company to adjudicate the product liability claims of out-of-state residents involving wholly out-of-state events and injuries?

INTRODUCTION

More than 3,400 residents from 45 states other than California have sued defendant Bristol-Myers Squibb Company ("BMS") in San Francisco Superior Court for injuries purportedly related to the prescription antiplatelet medication Plavix®. To determine whether personal jurisdiction over BMS exists, one might ask whether BMS is a California company. It is not. It is incorporated in Delaware with its principal place of business in New York. One might wonder whether BMS made Plavix® in California. It did not. Plavix® was developed and tested entirely outside California. One might then query whether the nonresidents were prescribed the drug, took it, or sustained injuries in California. They did not. So why did these plaintiffs sue BMS in San Francisco?

The nonresident plaintiffs did not come here to ride the cable cars or stroll across the Golden Gate Bridge. Nor did they come here because their underlying lawsuits somehow relate to California. These out-of-state plaintiffs filed suit here solely because their lawyers view San Francisco as a favorable forum to litigate product liability cases like this one. They did this—so far successfully—by joining thousands of out-of-state residents with a relative handful of in-state residents.

The Court of Appeal approved this tactic, holding that California courts could exercise personal jurisdiction over BMS to adjudicate the out-of-state plaintiffs' claims solely because BMS marketed Plavix® as part of a nationwide "common effort" that allegedly injured California residents along with nonresidents. If that were to become the law, California would be seen as a prime destination for product liability litigation.

This Court should reverse. There is no constitutional basis for personal jurisdiction on these facts. A state may exercise personal jurisdiction over a corporate defendant under one of two theories: general jurisdiction or specific jurisdiction. The Court of Appeal correctly found that California lacked general jurisdiction over BMS. Two recent United States Supreme Court decisions, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), compelled that conclusion. Those cases reined in an overly expansive theory of general jurisdiction embraced by some lower courts—the notion that corporate defendants could be sued for any and all claims anywhere in the country where they do continuous and systematic business. Corporations are now subject to general jurisdiction only in those states where they are incorporated or have their principal place of business. Because BMS is neither headquartered nor incorporated in California, it is not subject to general jurisdiction here. *See* Section I.

The Court of Appeal nevertheless found specific jurisdiction to exist. But specific jurisdiction is a historically narrower doctrine that applies only where a lawsuit is connected to the corporate defendant's contacts with the forum state. Under this Court's key precedents, the plaintiff's claim must be *substantially related* to the defendant's contacts with the forum. *Vons Cos. v. Seabest Foods, Inc.*, 14 Cal. 4th 434 (1996). This "relatedness" test is anchored in principles of

federalism and Due Process—it ensures that nonresident defendants are called to answer only for legal obligations that derive from their conduct in the forum state. Where, in contrast, all of the company's relevant events occurred outside the forum, a state has no genuine interest in the controversy and cannot constitutionally extend its authority to decide an extraterritorial dispute.

The Court of Appeal recognized that none of the conduct underlying the nonresident plaintiffs' claims bore any connection with California. Yet it found jurisdiction based on BMS's nationwide sales of Plavix®, including sales to *other* plaintiffs who *do* reside in this State and claim injury. These purported "connections" do not satisfy Due Process.

To begin with, after acknowledging that BMS's substantial California sales were insufficient to support general jurisdiction, the court relied on precisely those unrelated contacts to find specific jurisdiction. To do this, the court paid lip service to the constitutional requirement of "relatedness," but failed to actually apply it. The Court of Appeal's failure to inquire whether "there is a substantial nexus or connection *between the defendant's forum activities and the plaintiff's claim*" (*Vons*, 14 Cal. 4th at 456 (emphasis added)) would re-establish, for cases involving a nationally distributed product, an overly expansive view of jurisdiction incompatible with recent United States Supreme Court precedent. Under this theory, any plaintiff could sue BMS (or any other multinational corporation) in virtually any state in the nation. That is precisely the result the Supreme Court rejected so emphatically in *Daimler* and *Goodyear*. *See* Section II(A).

Nor, as the Court of Appeal thought, does the existence of parallel lawsuits brought by California residents provide the requisite connection between the claims of nonresidents and BMS's contacts in the forum. Permitting specific jurisdiction on the basis of similar but unconnected claims by out-of-state

plaintiffs is an invitation for rampant forum shopping. In product liability cases involving nationwide sales of a successful product, plaintiffs' lawyers will always be able to find resident-claimants in the forum of their choice to anchor the litigation in a tactically advantageous state. This is not a sufficient basis for invoking jurisdiction. *See* Section II(B).

Plaintiffs may invoke—and the Court of Appeal may have been influenced by—considerations of judicial efficiency. But such considerations cannot trump Due Process limits on the exercise of state power. Courts cannot erase territorial boundaries to hear nationwide disputes in the way that Congress can—for example, through the mechanism of multidistrict litigation. *See* 28 U.S.C. §1407. It would offend basic notions of federalism and fairness for a single state to make itself host of the bulk—or even the entirety—of nationwide mass tort litigation regarding a product simply because a relative handful of California residents also suffered injuries. *See* Section II(C).

