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.

APPLICATION OF THE AMERICAN TORT REFORM ASSOCIATION, *et al.*, FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER BRISTOL-MYERS SQUIBB COMPANY

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The American Tort Reform Association (ATRA), the National Association of Manufacturers (NAM), the National Federation of Independent Business (NFIB), and the Juvenile Products Manufacturers Association (JPMA), through their attorneys and pursuant to Rule 8.520(f) of the California Rules of Court, respectfully apply for leave to file the following brief *amici curiae* in support of Petitioner Bristol-Myers Squibb Company.

The *amici curiae* here have significant interests in this litigation. Each of the *amici curiae* supports California business interests and advocates on behalf of California business owners. The proposed *amici curiae* brief discusses how the Court of Appeal's elimination of the requirement that a lawsuit be "substantially related" to the defendant's forum activities is likely to result in forum shopping and impose severe costs on businesses and the California court system.

IDENTITY AND INTEREST OF AMICI CURIAE

ATRA, founded in 1986, is a broad-based coalition of more than 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote a civil justice system that ensures fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before California state and federal courts that have addressed important legal issues in tort actions in the state.

Founded in 1895, NAM is the preeminent association of U.S. manufacturers and the largest industrial trade association in the country. Its members include more than 12,000 manufacturing companies, over 1,000 of which are located in California, and it represents the interests of small and large manufacturers in every industrial sector and in all 50 States. NAM regularly participates as *amicus curiae* in cases like this one that raise

issues affecting U.S. manufacturers, their business practices, and their ability to stay competitive, promote economic growth, and create jobs. It has been involved as an *amicus curiae* in 44 instances in California courts in the past 14 years alone.

NFIB is the Nation's leading small business advocacy association, representing 350,000 member businesses including over 21,000 members in California. NFIB's members range from sole proprietors to firms with hundreds of employees, and collectively they reflect the full spectrum of America's small business owners. Founded in 1943 as a nonpartisan organization, NFIB defends the freedom of small business owners to operate and grow their businesses and promotes public policies that recognize and encourage the vital contributions that small businesses make to our national economy. NFIB is committed to advocating for federal and state policies that provide consistency and certainty for small business owners across the United States.

JPMA is a national trade organization of more than 250 companies in the United States, Canada and Mexico. JPMA exists to advance the interests, growth and well-being of North American prenatal-to-preschool product manufacturers, importers and distributors marketing under their own brands to consumers. It does so through advocacy, public relations, information sharing, product performance certification and business development assistance conducted with appreciation for the needs of parents, children and retailers.

DISCLOSURE REGARDING AUTHORSHIP OR MONETARY CONTRIBUTION

No party or counsel for any party authored any portion of the brief.

No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief.

No person or entity other than the *amici curiae,* their members and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

DATED: June 9, 2015

Respectfully,
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INTRODUCTION

The Court of Appeal ruling in this case improperly endorses the continued use of California as a national forum of choice for non-residents having no connection to the state. The resultant undue burden on businesses and the California court system is severe and will only increase if the decision is allowed to stand.

The unlimited reach of specific jurisdiction over out-of-state defendants under the ruling ignores the limits of the Due Process Clause imposed by the United States Supreme Court and the restraints of California law. One or more California residents alleging injury caused by an out-of-state defendant will create a platform sufficient to support a finding of specific jurisdiction over *any* parallel claim brought by any *non-resident* plaintiff who suffered injury *anywhere*. A business that once faced suit in California by a relative handful of California residents now also faces suit by thousands of non-residents whose claims have no connection to the forum. Absent strict adherence to the standard for a finding of specific jurisdiction, plaintiffs will continue to flock to California, and the already-overburdened California court system, as well as businesses operating nationwide, will suffer greatly. *See generally Appalachian Ins. Company v. Superior Court* (1984) 162 Cal. App. 3d 427, 438 ("California courts do not throw their doors wide open to forum shopping.").

While joinder of thousands of non-residents in California courts has become standard operating procedure for plaintiffs' counsel, it imposes prohibitive costs on businesses. Businesses large and small sell their products in more than one state, and frequently sell their products to consumers in all 50 states. When plaintiffs allege injuries in multiple fora, the Due Process Clause affords businesses much-needed predictability by foreclosing the prospect of litigation in far-flung, plaintiff-friendly jurisdictions with no connection to the dispute.

