

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BRISTOL-MYERS SQUIBB COMPANY, :

4 Petitioner : No. 16-466

5 v. :

6 SUPERIOR COURT OF CALIFORNIA, :

7 SAN FRANCISCO COUNTY, ET AL., :

8 Respondents. :

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10 Washington, D.C.

11 Tuesday, April 25, 2017

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13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:08 a.m.

16 APPEARANCES:

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18 Petitioner.

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21 for United States, as amicus curiae, supporting the
22 Petitioner.

23 THOMAS C. GOLDSTEIN, ESQ., Bethesda, Md.; on behalf of
24 the Respondents.

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1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 16-466,
5 Bristol-Myers Squibb Company v. The Superior Court of
6 California.

7 Mr. Katyal.

8 ORAL ARGUMENT OF NEAL K. KATYAL

9 ON BEHALF OF THE PETITIONER

10 MR. KATYAL: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 The California Supreme Court ruled that
13 hundreds of plaintiffs who were not prescribed a drug in
14 California, who did not take it in California, who
15 lacked any injury in California, and who had no other
16 connection to California could sue in California.

17 The court reasoned there was a sliding scale
18 whereby the defendant's other conduct with other
19 Californians could establish specific jurisdiction.
20 Those concepts have some footing in the law, but that
21 footing is limited to general jurisdiction, which is
22 lacking here, and this Court has never permitted
23 specific jurisdiction in such circumstances, which is
24 presumably why Respondents don't bother defending the
25 California Supreme Court.

1 Instead, they mint a whole new test, never
2 before seen by any court whereby an ad hoc
3 reasonableness inquiry with any number of undetermined
4 balancing factors will create jurisdiction.

5 JUSTICE KENNEDY: You've conceded that
6 there's fair play and substantial justice. That almost,
7 not quite, perhaps, takes away the due process argument,
8 which basically has to be the argument that you're
9 making here.

10 MR. KATYAL: Justice Kennedy, I don't think
11 that's actually what we conceded. What we did say is
12 that the reasonability -- reasonableness inquiry is with
13 respect to the third kind of safety valve factor. We
14 didn't make the argument with respect to the third
15 prong, but we absolutely did make the argument that
16 jurisdiction here was unreasonable below.

17 At pages 4 and 18 in the court of -- in the
18 California Supreme Court brief, we made very clear. We
19 said it would, quote, "Offend basic notions of
20 federalism and fairness" at page 4. At page 18, we
21 said, "Instead of achieving jurisdictional fairness,
22 their rule would distribute their burden of defending
23 mass torts in a lopsided way."

24 JUSTICE SOTOMAYOR: I'm sorry.

25 MR. KATYAL: But we absolutely did.

1 JUSTICE SOTOMAYOR: How is it
2 unreasonable --

3 MR. KATYAL: How to --

4 JUSTICE SOTOMAYOR: -- to have -- yes.

5 Now, you're not fighting that pending
6 jurisdiction permits a court to take multiple claims of
7 damages nationwide, or even worldwide, and even
8 unrelated causes of action and bring them to a
9 jurisdiction, correct, by one plaintiff? So you're not
10 -- you're not claiming that that offends due process.

11 MR. KATYAL: Pending jurisdiction, at least
12 personal jurisdiction, is only applied in some Federal
13 courts by dint of common law. We're absolutely
14 fighting. I mean, it's not the law in any court -- any
15 State court anywhere that pendent personal jurisdiction.

16 JUSTICE SOTOMAYOR: So how do you deal -- so
17 you're saying that pendent jurisdiction for claims that,
18 in some way, are connected violates due process?

19 MR. KATYAL: We're saying --

20 JUSTICE SOTOMAYOR: Do you go any further?

21 MR. KATYAL: We're saying that there has to
22 be a causation between the underlying cause of action.

23 JUSTICE SOTOMAYOR: With every single
24 individual action. And so you're destroying pendent
25 jurisdiction on every level.

1 MR. KATYAL: We're not destroying it. There
2 is no -- there is no pendent jurisdiction for State
3 claims as it exists right now. This Court has said time
4 and again, starting with International Shoe, the
5 relevant locus of analysis, Justice Sotomayor --

6 JUSTICE SOTOMAYOR: That's assuming I buy
7 your argument.

8 MR. KATYAL: -- is always --

9 JUSTICE SOTOMAYOR: Let's put it aside.

10 MR. KATYAL: But I'm just saying that that
11 has been the law, and always is --

12 JUSTICE SOTOMAYOR: But your position right
13 now is that in no suit will one court, State court, ever
14 be able to hear the entire controversy between a
15 plaintiff and a defendant.