Accordingly, there is no justification for permitting these nonresident plaintiffs to occupy a scarce and coveted slot in the San Francisco Superior Court's complex civil litigation department or for compelling California citizens to serve as jurors for lawsuits concerning claimed events and injuries that all occurred outside of California. *Id.*

No precedent supports the decision below. No decision of this Court or post-*International Shoe* decision of the United States Supreme Court supports specific jurisdiction where *no* connection exists. Indeed, the decision below conflicts with *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222 (1959), and innumerable California decisions. Cases upholding specific jurisdiction uniformly involve real and tangible in-state contacts underlying the plaintiff's claim—such as the plaintiff residing in the forum or suffering alleged injury there. *See* Section II(D).

Finally, if this Court were to conclude that the *Vons* substantial connection test is satisfied on these facts, then that test, as applied, would violate Due Process. The Court of Appeal's test would effectively eviscerate the relatedness requirement and expand the extraterritorial reach of a state to those disputes in which it has *no* legitimate interest. No state interest could justify California's assertion of adjudicatory authority over nonresidents allegedly injured elsewhere by out-of-state actors. *See* Section II(E).

STATEMENT OF FACTS

Plavix® is a prescription antiplatelet drug used to inhibit blood clots and thereby help prevent strokes, heart attacks and other cardiovascular problems. In March 2012, 575 nonresident plaintiffs joined with 84 California residents to file eight complaints in San Francisco Superior Court. Petitioner's Exhibits ("Pet. Ex.") 16-270.[1] Plaintiffs alleged personal injuries, principally bleeding events, from Plavix®. They named as defendants BMS—the manufacturer of Plavix®—and McKesson Corporation, one of many distributors for the drug. Pet. Ex. 16-270, 454, 456-59.

While all 659 plaintiffs took and claim injury from Plavix®, the similarities between the in-state and out-of-state plaintiffs end there. The 575 nonresident plaintiffs claim no contacts with BMS's California activities or with California generally. They hail from 32 states other than California. The doctors who prescribed them Plavix® reside and practice outside California. The nonresident plaintiffs obtained their prescriptions for Plavix® outside California. They purchased the drug, used it, and were allegedly injured outside California. *See generally* Pet. Ex. 1-270, 382-426.

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[1]"Petitioner's Exhibits" refer to the exhibits BMS filed in the Court of Appeal in support of its writ petition.

For its part, BMS is a Delaware corporation with its principal place of business in New York and major facilities in New Jersey. Pet. Ex. 428 ¶2; 432 ¶2; 509. The research, development, labeling, regulatory approval, and manufacturing of Plavix® occurred in New Jersey or other places outside California. Pet. Ex. 432 ¶3.

BMS conducts business and sells products nationwide and throughout the world. It has five facilities here, employs 164 Californians (1.3% of its U.S. employees) and has approximately 250 sales representatives covering the entire State. Pet. Ex. 428 ¶3; 430 ¶2. BMS sells Plavix® in California, and from 2006 to 2012 made just under $1 billion in California sales. Pet. Ex. 454. Overall, BMS derives 1.1% of its total U.S. sales revenue from California sales of Plavix® and appreciably less of its global revenue. Pet. Ex. 432 ¶4.

BMS did not challenge jurisdiction as to the 84 California plaintiffs, who presumably used Plavix® and suffered their alleged injuries here. Pet. Ex. 343-61. But it did challenge the assertion of personal jurisdiction as to the 575 nonresident plaintiffs. *Id.* The Superior Court disagreed, concluding that it could exercise general jurisdiction over BMS based on the company's substantial business activity in California. Pet. Ex. 808, 812-14. The court did not address whether it could exercise specific jurisdiction over BMS. *Id.*

BMS filed a Petition for Writ of Mandate with the Court of Appeal, naming the 575 nonresident plaintiffs as real parties in interest. The court summarily denied the writ petition on January 14, 2014—the same day the United States Supreme Court decided *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

This Court then granted BMS's Petition for Review and transferred the case to the Court of Appeal with direction to hear it on the merits. On July 30, 2014, the Court of Appeal affirmed the Superior Court on the basis of specific jurisdiction. Although the court held that California could not

exercise general jurisdiction because BMS was not "at home" in California (App. 17), it concluded that California *could* exercise specific jurisdiction over BMS because of its substantial business activities in this State and the existence of similar claims by California residents. App. 30-33.

After the Court of Appeal's decision, the federal District Court overseeing the Plavix® multidistrict litigation remanded to the San Francisco Superior Court 57 additional cases involving 3,073 plaintiffs. *See In re Plavix Prod. Liab. & Mktg. Litig.*, MDL No. 2418, No. 3:13-cv-2418, 2014 WL 4954654 (D.N.J. Oct. 1, 2014). These 3,073 plaintiffs reside in 45 states, Puerto Rico, and Canada, and have been added to the Plavix® coordinated proceedings in this State. In total, 3,732 individual plaintiffs—only 252 of whom are California residents—are now before the San Francisco Superior Court.

On November 19, 2014, this Court granted review and directed the parties to address both general and specific jurisdiction.

ARGUMENT

The United States Supreme Court has recognized two kinds of personal jurisdiction: general jurisdiction and specific jurisdiction. These doctrines, while distinct, are two sides of the same coin—together they define the limits of a state's authority to compel defendants to submit to adjudication in its courts. Under recent United States Supreme Court precedent, a court may only exercise general jurisdiction over companies that make the forum state their "home" by incorporating or maintaining their principal place of business there. *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n.19 (2014). Once a court has validly obtained general jurisdiction over a company, it may adjudicate "any and all claims" against that company, including those "arising from dealings entirely distinct from" the company's forum activities. *Goodyear Dunlop*

Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851, 2853 (2011). When the defendant is not "at home" in the forum, the doctrine of specific jurisdiction allows a state to adjudicate only those lawsuits that "*arise[] out of or relate[] to* the defendant's contacts with the forum." *Daimler*, 134 S. Ct. at 754 (emphasis added).