The Supreme Court recently reined in such forum-shopping by narrowing the scope of general jurisdiction and reiterating the limited scope of specific jurisdiction. In *Daimler AG v. Bauman* (2014) 134 S.Ct. 746, the Court held that a company is subject to general jurisdiction only when it is "essentially at home" in the forum state. *Id.* at 751. Meanwhile, specific jurisdiction is proper only when "the defendant's *suit-related conduct* [] create[s] a *substantial connection* with the forum State." *Walden v. Fiore* (2014) 134 S.Ct. 1115, 1121 (emphasis added). The Court of Appeal decision turns this distinction on its head.

This Court should follow the strict framework established by the Supreme Court in *Daimler*: 1) to provide national businesses with the predictability they require; and 2) to relieve the Herculean burden on California courts to resolve claims of thousands and thousands of non-residents having no connection to the state.

ARGUMENT

I.
THE RULING UNCONSTITUTIONALLY EXTENDS SPECIFIC JURISDICTION TO DISPUTES WITH NO CONNECTION TO CALIFORNIA

The constitutional precepts of general and specific jurisdiction "have followed markedly different trajectories post-*International Shoe*," but the United States Supreme Court has "declined to stretch general jurisdiction beyond limits traditionally recognized." *Daimler AG v. Bauman*, *supra*, 134 S.Ct. at 757-58. Consistent with *Daimler*, the Court of Appeal concluded that California does not have general jurisdiction over BMS. The Court of Appeal found that BMS was not "at home" in California, because BMS was not incorporated, headquartered, or principally based in California. Likewise, plaintiffs failed to establish that BMS' sales and research activities in California were so exceptional as to render BMS "at home" in California.

Nevertheless, the Court of Appeal held that BMS was subject to specific jurisdiction in California. Specific jurisdiction is proper only when, *inter alia*, "the defendant's *suit-related conduct* [] create[s] a *substantial connection* with the forum State." *Walden v. Fiore*, *supra*, 134 S.Ct. at 1121 (emphasis added). Likewise, under California law, there must be a "substantial nexus or connection between the defendant's forum activities and the plaintiff's claim." *Vons Cos. v. Seabest Foods, Inc.* (1996) 14 Cal. 4th 434, 456. The substantial connection requirement is the key distinguishing factor between general and specific jurisdiction—while a defendant submits to general jurisdiction in its home state for any type of dispute, "'[s]pecific" or 'case-linked' jurisdiction 'depends on an 'affiliatio[n] between the forum and the underlying controversy' (*i.e.*, an 'activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation')." *Walden v. Fiore*, *supra*, 134 S.Ct. at 1122 n.6 (citation omitted).

This case involves the claims of 84 California plaintiffs and 575 non-resident plaintiffs hailing from 32 states other than California. The Court of Appeal did not identify any connection between the non-residents' claims and BMS' activities in California. Nor could it have. The product liability claims of a non-resident who was prescribed a drug elsewhere, purchased a drug elsewhere, consumed a drug elsewhere, and was allegedly injured elsewhere obviously have no connection to California. Such a non-resident plaintiff would have no basis for filing suit in California by him/herself, and the case would be dismissed for lack of jurisdiction as a matter of course. *See Walden v. Fiore*, *supra*, 134 S.Ct. at 1122 ("Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant – not the convenience of plaintiffs or third parties."). To avoid such a result, it had become standard procedure for plaintiffs' counsel to join significant numbers of non-residents with a

relative handful of California residents. The *Daimler* decision reminded courts across the country of the separate and distinct standards to be employed in jurisdictional analysis, but the Court of Appeal failed to apply them properly here.

By blurring the separate and distinct concepts of general and specific jurisdiction, the Court of Appeal found that BMS' general business conduct in California somehow created specific jurisdiction over it for claims by non-resident plaintiffs who never had any connection to the state. Although BMS neither developed nor manufactured Plavix in California, the Court of Appeal concluded that BMS "has had substantial, continuous contact with California for many years, including regarding the sale of Plavix." Borrowing this *general* jurisdiction test, the Court of Appeal weighed a number of factors having nothing to do, much less a substantial connection with, a non-resident plaintiff's claims, including: BMS' sales in California; BMS' offices, facilities, and employees in California; the interstate character of BMS' business; and the Plavix-related lawsuits filed by California residents against BMS.