16 MR. KATYAL: Oh, definitely not. Heavens be
17 that is not our position at all, Justice Sotomayor. So,
18 for example, every place in which there was general
19 jurisdiction, you can have that court hear it --

20 JUSTICE SOTOMAYOR: Only when that's general
21 jurisdiction.

22 MR. KATYAL: No, not -- again, that's one
23 place. So Delaware, for example, here. But there's
24 also the ability for specific jurisdiction in places in
25 which the underlying activity was launched. So here

1 they have --

2 JUSTICE GINSBURG: If --

3 MR. KATYAL: -- for example, effective
4 marketing --

5 JUSTICE GINSBURG: If, for example, the
6 drugs that -- that everyone bought all over the country
7 was manufactured in one place, even though it wasn't
8 the -- the place of business or the place of
9 incorporation?

10 MR. KATYAL: Right. It may be that that's
11 enough for specific jurisdiction, depending on what the
12 underlying claim is. Exactly, Justice Ginsburg.

13 The question here is can theyglom on to the
14 180 million pills that had -- that Bristol-Myers has
15 sold in California? That's the --

16 JUSTICE SOTOMAYOR: What's efficient about
17 having piecemeal litigations across the country?

18 MR. KATYAL: Well --

19 JUSTICE SOTOMAYOR: For years we've been
20 approving pendent jurisdiction, or at least not taking
21 any case that disturbed it, and there are cases in which
22 we've just assumed it. What's the efficiency there?
23 And what's the reasonableness there?

24 MR. KATYAL: So -- so first of all, Justice
25 Sotomayor, I disagree with the premise. I don't know

1 this Court has ever accepted the idea of pendant
2 jurisdiction of State court claims that are -- are
3 without causality. Indeed, our brief, at pages 19 to
4 21, explains every precedent of this Court winds up on
5 the causality principle. And your most reason decisions
6 in Goodyear and Daimler, I think, make this very clear.

7 Now, with respect to the reasonability --
8 the efficiency, I think the first thing to say is their
9 rule doesn't create any efficiency at all. That is,
10 just take a look at the facts of this case. Even after
11 the California Supreme Court ruled, you already -- you
12 still have action going on in New York, coordinated
13 actions, you have law of MDL in New Jersey, and you have
14 lawsuits in Delaware. Petition Appendix page 72 says
15 before you had lawsuits in Arizona, Illinois, Hawaii --

16 JUSTICE KENNEDY: If -- if this suit went
17 forward just with the California plaintiffs and
18 Bristol-Myers did not prevail, would there be issue
19 preclusion in other States, assuming that judgment was
20 final?

21 MR. KATYAL: I don't think so. And -- and
22 our brief -- our reply brief does -- you know, cites a
23 bunch of, you know, literature on this that, basically,
24 because there's no much divergence in the underlying
25 causes of action, collateral estoppel just doesn't work.

1 JUSTICE GINSBURG: But if they all -- if
2 they -- if they all allege the same basic flaw in the
3 drug, the -- the drug was defective but cost, and that's
4 determined in suit number 1, I take it that would be
5 issue preclusion.

6 MR. KATYAL: But the -- the problem is there
7 are so many different substantive standards as a matter
8 of actual reality as opposed to, you know, kind of a
9 theory about deceptive marketing or something. They do
10 differ so much from State to State.

11 JUSTICE KENNEDY: Well, let's -- let's
12 assume that New York and California are basically the
13 same, the facts are basically the same. If there's a
14 California judgment that's valid, I assume, the
15 plaintiff is going to argue for issue preclusion. And
16 it -- it seems to me that actually helps you because --
17 because it shows that this rule that you're proposing is
18 not so inefficient as the Respondent would say.

19 MR. KATYAL: Absolutely, Justice Kennedy.
20 There's no -- there's no -- you know, we can, of course,
21 waive -- waive that and -- and seek collateral estoppel.