The Court of Appeal agreed that BMS's extensive contacts with, and sales of Plavix® in, California were insufficient to render BMS "at home" here because it neither was incorporated nor had its principal place of business here. The Court of Appeal nevertheless relied on the same contacts to support a finding of specific jurisdiction—without regard to whether the out-of-state plaintiffs' claims were in fact related to BMS's California activities. As a result, the Court of Appeal made specific jurisdiction in product liability cases a stand-in for the unduly expansive version of general jurisdiction that the United States Supreme Court has twice rejected on Due Process grounds. Whether labeled specific or general jurisdiction, this exercise of adjudicatory authority over claims brought by nonresidents against an out-of-state corporation suffers from the same constitutional infirmity.

I.

BECAUSE BMS IS NOT "AT HOME" IN CALIFORNIA, IT IS NOT SUBJECT TO GENERAL JURISDICTION.

In *Daimler*, the United States Supreme Court reaffirmed an easy-to-apply, bright-line test that it had adopted three years earlier to determine whether general jurisdiction exists. If a company is incorporated or has its principal place of business in the forum, it is subject to general jurisdiction there. Otherwise, it is not. BMS neither is incorporated nor maintains its principal place of business in California. Therefore, it is not subject to general jurisdiction here.

This was not always so clear. The Superior Court, for example, relied on *Hesse v. Best Western International, Inc.*, 32 Cal. App. 4th 404 (1995), to find general jurisdiction. Pet. Ex. 813. In that case, the cause of action neither arose out of nor related to the defendant's contacts with California. *Hesse* nevertheless held that California could exercise general jurisdiction over the defendant because it had engaged in "*continuous and purposeful transactions with the State of California.*" 32 Cal. App. 4th at 410 (emphasis added). Cases like *Hesse* had allowed plaintiffs' lawyers in product liability cases to sue nationwide companies in any state where they perceived a tactical advantage. But no longer.

The United States Supreme Court has issued two decisions in the last four years to rein in this kind of forum shopping. *Goodyear* was a product liability action against foreign tire manufacturers, which arose from a bus accident in France. 131 S. Ct. at 2850. Although tens of thousands of the defendants' tires were distributed in the forum state (*id.* at 2851, 2852), the Court found "[s]uch a connection does not establish the 'continuous and systematic' affiliation necessary to empower [the forum] courts to entertain claims unrelated to the foreign corporation's contacts with the State." *Id.* at 2851.

Three years later, the Court decided *Daimler*. *Daimler* involved twenty-two Argentinian residents who brought a lawsuit in California against Daimler, a German company, for human rights violations committed in Argentina. 134 S. Ct. at 750-51. The alleged torts occurred in Argentina, but plaintiffs argued that a California court could exercise general jurisdiction over Daimler because one of its U.S. subsidiaries did substantial business here. *Id.* at 751. The U.S. subsidiary (whose contacts the Court imputed to the parent for purposes of the analysis) had several offices in California and was the single largest supplier of luxury vehicles to the California market. *Id.* at 752. Nevertheless, because Daimler

was not incorporated or headquartered in California, the Supreme Court held that California could not exercise general jurisdiction over the company. *Id.* at 761.[2]

It is likely that under the *Hesse* standard, Daimler's contacts would have been sufficient to result in general jurisdiction. But *Daimler* confirmed that no matter how much business a corporation does in the forum, that alone cannot support general jurisdiction:

> If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which [the U.S. subsidiary's] sales are sizable. Such exorbitant exercises of all-purpose [general] jurisdiction would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. (*Id.* at 761-62 (citation and internal quotation marks omitted))

In the short period of time since *Daimler*, lower courts have consistently applied its clear holding. In *Young v. Daimler AG*, 228 Cal. App. 4th 855 (2014), for example, the Court of Appeal held that California could not exercise general jurisdiction over a manufacturer based on its subsidiary's

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[2] The Supreme Court referred to the possibility of an "exceptional case." *Daimler*, 134 S. Ct. at 761 n.19. But the only "exceptional case" the United States Supreme Court has ever identified arose from unique wartime circumstances in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). *Daimler*, 134 S. Ct. at 761 n.19; *Goodyear*, 131 S. Ct. at 2856. The defendant there was a Philippine mining corporation that had mostly ceased doing business there during the Japanese occupation. During that time, the company instead conducted its operations from Ohio, where its corporate president kept his office, oversaw corporate activities, and maintained the company files. As the Court explained in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 n.11 (1984), the Ohio court properly exercised general jurisdiction in those unique circumstances because "Ohio was the corporation's principal, if temporary, place of business." The nonresident plaintiffs here have never argued that BMS's contacts with California are analogous to *Perkins*.

distribution and sales in California. *Id.* at 867. In the Plavix® product liability litigation itself, an Illinois court rejected general jurisdiction over BMS even though it had offices and substantial sales in Illinois. Order, *In re Plavix Related Cases*, No. 2012L5688, 2014 WL 3928240 (Ill. Cir. Ct. Aug. 11, 2014).