In short, the Court of Appeal's analysis substitutes inadequate general jurisdiction factors to find specific jurisdiction over claims that bear no relationship to California.

II.
BY ENCOURAGING FORUM SHOPPING, THE RULING WILL IMPOSE SEVERE COSTS ON BUSINESSES AND THE CALIFORNIA COURT SYSTEM

The Court of Appeal's elimination of the substantial connection requirement is both unconstitutional and likely to result in an increase in rampant forum shopping. In today's economy, businesses both large and small sell their products in more than one state, and frequently sell their products to consumers in all 50 states. Many businesses also have employees and offices in multiple states. Thus, the types of contacts that

BMS has with California are not unique to BMS, or even to large multi-national companies, but are rather typical for modern businesses in the United States.

Because a single resident is all that is required to establish jurisdiction over a mass tort action, the ruling will strongly encourage plaintiffs to increase their strategic forum shopping in California. Plaintiffs will not only file suit in California for the existing reasons for which California has become a locus for mass tort filings, but also because California would become unique in permitting the joinder of the parallel claims of *any* plaintiff residing *anywhere*. Businesses large and small, regardless of their principal place of business, may be forced to defend nearly all their products liability litigation in California for one reason – a single California resident is added to a case with hundreds or thousands of non-residents who have never set foot in the state.

A. The Threat of Extraordinary Litigation Cost and Liability Exposure Will Likely Cause Businesses to Sever Ties with California and Settle Meritless Claims

The U.S. Supreme Court has repeatedly recognized the importance of predictability in the law governing personal jurisdiction. Businesses must be able "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Daimler AG v. Bauman*, *supra*, 134 S.Ct. at 761-762 (quoting *Burger King Corp. v. Rudzewicz*, (1985) 471 U. S. 462, 472). Since *International Shoe*, specific jurisdiction has been based on voluntary choices—by conducting business in a state, a business submits itself to jurisdiction for suits arising out of those activities. *Int'l Shoe v. Washington*, (1945) 326 U.S. 310, 913 (1945). Under the Court of Appeal ruling, however, a plaintiff's choice of forum is the only choice that matters. Businesses operating in several states lack any way to predict whether they might be

hauled into court in California by a few California residents or by a few California residents joined by thousands of non-residents. As the Supreme Court warned, "if the risks [of conducting business] are too great" a corporation may "sever[] it connections with the State." *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297.

The potential consequences of businesses severing ties with California are drastic and ripple through the micro and macro economies. California residents count on out-of-state businesses to provide a wide array of products and services, including life-saving medications. California businesses count on out-of-state suppliers. The State of California counts on taxes from interstate commerce. But, if only one California resident is needed to initiate a massive products liability action involving thousands of non-residents, years of litigation, millions of dollars in legal fees, and "bet-the-company" trials, the possibility that businesses could reduce or even cut ties with California to avoid those risks becomes very real. Likewise, the Court of Appeal ruling could impact strategic market entry analyses and possibly deter new businesses from building operations in California and employing California residents. Upholding the ruling could add to the trend of major employers relocating to other states and deter new businesses from settling in California.[1]

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[1] Companies with significant operations in California, including Toyota, eBay, and Nissan, have recently fled to other states. *See, e.g.*, *Fleeing California: A Hostile Business Climate Sends More Companies to Friendlier States*, WASH. TIMES, Feb. 17, 2015, available online at http://www.washingtontimes.com/news/2015/feb/17/editorial-businesses-flee-californias-high-taxes-a/ (as of June 9, 2015).

According to Dun & Bradstreet, 2,565 California businesses with three or more employees relocated to other states between January 2007 and 2011, and 109,000 jobs left with those employers. Available online at http://chiefexecutive.net/2014-best-worst-states-for-business/ (as of June 9, 2015).