22 But to go back to --

23 JUSTICE KAGAN: Mr. Katyal, could we go back
24 to a form of Justice Kennedy's first question, which is,
25 just could you explain what defendant's interests are at

1 stake here? In other words, you know, usually we've
2 looked to fairness for the defendant when we make the
3 due process inquiry. So what is the unfairness here,
4 given that there is another suit that's going to be
5 going forward in California, and what Mr. Goldstein
6 wants is just for additional claims of the exact same
7 kind to be joined to that suit?

8 MR. KATYAL: Exactly. So there's three
9 values this Court's isolated: Federalism,
10 predictability, and fairness. The fact that we --

11 JUSTICE KAGAN: So could we just start with
12 the fairness?

13 MR. KATYAL: Absolutely. So the fairness
14 concern -- and this is going to take me about 45 seconds
15 to walk through the lifecycle of --

16 JUSTICE KAGAN: You've timed it.

17 MR. KATYAL: -- but -- I have.

18 (Laughter.)

19 MR. KATYAL: And -- but our view is to
20 affirm Bristol-Myers in -- to affirm the judgment below
21 or to accept his theory is going to be -- you know, be
22 complex, it's going to be inefficient and unfair, and do
23 something this Court has never blessed before internally
24 that Bristol-Myers didn't open itself up to.

25 So the first thing that would happen in this

1 lawsuit is a determination of choice of laws he
2 acknowledges. There are 575 out-of-State plaintiffs
3 from 33 States. So the California court's going to have
4 to first figure that out.

5 Second, it's then going to have to apply
6 California procedure to all of these cases, which is
7 markedly different than the procedure in the places in
8 which Bristol-Myers sold the drugs as to which caused
9 the underlying injury.

10 So, for example, California has different
11 rules about summary judgment. It's really hard to get
12 summary judgment, very easy to go to trial. It's
13 also -- they don't have a Daubert rule, so they have
14 very lenient permissive testimony with respect to
15 experts. That isn't something Bristol-Myers bought into
16 when they sold, for example, a drug in Ohio to an Ohio
17 plaintiff.

18 Then you get to the trial. And this is, I
19 think, the most important part, because their reply --
20 because their brief points it out as, oh, this is
21 efficient and it's coordinating all of these actions.
22 Take a look at Joint Appendix page 74, which is their
23 jury trial demand. This is not one jury trial. They
24 are seeking 661 individual jury trials, and in each of
25 those jury trials, the court is going to have to

1 determine a whole variety of things which are going to
2 diverge from case to case; things about different rules
3 about -- legally, different States have different rules
4 on contributory negligence, they ever different rules on
5 the learned intermediary doctrine, which is a critical
6 doctrine in failure to warn cases. Some States don't
7 have it at all. Others restrict it in all sorts of
8 various ways. Could be fact determinations about what
9 is specific injury or not. And that is why this
10 Court --

11 JUSTICE SOTOMAYOR: I'm sorry. Don't all
12 those issues have to be decided in the 600 individual
13 cases anyhow?

14 MR. KATYAL: Oh, they do.

15 JUSTICE SOTOMAYOR: The question is what's
16 the unfairness of coordinating the common questions in
17 one place when there is so much overlap in the essence
18 of the claim, which is false marketing?

19 MR. KATYAL: So -- so, Justice Sotomayor,
20 first of all, I don't think that they would be
21 coordinated. They would be decided at individual trial
22 by trial. I don't think they would be coordinated. To
23 the extent you wanted coordination, the Federal system,
24 obviously, has a way to do that from the perspective
25 of --

1 JUSTICE KAGAN: But it seems you're
2 conflating two things, Mr. Katyal. I mean,
3 individual -- a lot of individual California claims can
4 be joined, and then we can have an argument about what
5 should probably be joined and what can go off
6 individually. But -- but that's a different question
7 than the question in this case, which is, why is it
8 unfair toglom on Texas claims and New York claims to
9 the California claims, once we already have a mass
10 action which will have multiple injury trials?

11 MR. KATYAL: So -- and the reasons are both
12 procedure and substance. So procedurally, you'll be
13 playing by different rules than what the defendant has
14 accepted, and this Court's always said, one of the goals
15 in specific jurisdiction litigation is to make sure and
16 tee up to businesses, particularly small businesses,
17 like the Plack brief points out, look, if you are enter
18 a jurisdiction, here's what you're going to face. And
19 Bristol-Myers doesn't disagree. When they sold the
20 180 million pills in California, they opened themselves
21 up to the jurisdiction for those pills. The question
22 is, can the folks from the 33 other States sue on that?
23 And then it does create substantive unfairness for
24 different juries. There's all sorts of things that
25 happen.

