No. 18-0350

In the Supreme Court of Texas

FRANK LUCIANO AND HELEN LUCIANO,
Petitioners,

v.

SPRAYFOAMPOLYMERS.COM, LLC,
Respondent.

On Petition for Review from the Court of Appeals for the Third Judicial District, Austin, Texas, No. 03-16-00382-cv

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing not only its 300,000 members but also the interests of over 3 million companies and professional organizations of every size, in every industry sector, and from every region of the Nation. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, it regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

This is such a case. Because of its growing population and favorable business climate, Texas has emerged as one of the largest economies in the world. Crucial to that success—and of great importance to the many Chamber members that call Texas home and to the myriad companies that do business in the State—is the fairness, efficiency, and predictability of the State's legal system, particularly the consistent enforcement of the protections due process affords out-of-state

[*] No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel made a monetary contribution to this brief's preparation or submission. *See* Tex. R. App. P. 11.

defendants before they can be haled into Texas courts. The Chamber previously has defended these interests before the U.S. Supreme Court as *amicus curiae* in a number of key cases, notably *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), and *Walden v. Fiore*, 571 U.S. 277 (2014), both of which feature prominently in this appeal.

The Chamber respectfully submits this *amicus* brief in the hope that its experience litigating the issue of specific jurisdiction in the U.S. Supreme Court and courts across the Nation will assist this Court in resolving that issue in this case. Although petitioners contend that the Third Court's decision somehow "upended" Texas law, it did nothing of the kind. If anything, it is petitioners who seek a radical change in Texas law. This Court should decline their request and affirm the Third Court's well-reasoned decision.

INTRODUCTION

Petitioners say the Third Court's decision "upends" Texas law—but it is actually petitioners' arguments, if accepted, that would put Texas law on a path that both this Court and the U.S. Supreme Court have already rejected. Although petitioners never come out and say it, what they really want—indeed, what they must have to prevail—is the elimination of the "plus" requirement from the "stream-of-commerce-plus" basis for specific jurisdiction. This Court should decline their invitation in no uncertain terms.

The U.S. Supreme Court has cautioned that "the 'stream of commerce' metaphor" has carried the personal jurisdiction inquiry "far afield," and emphasized that "[a]s a general rule, the exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (plurality). That is why both the U.S. Supreme Court and this Court have made clear that "it is not enough that the defendant might have predicted that its goods will reach the forum State." *Id.* at 882; *TV Azteca v. Ruiz*, 490 S.W.3d 29, 46 (Tex.

2016). Rather, there must be "additional conduct" demonstrating "an intent or purpose to serve the market in the forum State." *TV Azteca*, 490 S.W.3d at 46.

This "additional conduct" is the "plus" required by the "stream-of-commerce-plus" basis for specific jurisdiction—and it is a critically important safeguard for businesses across the Nation. Without it, "[t]he owner of a small Florida farm" who "sell[s] crops to a large nearby distributor . . . who might then distribute them to grocers across the country . . . could be sued in Alaska or any number of other States' courts without ever leaving town." *Nicastro*, 564 U.S. at 885. Due process—which encompasses fundamental notions of fairness and predictability—requires more.

Were that not enough, by ignoring their pleading failures and evidentiary shortcomings, petitioners effectively seek to eliminate the requirement that plaintiffs show a "substantial connection" between a defendant's contacts with the forum and the "operative facts of the litigation." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 585 (Tex. 2007).

This Court should firmly reject petitioners' invitation to roll back vital due process protections, implicitly overrule prior precedent, and impose unnecessary costs and uncertainty on businesses small and large across the Nation.

ARGUMENT

I. The court of appeals faithfully followed precedent in holding that the exercise of specific jurisdiction cannot rest merely on the release of a product into the stream of commerce.

"The Texas long arm statute provides for personal jurisdiction [over out-of-state parties] that extends to the limits of the United States Constitution." *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 66 (Tex. 2016). For over a century, the U.S. Supreme Court has drawn those limits in accordance with the demands of the Due Process Clause, *see Pennoyer v. Neff*, 95 U.S. 714, 733 (1878), which requires that before a State can exercise jurisdiction over an out-of-state defendant, the defendant must have "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014) (alteration in original) (quoting *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 923 (2011)).