Here too, the Court of Appeal correctly held that, in light of *Daimler* and *Goodyear*, California could not exercise general jurisdiction over BMS. App. 17. Although BMS conducts business in this State—including substantial product sales and the maintenance and operation of physical facilities—it is not incorporated here and does not have its principal place of business here. California is no different than any of the dozens of other states in which BMS does substantial business but is not incorporated and does not have its principal place of business. BMS is not subject to general jurisdiction in those states and is not subject to it here.

II.

CALIFORNIA COURTS MAY NOT EXERCISE SPECIFIC JURISDICTION OVER BMS TO DECIDE CLAIMS OF NONRESIDENTS THAT HAVE NO CONNECTION TO CALIFORNIA.

A. The Court Of Appeal Effectively Resurrected, Under A Different Label, The Sprawling Concept Of Jurisdiction That *Daimler* And *Goodyear* Rejected.

The Court of Appeal agreed that under *Daimler* and *Goodyear*, BMS's Plavix® sales in California were insufficient to confer general jurisdiction over BMS. The court was then required to determine whether the nonresidents' lawsuits were sufficiently connected to BMS's contacts within the State to allow for specific jurisdiction. But the court made no such assessment. Instead, it held that BMS's sales of Plavix® in California to individuals *other* than the nonresident plaintiffs by itself supplied a sufficient connection for the nonresidents' claims. The result is that a company's marketing to

other purchasers within the state, while insufficient to confer general jurisdiction, would always be sufficient to confer specific jurisdiction in product liability suits brought by nonresidents. Such a holding is an impermissible end-run around *Daimler* and *Goodyear*, and resurrects the now-discredited *Hesse* standard by another name.

1. Specific Jurisdiction Requires Relatedness Between Plaintiffs' Claims And BMS's In-State Activities.

Courts have established a three-part test to determine whether a state has a sufficient interest in a lawsuit to justify the exercise of specific jurisdiction over an out-of-state company: (1) the defendant must have purposefully availed itself of the forum benefits; (2) the cause of action must "arise out of" or "relate to" the defendant's forum contacts; and (3) the exercise of jurisdiction must comport with "fair play and substantial justice." *Snowney v. Harrah's Entm't, Inc.*, 35 Cal. 4th 1054, 1062 (2005) (citations omitted). At issue here is the "relate to" (or "relatedness") prong. In California, this Court has deemed relatedness to exist when "there is a substantial nexus or connection *between the defendant's forum activities and the plaintiff's claim.*" *Vons*, 14 Cal. 4th at 456 (emphasis added).[3]

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[3] Lower courts in other jurisdictions have employed different tests to determine whether a state has the requisite interest in the controversy. For example, many courts require, at a bare minimum, "but-for" causation—a standard that would result in a finding of no relatedness here. *See, e.g., O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 322 (3d Cir. 2007) ("[B]y ensuring the existence of some minimal link between contacts and claims, but-for causation provides a useful starting point for the relatedness inquiry"); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1079 (10th Cir. 2008); *Beydoun v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507-08 (6th Cir. 2014) (demanding proximate causation for relatedness). Each of those tests would almost certainly require rejection of a finding of relatedness here.

As the Court explained in *Daimler* and *Goodyear*, the relatedness prong sets specific jurisdiction apart from general jurisdiction. *See Daimler*, 134 S. Ct. at 754 (discussing differences between specific and general jurisdiction); *id.* at 772 n.10 (Sotomayor, J., concurring); *Goodyear*, 131 S. Ct. at 2851. When a company has chosen to make a forum its home, that state has an interest in regulating the company's overall conduct; the state therefore has general jurisdiction to adjudicate any type of dispute against the company there. But for defendants that reside outside the forum, the "relatedness" prong for specific jurisdiction ensures that the state only adjudicates those extraterritorial disputes where it has an interest in the controversy. *See, e.g.*, *Goodyear*, 131 S. Ct. at 2851 ("Specific jurisdiction . . . depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation") (citations omitted).

The United States Supreme Court explained this long ago in *International Shoe* and has never departed from this fundamental principle:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, *so far as those obligations arise out of or are connected with the activities within the state*, a procedure which requires the corporation to respond to a suit *brought to enforce them* can, in most instances, hardly be said to be undue. (*Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (emphasis added)) (quoted in part in *Daimler*, 134 S. Ct. at 758 n.10)

See also, e.g., *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 323 (3d Cir. 2007) (relatedness requirement's "function is to maintain balance in this reciprocal exchange"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) ("[I]t is not unreasonable to subject it to suit in one of those

States *if* its allegedly defective merchandise has *there* been the source of injury to its owner or to others") (emphases added).

Put differently, specific jurisdiction is grounded on a *quid pro quo*: in exchange for the privilege of conducting business in a state, the non-resident defendant assumes responsibility for any resulting legal obligations. As explained in *International Shoe*, it is reasonable, and not disproportionate, to require an out-of-state corporation "to respond to a suit brought to enforce" obligations incurred when it "exercises the privilege of conducting activities" there. 326 U.S. at 319. But BMS's sale of Plavix® within California should not be conditioned upon BMS subjecting itself to suit here on claims that have no connection to the State. California has no legitimate interest in imposing such a disproportionate condition, which would open the door to California regulating all BMS's sales throughout the United States.