1 And if I could, Justice Kagan, just return
2 to the first two values. Predictability is really
3 important. There are 4 million people who take Plavix
4 in -- in America. If you accept their rule, it's not as
5 if they have to sue in California. Each of those people
6 can sue in any of the 50 States. That's 200 million
7 possibilities. That is the --

8 JUSTICE KAGAN: But you already know because
9 this is a nationwide marketing that you do, nationwide
10 drug, you already know that you're subject to
11 jurisdiction in any of the 50 States and have to be
12 prepared to confront jurisdiction in any of the 50
13 States.

14 MR. KATYAL: But -- but Justice Kagan,
15 critically, we know that we confronted with respect to
16 each individual State's procedure and substance. We
17 don't accept the idea that plaintiffs can play by least
18 common denominator rules and file Ohio claims in
19 California or Alaska.

20 JUSTICE KAGAN: Well, I guess what I'm
21 saying is that I -- the unfairness aspect of this is
22 what I really want to drive at, because predictability
23 just honestly doesn't seem like what's at issue here
24 given that you know it's perfectly predictable to have
25 litigation in any of the 50 States.

1 So the question is, why is it unfair to have
2 more litigation than you would in one of those States
3 rather than another?

4 MR. KATYAL: Justice Kagan, it's not a
5 numbers game. It's not the amount of litigation. It's
6 the way in which the litigation unfolds, both
7 procedurally and substantively. And this Court's
8 specific jurisdiction jurisprudence has always tried to
9 say to defendants, look, we want you to know the
10 consequences that follow when you enter into a new
11 market. And when Bristol-Myers, for example, sells in
12 Ohio to an Ohio plaintiff, I don't think they sit there
13 and think, oh, that allows me to be sued in California.
14 Of course they can be sued in --

15 JUSTICE KAGAN: Could you make this as
16 concrete as you can for me? And I -- I'm assuming that
17 your interests are the flip side to the plaintiffs'
18 interests. So why is it that a person would choose to
19 sue in California, and why is it that Bristol-Squibb
20 does not want more suits than necessary to happen in
21 California?

22 MR. KATYAL: Well, I suppose one thing, the
23 plaintiffs only have one thing to think about, which is
24 what's kind of jurisdictionally advantageous for them,
25 either procedurally or substantively. You know, for us,

1 when we're, for example, thinking about where to
2 incorporate and set up our principal place of operations
3 in New Jersey. I mean, nobody could say New Jersey is
4 kind of a defendant-friendly State. It's done so for
5 all sorts of reasons about employment and things like
6 that.

7 And so I do think this Court has identified
8 a concern in this area about forum shopping. We do
9 think that concern exist -- exists here. But I think
10 that kind of underlying this is a notion about
11 predictability and what their rule does, fairness, and
12 then federalism, which I'd like to get to, because this
13 Court's identified it, starting in World-Wide
14 Volkswagen, as a critical thing.

15 And the idea that the Ohio plaintiffs -- or
16 that the State of Ohio can't adjudicate these cases
17 because they're grabbed by California is something,
18 again, that this Court hasn't --

19 JUSTICE KAGAN: I guess -- I guess I'm --
20 I'm feeling a little bit stymied here because I thought
21 you were going to come at me with saying, look, the
22 juries in California are different or there's punitive
23 damages in California when there's not someplace else or
24 the substantive rules might be different. And I'm not
25 hearing any of that.

1 MR. KATYAL: All of the above,
2 Justice Kagan. There's a bunch of stuff wrong with this
3 rule --

4 JUSTICE BREYER: All of those things. Now,
5 I'm starting here; this is my problem.

6 Before International Shoe, I think basic
7 rule with qualifications, et cetera, a State is a
8 sovereign and can open its doors to whom it wants. End
9 of the matter. No. That isn't quite, but basic rule.
10 Now, along comes International Shoe, no, you can't, not
11 if it's unfair. Hence the questions.