Where, as here, a nonresident defendant's "minimum contacts" do not suffice to make it "at home" in the State (as "general jurisdiction" requires), a plaintiff can attempt to establish "specific jurisdiction"—which is limited to a suit that arises out of or relates to the defendant's contacts with the forum. *Id.* at 127. "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." *Goodyear Dunlop Tires*, 564 U.S. at 919 (second alteration in original).

Specific jurisdiction still requires that the defendant "'purposefully avail itself of the privilege of conducting activities within the forum State.'" *Nicastro*, 564 U.S. at 882 (alteration omitted) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Thus, "it is not enough that the defendant might have predicted that its goods will reach the forum State." *Id.* Instead, the defendant must "have targeted the forum." *Id.*; *accord TV Azteca*, 490 S.W.3d at 46 (requiring placement of product into stream of commerce, plus "additional conduct" demonstrating "an intent or purpose to serve the market in the forum State").

None of this is new. But it bears repeating given petitioners' fundamental misunderstanding of specific jurisdiction and outsized reliance on the stream-of-commerce theory to demonstrate purposeful availment. In fact, the stream-of-commerce theory is not an independent "theory" of personal jurisdiction at all—the U.S. Supreme Court "has rejected the notion that a defendant's amenability to suit 'travels with the chattel.'" *Nicastro*, 564 U.S. at 891 (Breyer, J., concurring in the judgment) (alteration omitted) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980)).

To be sure, the U.S. Supreme Court "has stated that a defendant's placing goods into the stream of commerce 'with the expectation that they will be purchased by consumers in the forum State' *may indicate* purposeful availment." *Id.* at 881–82 (plurality) (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 298). "But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum," such as when "manufacturers or distributors 'seek to serve' a given State's market." *Id.* at 882 (quoting *World-Wide Volkswagen*, 444 U.S. at 295).

The touchstone of the jurisdictional analysis remains whether the defendant "purposefully avai[led] itself of the privilege of conducting activities within the forum State." *Id.* To constitute purposeful availment, "it is not enough that the defendant might have predicted that its goods will reach the forum State." *Id.* Instead, the plaintiff must show stream of commerce *plus*—namely, that the defendant "targeted the forum." *Id.*; *accord TV Azteca*, 490 S.W.3d at 46; *Daimler AG*, 571 U.S. at 128 n.7 ("specific jurisdiction may lie over a foreign defendant that places a product into the 'stream of commerce' *while also* 'designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State'") (emphasis added) (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality)).

This "stream-of-commerce-*plus*" concept, as it is sometimes known, is a vital safeguard to ensure that the exercise of personal jurisdiction comports with due process. The constitutional limits on personal jurisdiction "give[] a degree of predictability to the legal system that

allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 n.17 (1985) (due process is violated when a "defendant has had no 'clear notice that it is subject to suit' in the forum and thus no opportunity to 'alleviate the risk of burdensome litigation' there") (quoting *World-Wide Volkswagen*, 444 U.S. at 297). This "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

In the modern economy, technological advancements and decreased shipping costs have enabled businesses to sell products across state and international borders—including indirect sales through third-party distributors and other supply-chain partners. Under a stream-of-commerce approach without the "plus" component, manufacturers that enter into agreements with distributors could be sued anywhere those distributors happen to sell products—drastically reducing manufacturers' ability to predict where they are subject to specific jurisdiction, and to tailor their conduct accordingly. Under such a

regime, manufacturers would have no choice but to forbid (by contract) sales of their products in unwanted forums—and even that might not be enough.

Make no mistake—that is the inevitable result of petitioners' approach, which is no different from the "pure" stream-of-commerce approach that this Court and the U.S. Supreme Court have already rejected. It would require businesses to learn "not only the tort law of every State, but also the wide variance in the way courts within different States apply that law." *Nicastro*, 564 U.S. at 892 (Breyer, J., concurring in the judgment). Faced with these potential costs, U.S. manufacturers may try to limit their exposure to the vagaries of litigation by restricting the number or size of the distributors with which they deal—and foreign manufacturers may even try to avoid selling their products to U.S. distributors altogether. Either way, consumers will ultimately bear the costs—in the form of higher prices, restricted choices, or both.