2. BMS's Nationwide Sales Cannot Supply The Requisite Substantial Connection.

The Court of Appeal pointed to no connection between the nonresident claims and BMS's contacts with California that would allow California to claim any state interest in adjudicating the dispute. Indeed, there is none. The claims of the out-of-state plaintiffs would have been the same had BMS never set foot in California and never sold its product here. The out-of-state plaintiffs did not take Plavix® in California. Their prescribing doctors did not reside or treat the out-of-state plaintiffs in California. Those doctors did not see any advertisements or marketing materials for Plavix® in California. The out-of-state plaintiffs' injuries and their treatment did not occur in California. Plavix® was not developed, tested, and produced here. Had their cases been filed and tried in their home states, the word "California" probably

would not have appeared in the entire court file and would not have been mentioned at trial.

However, the Court of Appeal found relatedness based on BMS's substantial California sales of Plavix® to *other* people as part of its nationwide sales. App. 31. But all multinational corporations sell their products nationwide. All consumer product companies utilize nationwide marketing campaigns. The Court of Appeal's logic necessarily means that so long as a company sells its products here, California can *always* exercise personal jurisdiction over any claim alleging injury from that product. The jurisdictional facts underlying the nonresidents' claims would then become irrelevant. This result would extend the relatedness requirement and expand the extraterritorial reach of a state to those disputes in which it has no legitimate interest. *See Goodyear*, 131 S. Ct. at 2851; Charles W. Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, But "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 204 (2005) ("The relatedness prong, at its core, mandates a connection between the forum and the defendant with respect to the particular suit in order to . . . solidify state interests. . . insur[ing] that the state regulates only activities within the state that implicate its sovereign regulatory interests."). It would dispense with precisely the principle that *Daimler* emphasized: states cannot adjudicate wholly extraterritorial controversies.

The Court of Appeal stretched the relatedness requirement past its breaking point to accomplish by another name what *Daimler* foreclosed: nationwide jurisdiction for product liability cases over a corporation on the basis of its nationwide sales. The court replaced an unconstitutional vision of general jurisdiction with an unconstitutional vision of specific jurisdiction.

B. The Existence of Parallel Claims By Forum Residents Is Not A "Substantial Connection" Between The Defendant's Forum Activities And The Out-Of-State Plaintiffs' Claims.

The Court of Appeal also relied on the fact that California residents had filed similar Plavix®-related claims against BMS in California. App. 31. But parallel lawsuits brought by *other* plaintiffs who *do* reside in California cannot supply a connection to nonresidents' separate claims and is therefore not a relevant factor under the *Vons* test for relatedness.

Parallel lawsuits by California residents are just that—parallel lawsuits. Parallel lines do not intersect, and that geometry is not altered by the device of adding a relatively few California residents to an action prosecuted overwhelmingly by nonresident plaintiffs. Permitting the presence of a few in-state plaintiffs to confer jurisdiction over the claims of dozens, hundreds or thousands of out-of-state plaintiffs who lack any connection to the state would allow a very small tail to wag a very large dog.

The presence of lawsuits by California residents is, in fact, not a separate factor at all; it is a natural consequence of a consumer product company doing business nationwide. If something goes wrong with a product, consumers everywhere will claim injury. To hinge jurisdiction on the California residents' claims is to do no more than hinge it on the company's nationwide sales—precisely what *Daimler* rejected.

The Court of Appeal's approach would give plaintiffs' lawyers unprecedented power to create personal jurisdiction for tactical reasons. Consider the claim of one typical nonresident plaintiff—Virgil S. Anderson. He resides in Texas and all the conduct underlying his claim occurred there. Pet. Ex. 19 ¶11. Mr. Anderson could not have filed a single-plaintiff lawsuit in California because neither he nor his claim has *any* connection with BMS's California sales or other activities. The relatedness calculus should not change just because Mr.

Anderson's lawyer made the tactical decision to file his claim in California in tandem with dozens of other out-of-state residents and a handful of California residents.

Jurisdiction must be based on a connection between the defendant's underlying conduct in the forum and the operative facts of the controversy, not on *post hoc* litigation decisions by plaintiffs' counsel. *See Daimler*, 134 S. Ct. at 761-62 (jurisdictional rules must allow defendant to structure primary conduct to accept or avoid jurisdiction); *Vons*, 14 Cal. 4th at 456 (test is whether there is a substantial connection between "*the defendant's forum activities* and the plaintiff's claim") (emphasis added); *Snowney*, 35 Cal. 4th at 1068 ("[O]nly when *the operative facts of the controversy* are not related to *the defendant's contact with the state* can it be said that the cause of action does not arise from that [contact]") (emphasis added; internal quotation marks omitted). Otherwise, plaintiffs' lawyers would have unilateral power to create specific jurisdiction anywhere they wish through the procedural device of joinder. The forum shopping that *Daimler* reined in would reappear under the guise of specific jurisdiction.

C. Considerations Of Judicial Efficiency Are Irrelevant To The Test For Relatedness.

In developing its expansive view of relatedness, the Court of Appeal appears to have been influenced by its belief that litigating similar Plavix® claims from all over the country in a single coordinated proceeding would be judicially efficient. App. 35. But a desire to achieve efficiency through the coordinated handling of similar claims—including claims as to which the state does not have the slightest interest—does not trump basic Due Process principles.