12 Now, if that's what it is, if that's the
13 basic way to look at it -- and I hear the answers you've
14 given. Many, but not all, of those answers I could, I
15 think, have said the same thing in respect to
16 multidistrict litigation. And -- and so it sounds to
17 me, if I'm right on that -- which I might not be, you'd
18 have to say which ones aren't -- that what we need here
19 is a rule. We need a panel. We need Congress. We need
20 the multidistrict panel. But that isn't the
21 Constitution.

22 And then what I fear is if we say it's the
23 Constitution, what do we do to either the class actions
24 or maybe even multidistrict litigation? I think you
25 could solve that problem by putting the jurisdiction

1 transfer our court. But -- but you see, that's why I
2 think, what is it specifically that's special -- sorry,
3 but --

4 MR. KATYAL: So, Justice Breyer, we -- we
5 think you should write an opinion for us that doesn't
6 deal with multidistrict litigation or class actions, and
7 that's easy to do. The first thing to do is do what
8 this Court did in Omni Capital, footnote 5, and say
9 Federal is different than States, that the due process
10 guaranties apply differently, precisely because --

11 JUSTICE SOTOMAYOR: I have no idea how you
12 draw that line.

13 MR. KATYAL: Because there's not
14 rivalrous --

15 JUSTICE SOTOMAYOR: If it is due process,
16 then -- and how do you say that it's not due process
17 merely because it's Federal?

18 MR. KATYAL: For two reasons: Because it's
19 not rivalrous jurisdiction, it's not Ohio versus
20 California and every State in between; and because the
21 whole question in due process is minimal contacts, and
22 people are deemed to have minimal contacts with the
23 Federal government as a sovereign. That's why this
24 Court has always bracketed --

25 JUSTICE SOTOMAYOR: But that is not a

1 Federal claim in -- that is a State law claim that would
2 be brought in -- in Federal court.

3 MR. KATYAL: But -- but the --

4 JUSTICE SOTOMAYOR: Why would due process be
5 different?

6 MR. KATYAL: The constitutional rule that
7 Justice Breyer was asking would apply differently.
8 That's why this Court's always reserved it.

9 And multidistrict litigation, of course,
10 operates very differently. It's only pretrial
11 coordination, it's not trial, and so it's a very, very
12 different process.

13 JUSTICE GINSBURG: But could Congress make
14 it for trial? Right now, the multidistrict litigation
15 panels is only for pretrial. It can be a trial if
16 everyone consents. But absent consent, you have to go
17 back to where you began.

18 But would there be any constitutional
19 impediment to having a multidistrict statute amended so
20 that the -- the forum in which the cases are
21 consolidated could go on to the merits?

22 MR. KATYAL: Justice Ginsburg, I certainly
23 think the Court could write an opinion which says that
24 that is perfectly permissible and still reject
25 Mr. Goldstein's theory 100 percent, which is what this

1 Court has done time and again.

2 May I reserve?

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Ms. Kovner.

5 ORAL ARGUMENT OF RACHEL P. KOVNER

6 FOR UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING THE PETITIONER

8 MS. KOVNER: Mr. Chief Justice, and may it
9 please the Court:

10 This Court in Goodyear and Daimler rejected
11 approaches to general jurisdiction that would allow
12 plaintiff in one State to sue a national company for
13 product liability in all of the other 49 States, calling
14 those approaches exorbitant and unacceptably grasping.
15 The California Supreme Court misunderstood this Court's
16 decisions when it allowed that same result under the
17 label of specific jurisdiction.

18 As this Court explained in Goodyear,
19 specific jurisdiction lets a State exercise authority
20 over activity within its borders, which it has a strong
21 interest in controlling. But a State lacks a comparable
22 interest in exercising authority over out-of-State
23 defendants for entirely out-of-State conduct.

24 JUSTICE GINSBURG: But if this were -- if
25 this were a case where the nonresident plaintiffs were

1 suing Bristol-Myer in California, then everything you
2 say follows. But that's -- no one is urging that
3 California could assert jurisdiction against
4 Bristol-Myers on behalf of out-of State plaintiffs.
5 It's -- essential to this case is that there be a case
6 of Californians against Bristol-Myers, and this is
7 tagged on to it.