Based on the experience of the U.S. Chamber and its members, the "purposeful availment" inquiry provides much-needed clarity and predictability to the business community. That test is easy to apply, provides predictability for defendants, and best comports with the U.S.

Supreme Court's long-standing approach to specific jurisdiction. Adopting petitioners' expansive "stream-of-commerce" approach to jurisdiction would impose new and costly burdens on American and international businesses and eviscerate the traditional due process limits on personal jurisdiction.

Petitioners latch on to *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017)—which *rejected* the exercise of personal jurisdiction—and contend that the Third Court "misinterpret[ed]" it "to stand for the proposition that stream of commerce is no longer a basis for jurisdiction" and thereby "rewrote the products liability landscape to preclude relief from injuries to Texas residents and their property caused by all but Texas manufacturers' products." Luciano Merits Br. 8. Even a cursory review of the Third Court's opinion, however, discloses that it did nothing of the sort—as petitioners' own, internally inconsistent criticisms confirm. *Compare id.* at 23 ("The Third Court of Appeals, notwithstanding the holdings in *Bristol-Myers* . . . , incorrectly looked to the contacts the Respondent had with the Lucianos, rather than the contacts the Respondent had with the State of Texas.") (emphasis omitted), *with id.* at 24 ("Furthermore, by basing its analysis wholly on

Bristol-Myers Squibb, the Third Court appears not to have recognized that the injuries suffered by the Lucianos happened within the territorial borders of the State of Texas, namely in Travis County.").

Petitioners similarly strain to manufacture a departure from precedent when they contend that the Third Court's decision conflicts with this Court's decision in *Spir Star AG v. Kimich*, 310 S.W.3d 868, 874 (Tex. 2010). Not so. This Court could not have been clearer in *Kimich* when it explained that "it is not the actions of the Texas intermediary that count, but the actions of the foreign manufacturer who markets and distributes the product to profit from the Texas economy." *Id.* Heeding that instruction, the Third Court properly focused on the nonresident defendant's actions—finding that when petitioners made their purchase from the Texas distributor's installer, there was no indication that the defendant was involved; no indication that the defendant trained or oversaw the distributor's installers; no indication "that [the defendant] had purposefully established contacts with the installation company"; and no indication that the product had even been "shipped through [the defendant's] Texas distribution center." 584 S.W.3d 44, 51–53 (Tex. App.—Austin 2018, pet. granted).

Kimich does not guarantee specific jurisdiction merely because a nonresident defendant has a Texas distribution center—especially not where, as here, petitioners failed to tie any of the sales through that distribution center with the product at issue. *See* 584 S.W.3d at 53 ("the petition did not allege where the [product] was shipped from, nor did [petitioners] attach affidavits or other evidence . . . that might show how the [product] was sent to the Lucianos' project"). Any possible doubt on that score was removed by *Bristol-Myers*, which made clear that the "bare fact that [the defendant] contracted with [an in-state] distributor is not enough to establish personal jurisdiction in the State." 137 S. Ct. at 1783.

Contrary to petitioners' contention, the Third Court did not misread or misapply this Court's or the U.S. Supreme Court's precedents—its application of those precedents to the facts of this case simply led to a result with which petitioners disagree. If anything, it is *petitioners'* view that departs from those precedents by effectively eliding the "plus" factor that both this Court and the U.S. Supreme Court have insisted upon to ensure that a stream-of-commerce-based exercise of personal jurisdiction comports with due process. "[T]he stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on

judicial authority that Clause ensures." *Nicastro*, 564 U.S. at 886 (plurality).

II. The court of appeals properly required a substantial connection between petitioners' jurisdictional allegations and their claims.