As a matter of federalism, no single state may create a national forum for hearing multi-jurisdictional disputes in a single nationwide lawsuit. Congress has that power and has

exercised it by authorizing multidistrict litigation proceedings for federal actions sharing common questions of fact. *See* 28 U.S.C. §1407. But state courts lack authority to adjudicate extraterritorial claims that bear no connection to the forum, just as they lack the power to regulate conduct in other states (*see* Section II(E), *infra*), whether or not it would be more convenient to do so.

Permitting one state to host a nationwide litigation comprised mostly of out-of-state residents might be convenient in the sense of being tactically advantageous to the plaintiffs, but it would upend the balance of judicial power among the states. Using the same rationale, other states could exercise specific jurisdiction over BMS for any Plavix®-related claim, regardless of where the plaintiff resides or was injured. Any Plavix® personal injury action could be filed anywhere, untethered from the requirements of Due Process.

Instead of achieving jurisdictional fairness, this result would distribute the burden of defending mass tort cases in a lopsided way. A company that sells just 1%, 2% or even 3% of its products in California could be required to defend in California 100%—or at least, a hugely disproportionate share—of the product liability claims arising out of its nationwide sales. As the Court explained in *Daimler*, "[n]othing in *International Shoe* and its progeny suggests that 'a particular quantum of local activity' should give a State authority over a 'far larger quantum of . . . activity' having no connection to any in-state activity." 134 S. Ct. at 762 n.20. The decision below effectively jettisons the reciprocal exchange underlying specific jurisdiction. *See O'Connor*, 496 F.3d at 323 (the degree of relatedness must "keep the jurisdictional exposure that results from a contact closely tailored to that contact's accompanying substantive obligations" and "be intimate enough to keep the quid pro quo proportional").

Moreover, permitting this kind of unrestrained forum shopping would impose on California's judicial system, California jurors, and California taxpayers the obligation to provide a forum for non-resident plaintiffs whose claims have no relationship to California. California taxpayers will have to foot the bill, and California citizens will have to serve as jurors, for the adjudication of disputes in which the State has utterly no interest. California's scarce judicial resources should instead be used to adjudicate claims that bear a real connection to this State.

D. Precedent Does Not Support Specific Jurisdiction Where There Is *No* Connection Between A Plaintiff's Claims And The Defendant's In-State Activities.

1. *Vons* Does Not Support Specific Jurisdiction Here.

The Court of Appeal rooted its decision in the "substantial connection" test that this Court articulated in *Vons* and *Snowney*. But *Vons* and *Snowney* preclude the exercise of specific jurisdiction over an out-of-state defendant where there is *no* connection between a nonresident plaintiff's claims and the defendant's contacts with the forum state.

It is true that *Vons* endorsed a "sliding scale" approach, which provides that "the greater the intensity of [an out-of-state corporation's] forum activity, the lesser the relationship required between the contact and the claim." 14 Cal. 4th at 453; *see also Snowney*, 35 Cal. 4th at 1068. But "lesser" does not mean "none": the sliding scale approach has never operated to confer jurisdiction where there is *no connection whatsoever* between a nonresident plaintiff's claim and the defendant's activities within the forum state. *See Greenwell v. Auto-Owners Ins. Co.*, No. C074546, — Cal. App. 4th —, 2015 WL 332280, at *9 (Jan. 27, 2015) ("To the extent [plaintiff] would have us read [*Vons*] to mean that *any relationship whatsoever* between the operative facts of the controversy and

the defendant's contact with the forum state is sufficient to support a finding of specific jurisdiction, that reading would undercut entirely the extensive discussion of the substantial nexus test in both *Vons* and *Snowney*") (emphasis in original).

Indeed, in *Vons* itself, this Court went to great lengths to describe the California contacts that supplied the essential jurisdictional underpinning for litigating in California. *Vons* involved a cross-complaint by a California meat supplier—who supplied contaminated meat to a California franchisor—against two out-of-state franchisees that served the meat. The meat supplier alleged that the franchisees cooked the meat at the wrong temperature. The Court found significant that the out-of-state franchisees had sought out and entered into a business relationship with a California franchisor. That agreement, which dictated the terms of the franchisees' purchase of and the manner of cooking the meat, contained a forum selection clause specifying California. *Vons*, 14 Cal. 4th at 450-51. Consequently, the agreement created the supply and distribution chain that drew the supplier and franchisees into the very relationship that gave rise to the indemnification claim against the out-of-state franchisees. *Id.* at 456. And that agreement directly related to the claims in the case, as the alleged violations of the franchise contract's specifications of procedures for food preparation were a "contributing cause of" injuries to the meat supplier's reputation and the basis of its negligence claim. *Id.* at 457.

Accordingly, in *Vons*, even though the defendant's contacts with California did not actually *cause* the plaintiff's claim (*id.* at 468), this Court found specific jurisdiction because the plaintiff's claims "arose out of" the California-based contractual relationship entered into by defendants. *Id.* at 457; *see also id.* at 468 (citing examples of contacts in other cases that did not *literally* cause plaintiff's claim, but still gave rise to

it). Nowhere did *Vons* suggest that a court may find specific jurisdiction when no such connection exists between the claim and the defendant's California activities.

2. Other Authority Rejects Specific Jurisdiction Where The Injury Alleged Is Unconnected To Defendant's In-State Activity.