8 MS. KOVNER: That's right, Your Honor. So I
9 agree that the question here is whether the fact that
10 the out-of State plaintiffs have joined their claims in
11 a single lawsuit with California plaintiffs makes a
12 difference. And I don't think that it does, if you
13 looked at the interest that the Court has considered in
14 its specific and its general jurisdiction decisions.
15 Because I don't think that California has a greater
16 interest in exercising control over the conduct of
17 out-of-State defendants in another State just because
18 those claims have been joined with in-State plaintiffs.

19 I think the principal reason that
20 respondents suggest that California does have that
21 interest is an efficiency interest. But this Court has
22 defined general jurisdiction in a way that allows
23 plaintiffs to bring their suit together in a single
24 forum for efficiency purposes --

25 JUSTICE GINSBURG: What about McKesson?

1 There -- there are two defendants here. McKesson is a
2 California corporation or principal place. Is there
3 another place where these plaintiffs could sue McKesson
4 as well as Bristol-Myers?

5 MS. KOVNER: So I think it's not -- it's not
6 clear. We agree that personal jurisdiction is defendant
7 by defendant. So there may be some cases -- and this
8 may be such a case -- in which there's not one place
9 where any group of defendants can be joined together.
10 We think generally, there will be, because if the
11 allegation is that two defendants have engaged in a
12 course of conduct together, there's going to be some
13 place where those defendants engaged in that course of
14 conduct --

15 JUSTICE KENNEDY: Could the plaintiffs here
16 have filed against McKesson and then, under California
17 procedure, added Bristol-Myers as a necessary party?

18 MS. KOVNER: I'm not -- I'm not sure as a
19 matter of California law. We don't --

20 JUSTICE KENNEDY: Assume California law will
21 have that. Would that be -- would that be consistent
22 with due process?

23 MS. KOVNER: No. We don't think that the --
24 the procedure that was used would make a difference. We
25 think that the problem with McKesson here -- and I think

1 page 59A to 60A of the opinion below makes -- makes it
 2 clear is, is it's not clear what the Respondents are
 3 alleging that McKesson did. They're not alleging that
 4 McKesson distributed the drugs that plaintiffs received.
 5 If McKesson did, then there would obviously be some
 6 conduct that occurred in California that was connected
 7 to both plaintiffs that would make a lawsuit --

8 JUSTICE SOTOMAYOR: Can we go to the logic
 9 of your position? Assume a foreign corporation. Under
 10 your theory, that foreign corporation might be sued in
 11 the particular State in which an injury occurred. But
 12 since it has no home State in the United States, that
 13 means that in that situation, there's no place for
 14 plaintiffs to come together and sue that person;
 15 correct?

16 MS. KOVNER: I think that it might not be in
 17 the United States. There will not be a general
 18 jurisdiction location for international defendants --

19 JUSTICE SOTOMAYOR: Products are sold here
 20 across the United States. All the marketing, everything
 21 is the same. The theory is the same. But because it's
 22 a foreign State, there's no one jurisdiction -- a
 23 foreign company, there's no one jurisdiction in the
 24 United States now under your theory.

25 MS. KOVNER: That's true for some.

1 JUSTICE SOTOMAYOR: There is an amicus brief
2 here that talked about all of the criminal laws that
3 would be subject to questioning under your theory of --
4 of constitutional due process.

5 What is your response to them? Is it the
6 same as Mr. Katyal's? We'll face that when we get to
7 it?

8 MS. KOVNER: No. I don't think that the --
9 this Court has applied its civil personal jurisdiction
10 cases in the same way in a criminal context. The United
11 States has a strong sovereign interest in regulating
12 certain conduct when it occurs overseas --

13 JUSTICE SOTOMAYOR: If due process says that
14 you can't hail someone into a court with which they've
15 had no contacts, how do you justify the many criminal
16 statutes we have -- RICO, CERCLA, there's a whole bunch
17 of them -- that permit the joinder of all of these
18 defendants in one indictment?

19 MS. KOVNER: Well, Your Honor, if we're
20 talking about criminal statutes, these are statutes that
21 are based on the idea that this is conduct that
22 exercises some --

23 JUSTICE SOTOMAYOR: All of them have a civil
24 component.

25 MS. KOVNER: Yes. And with respect to the

1 civil component, I mean, courts have looked to personal
2 jurisdiction considerations. We think if it's a Federal
3 statute, the relevant question would be a Fifth
4 Amendment analysis. But if you look to the statutes
5 that -- that Respondent cites, we're talking about
6 statutes that exert some kind of -- that involve conduct
7 that exert some kind of effect on US citizens or -- or
8 the United States.