Specific jurisdiction is "case-linked"—that is, a court's "inquiry . . . focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Walden v. Fiore*, 571 U.S. 277, 283–84 & n.6 (2014) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). That does not mean that any in-forum activity, however loosely connected to the parties' dispute, will do. Rather, as this Court explained in *Moki Mac*, "there must be a *substantial connection* between [a defendant's forum] contacts and the operative facts of the litigation." 221 S.W.3d at 585 (emphasis added) (citing *Rush v. Savchuk*, 444 U.S. 320, 324 (1980)); *see also Walden*, 571 U.S. at 284 ("the defendant's suit-related conduct must create a *substantial connection* with the forum State") (emphasis added). To support specific personal jurisdiction, the defendant must purposefully engage in forum activity that is a cause of the asserted claim and that also has a sufficiently significant relationship to that claim. The

substantial-connection requirement furthers two fundamental due process principles.

First, it ensures fairness to nonresident defendants. As the U.S. Supreme Court has explained, specific jurisdiction involves a "limited form of submission to a State's authority," whereby a defendant subjects itself "to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State." *Nicastro*, 564 U.S. at 881 (plurality). The substantial-connection requirement guarantees that a nonresident defendant may only be subjected to a State's specific jurisdiction when plaintiffs can show a meaningful connection between the defendant's in-state contacts and their claims.

Second, the substantial-connection requirement promotes principles of federalism by respecting States' "sovereign power to try causes in their courts. The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States." *Bristol-Myers*, 137 S. Ct. at 1780 (alterations in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 293). Requiring a substantial connection between a defendant's suit-related conduct and the forum State prevents "States[,]

through their courts," from "reach[ing] out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292.

Following that established precedent, the Third Court thoughtfully considered the conduct that allegedly gave rise to petitioners' claims and correctly held that the requisite substantial connection was lacking. As the court explained, although petitioners' "claims are related to the installation" of the nonresident defendant's product, the evidence established that the product was not processed, shipped, or produced by the defendant or its employees in Texas. 584 S.W.3d at 48–49, 51–52. Nor did petitioners present any evidence "establish[ing] that the installation company was . . . trained and certified" by the defendant. *Id.* at 52. The court therefore properly concluded that petitioners' claims relate entirely to the defendant's *out-of-state* conduct.

Petitioners contend that the Third Court misapplied *Bristol-Myers* and *Moki Mac* by requiring a proximate causal connection instead of a substantial connection. Luciano Merits Br. 7–8, 20, 23, 25. That is wrong. *Bristol-Myers* does not, as petitioners assert (at 21 n.4), stand for the proposition that "California clearly had specific jurisdiction over the

claims of its own citizens." Rather, *Bristol-Myers* held that "[i]n order for a state court to exercise specific jurisdiction, 'the *suit*' must 'aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'" 137 S. Ct. at 1780 (last two alterations in original). The Third Court correctly applied that rule and dismissed petitioners' suit because all of the conduct giving rise to their claims occurred outside of Texas. *See supra* pages 12–13; *see also* SprayFoamPolymers Merits Br. 5, 12–16.

Petitioners repeatedly observe that the defendant had a distribution center in Texas. Luciano Merits Br. 4–5, 16. But as already explained, that is not enough absent some plausible allegation that the center had anything to do with petitioners' claims. Nor is it enough that petitioners' injuries occurred in Texas. *See id*. at 4, 9, 16–17, 24. For decades, courts "have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Walden*, 571 U.S. at 284; *see also Calder v. Jones*, 465 U.S. 783 (1984).

That settled precedent (among others) further demonstrates that the Third Court properly declined to exercise specific jurisdiction over the defendant. As with petitioners' attempt to effectively do away with the

"plus" requirement for stream-of-commerce jurisdiction, this Court should firmly reject their attempt to dilute the substantial-connection requirement. That requirement provides the predictability businesses need to structure their affairs and limit the number of potential jurisdictions in which they can be sued.

PRAYER

For the foregoing reasons, the Court should affirm the court of appeals' decision to dismiss petitioners' claims with prejudice.

Dated: December 10, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), I certify that this brief contains 3,317 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ *Allyson N. Ho*
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CERTIFICATE OF SERVICE

I certify that, on December 10, 2019, a true and correct copy of the foregoing Brief for *Amicus Curiae* was served via electronic service on all counsel of record.

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