The mass joinder of non-residents also ratchets up the stake and cost of litigation in California. Plaintiffs' preference for a forum with higher-than-average jury verdicts and consumer-friendly laws will result in greater liability exposure. The threat of class certification or transfer to Judicial Council Coordinated Proceedings (JCCP) in a perceived plaintiff-friendly jurisdiction may necessitate the settlement of meritless claims. And these unnecessary costs *will* be passed on to consumers in *all* forums.[2] Indeed, surveys of business leaders and senior attorneys reveal that California is among the worst states for litigation climate[3] and for business.[4]

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[2] In a 2007 Harris nationally representative sample of 1,109 small business owners/managers who indicated that they were somewhat or very concerned about frivolous or unfair lawsuits, 62% said they make business decisions to avoid lawsuits and 61% said that lawsuits made their products and services more expensive. Available online at http://www.instituteforlegalreform.com/hooks/1/get_ilr_doc.php?fn=SmallBizNatlandQuestionaire.pdf (as of June 9, 2015).

[3] The 2012 State Liability Systems Survey, conducted by the U.S. Chamber Institute for Legal Reform, surveyed a national sample of 1,125 in-house general counsel, senior litigators or attorneys, and other senior executives who were knowledgeable about litigation matters at companies with at least $100 million in annual revenue. More than two-thirds (70%) of respondents reported that a state's litigation environment is "likely to impact important business decisions at their companies, such as where to locate or do business." For overall legal climate, California ranked 47th, and for treatment of class action suits and mass consolidation suits, California ranked 50th (last place). Available online at http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuit_Climate_Report_2012.pdf (as of June 9, 2015).

[4] In *Chief Executive* magazine's 2015 "Best & Worst States for Business" survey of 511 CEOs across the United States, California ranked as the worst state for business, for the *eleventh year in a row*. Available online at http://chiefexecutive.net/best-worst-states-business/ (as of June 9, 2015).

This burden will fall solely on the California state court system because of yet another facet of the strategy to create a national forum in the state. Part and parcel of plaintiffs' counsel strategy is the calculated inclusion of at least one non-resident plaintiff who is a citizen of the same state as the defendant business.[5] This tactic generally defeats removal on diversity grounds because there would not be complete diversity of citizenship between each plaintiff and the corporate defendant. As a result, the case would remain in the California state court system thereby divesting businesses of their right to have a case involving claims between citizens of different states heard in federal court. The loss of this right is compounded because of the large number of non-residents typically included in mass tort filings. In a traditional single plaintiff action, a corporate defendant could predict that claims against it in a forum other than its state of citizenship would be heard in a federal court. The increased abrogation of this important right will be a casualty of the Court of Appeal decision in this case.

B. The Ruling Promotes the Filing of Complex Actions that Will Consume the Scarce Resources of the Already Overburdened California Court System

Forum shopping will impose severe costs on the California court system. The Courts of California have become a destination location for plaintiffs' lawyers to establish mass tort proceedings, particularly because of the availability of the JCCP and its reputation amongst the plaintiffs' bar.[6] The official JCCP Log, which lists cases from 2005 to the present, is

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[5] For example, in the case of BMS, which is a Delaware corporation with a principal place of business in New York, plaintiffs' counsel would typically include at least one resident of either Delaware or New York.

[6] *See* Trenton H. Norris, *Consumer Litigation and FDA-Regulated Products: The Unique State of California*, 61 FOOD & DRUG L.J. 547, 547 (2006) ("What may be equally apparent to businesses is that California is

over 300 pages long and notes over 400 cases.[7] Each of those coordinated cases may have hundred, or thousands, of individual plaintiffs. In Fiscal Year 2012-13, over 7.7 million cases were filed statewide in the Superior Courts.[8] There are approximately a million new civil lawsuits filed in California every year. *Id.* In 2014, there were approximately 1,500 civil jury trials and 75,000 civil all court trials. *Id.* These cases also impose a substantial burden on the appellate courts. In 2014, there were 20,391 contested matters in the Courts of Appeal and 7,813 filings in the Supreme Court.[9]

Despite its immense workload, the California court system is understaffed and underfunded. According to the Chief Justice's March 2015 State of the Judiciary address, the judicial branch has "suffer[ed] over a billion dollars in cuts over five years."[10] Despite new investment into the judicial branch, there are "continued court closings, courthouse closures, reduced hours, and [] employees who are still, yes, on furlough." *Id.* In

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also a likely place to be sued. Our consumer protection laws are some of the toughest in the country. With a robust initiative process, organized interest groups, a savvy plaintiffs' bar, ambitious prosecutors, an attentive media and an overburdened judiciary, California is to litigation what the Cayman Islands is to banking.").