Other California precedent squarely on point rejects specific jurisdiction where, as here, the harm alleged by a nonresident plaintiff is unconnected to the defendants' activities in the forum. For instance, in *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222 (1959), this Court rejected the exercise of specific jurisdiction when both parties resided and all events giving rise to the claim occurred outside California. Certain equipment had been installed in Idaho, where it caused a gas meter and pressure-reducing station to explode, injuring three Idaho residents. *Id.* at 223. Although the defendant sold the same product through a California distributor (*id.* at 223-24), the equipment that caused the accident was neither purchased nor used in California. The plaintiffs nevertheless brought product liability claims in California, alleging that "[defendant's] sales activities in this state [were] sufficient to subject it to the jurisdiction of [California] courts even if the causes of action [were] not related to those activities." *Id.* at 224. In an opinion authored by Justice Traynor, this Court disagreed: "The causes of action did not arise out of and are not related to [defendant's] activities in this state, and none of the relevant events occurred here." *Id.* at 226. The decision below cannot be squared with *Fisher Governor*.

Similarly, *Boaz v. Boyle & Co.*, 40 Cal. App. 4th 700 (1995), applied the relatedness requirement to a pharmaceutical product liability case. There, both California and non-California residents sued a prescription drug manufacturer for disabilities they allegedly suffered as a consequence of

their grandmothers' ingestion of DES in other states. *Id.* at 704. The Court of Appeal concluded that California could not exercise specific jurisdiction over the manufacturer as to the claims of either the resident or the nonresident plaintiffs, despite the manufacturer's prior sale of substantial amounts of DES—9% of its national sales—to others in California. *Id.* at 714-21. The territorial limits on a state's jurisdiction, the court held, could not be "jettison[ed] . . . in favor of an approach which recognizes no defined limits to the assertion of jurisdiction against any defendant whose national marketing somehow affects commerce in the forum state." *Id.* at 720-21.

Notably, in *Boaz*, the court even rejected the assertion of specific jurisdiction by a resident plaintiff who was born in California and who suffered birth defects in California allegedly caused by her grandmother's out-of-state ingestion of DES. Her "DES-related affliction . . . ha[d] nothing to do with any of [defendant] Emons's activities related to California." *Id.* at 718.[4] The argument for specific jurisdiction here, where—unlike *Boaz*—*none* of the out-of-state plaintiffs are California residents and *none* of the alleged harm occurred in California, is even weaker.

Likewise, not a single modern United States Supreme Court case has upheld specific jurisdiction when the harm alleged was not a consequence of the defendant's activities in the forum:[5]

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[4] *See also Spirits Inc. v. Superior Court*, 104 Cal. App. 3d 918, 924 (1980) (no specific jurisdiction because "neither activity within the forum nor a related injury within the forum, the two threshold elements prerequisite to exercise of limited jurisdiction, exist here"); *Cassiar Mining Corp. v. Superior Court*, 66 Cal. App. 4th 550, 558 (1998) (noting in dicta that California may lack specific jurisdiction in an asbestos action involving "a foreign defendant, a foreign sale and a foreign exposure").

[5] Indeed, Justice Ginsburg has noted that the "[s]tate in
(continued . . .)

- In *McGee v. International Life Insurance Co.*, 355 U.S. 220, 221-22 (1957), a resident insurance beneficiary who paid premiums *in the forum* sued an out-of-state insurance company for failure to pay on the policy.
- *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984), involved a nonresident plaintiff who sustained libel *injuries in the forum.*
- In *Calder v. Jones*, 465 U.S. 783, 789 (1984), a resident plaintiff *injured in the forum* brought a libel action against an out-of-state tabloid.
- Finally, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479-80 (1985), a resident plaintiff brought a breach of contract action against an out-of-state franchisee when several key events relating to the contract formation *occurred in the forum.*

Neither this Court nor the United States Supreme Court has ever upheld the exercise of specific jurisdiction over an out-of-state defendant where the plaintiff resided out-of-state and the claim at issue had no connection to the forum state—in other words, where the forum state had no interest.

E. To Whatever Extent Prior California Law Might Be Construed As Supporting Jurisdiction Here, It Has Been Eclipsed By *Daimler* And *Goodyear* And Should Be Clarified To Conform To Federal Constitutional Standards.

Neither United States Supreme Court nor California precedent supports the exercise of jurisdiction here. But if this Court concludes that California's test for relatedness as previously enunciated in *Vons* could be construed to support

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which the injury occurred would seem most suitable for litigation of a products liability tort claim." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2798 (2011) (Ginsburg, J., dissenting); *see also id.* at 2803-04 (noting that the European Court of Justice has authorized jurisdiction either where the harmful act occurred or at the place of injury).

specific jurisdiction here, the Court should revisit that test and conform it to *Daimler*, *Goodyear*, and other relevant precedents of the United States Supreme Court and this Court.

Under our federal system, states have limited power to adjudicate controversies that concern other sovereign states. As the Court explained in *World-Wide Volkswagen*, 444 U.S. at 293, "[t]he Framers . . . intended that the States retain . . . the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister states . . . ." *See also Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (restrictions on personal jurisdiction are "a consequence of territorial limitations on the power of the respective States") (citation omitted). Even with modern means for communication and travel, this principle continues to have vitality.[6] In short, to exercise extraterritorial jurisdiction, a state must have a dog in the fight.