9 JUSTICE GORSUCH: Counsel, one thing we
10 haven't talked about, we've talked a fair amount about
11 fairness and predictability, but we haven't talked about
12 federalism. I know Mr. Katyal was trying to get to
13 that. I was hoping you might just give us a couple of
14 words about what implications there are for the
15 interests, say, of Ohio in administering its own
16 procedures with respect to its own citizens for torts
17 that occur in its own State.

18 MS. KOVNER: Yes, Your Honor. So going back
19 to World-Wide Volkswagen and continuing --

20 JUSTICE GORSUCH: Or -- or McIntyre, maybe?

21 MS. KOVNER: Yes, and continuing through
22 McIntyre, this Court has made clear that specific
23 jurisdiction needs to be defined with -- with an eye to
24 the view that there are 50 different States, and that
25 other States are also going to have an interest in

1 adjudicating conduct that occurs within their borders.
2 So if specific jurisdiction is defined in a very
3 permissive way that allows States that don't have a
4 strong interest in regulating the conduct to --

5 JUSTICE KAGAN: So who -- which State are we
6 worried about here? Are we worried about the
7 plaintiff's State, or are we worried about the
8 defendant's State?

9 MS. KOVNER: I think there are two States
10 that have a very strong interest, at least two States
11 that have a very strong interest in providing a forum
12 for the conduct at issue here. It's States where the
13 plaintiffs were injured, and States where the defendants
14 are at home, because States have an interest in
15 regulating the conduct of their --

16 JUSTICE KAGAN: So on the plaintiff's side,
17 that seems a pretty attenuated interest, if -- because
18 usually when we say that the State has an interest, it's
19 in protecting their own citizens and providing their own
20 citizens with a forum. But here the citizen has decided
21 he doesn't want that protection, he wants to go
22 someplace else. It seems, you know, a little bit weak
23 to say that the State has a very strong interest in
24 protecting its own citizen that doesn't want to be
25 there.

1 MS. KOVNER: I don't think so at all. I
2 think, Your Honor, that the State has a strong interest
3 in regulating the conduct that occurs within its
4 borders, and defining what's fair with respect to how
5 that conduct is adjudicated. That's --

6 JUSTICE KENNEDY: And it's also true, it
7 would seem to me, that a State A has a very strong
8 interest in confining State B to State B's
9 territorial --

10 MS. KOVNER: That's right, Your Honor.

11 JUSTICE KENNEDY: Which doesn't -- that's
12 why due process is the same for Federal and State, but
13 there's a different set of criteria to which you apply
14 it. The States are limited in their jurisdiction to
15 nationwide, the Federal government isn't.

16 MS. KOVNER: That's right, Your Honor. And
17 that's exactly what this Court has already said in
18 World-Wide Volkswagen and Nicastro. And we think if the
19 Court applies that principle here, it counsels strongly
20 against expanding specific jurisdiction to allow States
21 to reach claims in which they don't have an interest,
22 because it does tend to crowd out the jurisdiction.

23 JUSTICE BREYER: So what -- what is your --

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: Justice Breyer.

1 JUSTICE BREYER: What is your solution to
2 mass torts?

3 MS. KOVNER: So we think there are a couple
4 solutions. Claims like this, which are, I think, mass
5 tort claims can be brought in a jurisdiction of general
6 jurisdiction. They can also be brought in Federal
7 courts and consolidated for schemes like the MDL scheme.
8 These are both solutions that provide efficiency. And,
9 of course, Congress can step in, if it sees a particular
10 kind of mass tort that it doesn't -- that it wants to
11 provide an additional forum for. It's done that for
12 specific kinds of -- for instance, mass accidents. So
13 that's an additional vehicle. There are forums where
14 claims like this can be brought efficiently.