[7] Available online at http://www.courts.ca.gov/documents/CivilCaseCoord_2005toPresent_JCCPLog.pdf (as of June 9, 2015).

[8] Available online at http://www.courts.ca.gov/documents/2014-Court-Statistics-Report-Introduction.pdf (as of June 9, 2015).

[9] Available online at http://www.courts.ca.gov/documents/2014-Court-Statistics-Report-Preface.pdf (as of June 9, 2015).

[10] Available online at http://www.courts.ca.gov/29136.htm (as of June 9, 2015).

2014, the number of authorized judicial positions was 2,024, but the assessed number of judges needed was 2,286.[11]

Meanwhile, the ruling promotes the filing of the type of "complex" cases that consume substantial judicial resources—massive products liability actions that take years to resolve, frequently result in multiple bellwether trials, and consist of thousands of filings.[12] Unlike a federal MDL, in which cases are consolidated for pretrial management and then transferred to their respective transferor courts for trial, the ruling will result in mammoth cases being direct-filed in California. These cases will be finally resolved in California, since there is no court to which they could be transferred. California jurors will be compelled to decide these lengthy, complex trials and more often than not the claims will have nothing to do with California.

Although California courts have a significant interest in hearing the claims of their residents and applying California law, the ruling will cement California courts as a forum for non-residents and the application of foreign law. As is evident here, where over 80% of plaintiffs are non-residents, and all relevant events occurred outside of California, permitting thousands of

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[11] Available online at http://www.courts.ca.gov/documents/2014-Court-Statistics-Report-Introduction.pdf (as of June 9, 2015).

[12] *See* Rule 3.400(b) of the California Rules of Court (defining a "complex" civil action as one that is likely to involve: "(1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve; (2) Management of a large number of witnesses or a substantial amount of documentary evidence; (3) Management of a large number of separately represented parties; (4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or (5) Substantial postjudgment judicial supervision."); *see also* JCCP Fact Sheet: Civil Case Coordination (noting that mass tort claims are a typical type of "complex" action), available online at http://www.courts.ca.gov/documents/civcoord.pdf (as of June 9, 2015).

non-residents to join with a handful of California residents will result in a suit with little or no connection to California. This Court recognized, in the forum non conveniens context, the exceptional burden on the State of California and its citizens of exercising jurisdiction over a "transitory cause of action":

> There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned . . . . [T]he injustices and the burdens on local courts and taxpayers, as well as on those leaving their work and business to serve as jurors, which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this state . . . require that our courts, acting upon the equitable principles . . . , exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere.

See Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 751 (citation omitted).

Under the ruling, massive cases with no connection to California (other than the presence of a few plaintiffs), will ultimately become the responsibility of the already-burdened California court system.

CONCLUSION

The *Daimler* opinion provided an updated road map of jurisprudence for proper application of both general and specific jurisdictional analysis. When applied properly, this analytical framework rejects the strategic mass joinder of non-resident plaintiffs as a means to obtain specific jurisdiction over a non-resident business or corporation. Unfortunately, the Court of Appeal refused to follow the map and lost its way.

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: June 9, 2015

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

Pursuant to California Rule of Court 8.520(c), and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing **Brief Amici Curiae of the National Association of Manufacturers, *et al.*** contains 3,855 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

DATED: June 9, 2015

Nicholas M. Kouletsis

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, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at the address shown above, or _____

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That on the 9th day of June, 2015, deponent served the within

APPLICATION OF THE AMERICAN TORT REFORM ASSOCIATION, ET AL. FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER BRISTOL-MYERS SQUIBB COMPANY

upon the attorneys, and by the method designated below, who represent the indicated parties in this action, and at the addresses ~~below~~ stated, which are those that have been designated by said attorneys for that purpose.

☑ By depositing 1 true copy of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Names of attorneys served, together within the names of the clients represented and the attorney's designated addresses.

SEE ATTACHED SERVICE LIST

Sworn to before me this
9th day of June, 2015.

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