Territorial limits on a state's authority are a central characteristic of our federal constitutional structure and are reflected in several doctrinal areas, including Due Process limitations on the application of forum law,[7] Commerce

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[6] *See, e.g., Int'l Shoe*, 326 U.S. at 317 (limiting jurisdiction of states within "the context of our federal system of government"); *World-Wide Volkswagen*, 444 U.S. at 293 ("[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution."); *Hanson*, 357 U.S. at 251 (noting that it would be a "mistake to assume that this trend [toward jurisdiction based on minimum contacts] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions . . . are a consequence of territorial limitations on the power of the respective States") (citation omitted).

[7] *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (addressing choice-of-law limitations and explaining that the forum may "'not abrogate the rights of parties beyond its borders having no relation to anything done or to

(continued . . .)

Clause limitations on state legislation having extraterritorial impact,[8] Due Process prohibitions on the application of state taxing authority,[9] Full Faith and Credit limitations on state attempts to enjoin conduct in other states or to issue orders of direct enforcement,[10] and Due Process limitations on the use of punitive damages awards to influence conduct taking place in other states.[11]

For example, California could not issue regulations governing the marketing, sale or use of Plavix® in other states. Nor could California punish a defendant for tortious or criminal

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(. . . continued)
be done within them'") (quoting *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)).

[8] *See, e.g., Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (invalidating state statute that "'project[ed] its legislation into [other states]'" as violating the dormant Commerce Clause) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority . . ."); *Edgar v. MITE Corp.*, 457 U.S. 624, 641-42 (1982) (invalidating state statute that "directly regulate[d] transactions which take place across state lines, even if wholly outside the [forum] [s]tate," because it violated the Commerce Clause).

[9] *See Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 309-19 (1992) (invalidating on Commerce Clause grounds a state's effort to tax out-of-state mail order businesses with no physical presence within the state); *see also State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 454-55, 457-58 (1962) (state's attempts to tax or regulate insurance contracts violated Due Process where the only connection to the forum was that the property covered by the insurance was physically located in the state).

[10] *See, e.g., Fall v. Eastin*, 215 U.S. 1, 12 (1909) (Full Faith and Credit Clause does not permit a court in one state to directly transfer title to real property located in another state).

[11] *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) ("[A] State may not impose economic sanctions [*i.e.*, punitive damages] on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States").

conduct taking place—and injuring parties—entirely outside California. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 569-73 (1996); *People v. Betts*, 34 Cal. 4th 1039, 1046-47 (2005) (citing *Strassheim v. Daily*, 221 U.S. 280, 285 (1911)).

There is no state interest here that could justify extending California's reach to decide disputes arising and playing out entirely outside its borders. In *Vons*, this Court took heed of California's interest in "providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." 14 Cal. 4th at 472-73. But here, of course, California has no interest in encouraging or discouraging out-of-state conduct by, or affecting, residents of other states. And it has no interest in providing *nonresidents* with a forum for redressing injuries caused and suffered entirely outside California by a nonresident defendant.

Especially given the United States Supreme Court's pronouncements in *Daimler* and *Goodyear*, California's sliding scale concept as set out in *Vons*, if construed to authorize jurisdiction here, would violate fundamental Due Process limitations on states' extraterritorial authority. No sliding scale concept could justify arrogating authority over disputes that lack *any* connection to the forum and the defendant's activities there. The fundamental problem with a sliding scale concept—if so broadly construed—is that it would authorize a new form of "hybrid" jurisdiction in cases that would otherwise flunk both the general jurisdiction test and the traditional, unadorned relatedness test. It would mean that when facts that are insufficient to support general or specific jurisdiction are added together, the sum becomes more than its parts and jurisdiction exists. But zero plus zero still equals zero.

This is not a new critique. Even before *Daimler* and *Goodyear*, numerous courts rejected a sliding scale approach as blurring the line between specific and general jurisdiction.

The Third Circuit criticized it as "a freewheeling totality-of-the-circumstances test" (*O'Connor*, 496 F.3d at 321), which merges general and specific jurisdiction and destroys predictability. *See also, e.g., Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 583-84 (Tex. 2007).

The United States Supreme Court's recent decisions bring this longstanding critique of the sliding scale concept into clear focus. Both *Daimler* and *Goodyear* emphasize the firm distinction between general and specific jurisdiction. *See Goodyear*, 131 S. Ct. at 2855; *Daimler*, 134 S. Ct. at 754-57. The *Vons* sliding scale concept should not be allowed to blur that distinction.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeal and remand the case with directions to issue a writ of mandate directing the San Francisco Superior Court to vacate its order denying BMS's motion to quash and to enter a new order granting that motion.

DATED: February 2, 2015

Respectfully,

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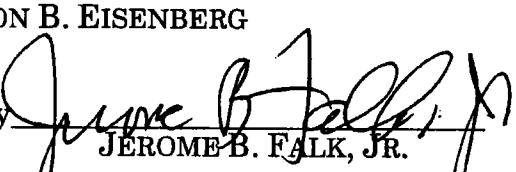
By 
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CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.520(c)(1)

Pursuant to California Rule of Court 8.520(c)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing **Petitioner's Opening Brief On The Merits** contains 8,030 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

DATED: February 2, 2015

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PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Three Embarcadero Center, 10th Floor, San Francisco, California 94111-4024. On February 2, 2015, I served the following document(s) described as **PETITIONER'S OPENING BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed to each as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on February 2, 2015.

Jane Rustice