15 JUSTICE BREYER: How, if it's
16 constitutional?

17 MS. KOVNER: I'm sorry?

18 JUSTICE BREYER: How? How? How can
19 Congress step in if it's constitutional?

20 MS. KOVNER: Because Congress is acting
21 under the Fifth Amendment. And as this Court indicated
22 in Nicastro, it's --

23 JUSTICE BREYER: Fifth is different from the
24 Fourteenth?

25 MS. KOVNER: Well, it's the -- it's

1 different in the following sense --

2 JUSTICE BREYER: Isn't that what you write?

3 MS. KOVNER: It's different in the sense
4 that the sovereign is different, and so the kind of
5 contexts that you're talking about in the Fifth
6 Amendment are contexts with the national sovereign. So
7 in that case, you would look to, does this company have
8 the relevant minimum context to make it fair for the
9 national sovereign --

10 JUSTICE GINSBURG: So it's context with the
11 United States as opposed to an individual State. So if
12 we -- if it's a Federal statute, then that -- and not
13 hemmed in by State boundaries, it can create a
14 nationwide claim.

15 MS. KOVNER: That's right, Your Honor, and
16 the court -- courts of appeals have agreed on this.
17 There are, you know, nationwide service of process
18 provisions in which Congress has exercised that kind of
19 authority. And there's been no disagreement in the
20 court of appeals -- courts of appeals, although this
21 Court has reserved the issue itself in Omni. We think
22 it's a different sovereign, and so a different kind of
23 context that would be --

24 JUSTICE ALITO: Could you say how you would
25 phrase the rule that you would like us to apply in this

1 situation?

2 MS. KOVNER: Yes, Your Honor. I think the
3 Court could simply say in this case that for purposes of
4 specific jurisdiction, when we're talking about conduct
5 that arises out of -- takes activity within the forum,
6 there has to be something that's connected to the claim,
7 some causal connection between the individual claim
8 and -- and the forum, the parties in the forum.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MS. KOVNER: Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Mr. Goldstein.

12 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

13 ON BEHALF OF THE RESPONDENTS

14 MR. GOLDSTEIN: Mr. Chief Justice, and may
15 it please the Court:

16 We believe that four facts make -- are
17 sufficient to establish specific personal jurisdiction
18 in this case. If I could just very briefly summarize
19 them.

20 The first is that the defendant engaged in
21 the systematic and continuous exploitation of this
22 market, California, the forum, with respect to the
23 matter that gave rise to the claim, so the sale of
24 Plavix. The second is the case was decided below, and
25 certiorari was granted on the understanding that

1 litigating here would not place a significant additional
2 burden on BMS, it wouldn't be unfair because the claims
3 arise not from parallel activity, but the same activity
4 by BMS. It's the same legal theory and the same
5 operative facts.

6 The third is that there is a significant
7 governmental interest that is implicated by this case in
8 that the courts are able to bring together a large
9 volume of litigation that would otherwise be atomized
10 across the States.

11 And the fourth is that there is what --

12 JUSTICE KENNEDY: The States or the State?

13 MR. GOLDSTEIN: That would be atomized
14 across the States.

15 My point is that, you know, we have a large
16 number of cases about Plavix, and what's happening here
17 for the benefit of the States, this is discussed in
18 Keeton, is to bring the cases together so that the
19 multistate judicial process can operate more
20 efficiently.

21 JUSTICE GINSBURG: But that's really not
22 possible. And it would be ideal if we could get all the
23 Plavix plaintiffs together in one forum. We have no way
24 of doing that because plaintiffs have many choices. And
25 so some individual plaintiffs chose to hook up with the

1 California, but there's lots of -- there's one footnote
2 that says all the cases, some are multidistrict cases,
3 some are multiple plaintiff cases.

4 The -- so whatever we rule in -- in this
5 case, there's still going to be a lot of -- a lot of
6 Plavix litigation spread around the United States.

7 MR. GOLDSTEIN: Yeah, Justice Ginsburg, if I
8 can come back that -- in one second, I -- I think it's a
9 fair point. I want to give you my sense of why our rule
10 is better with respect to that --

11 JUSTICE KENNEDY: And could we have the
12 fourth of -- I interrupted --

13 MR. GOLDSTEIN: Yeah, exactly right. That's
14 why I just --

15 JUSTICE KENNEDY: I interrupted you at
16 first --

17 MR. GOLDSTEIN: No, no --

18 JUSTICE KENNEDY: But what was the fourth?

19 MR. GOLDSTEIN: Right. The fourth is that
20 this case has what Justice Breyer, in Nicastro, talked
21 about as a special feature, and that's McKesson. What
22 we have here is Bristol-Myers' decision to contract with
23 a California company to distribute this drug nationally.
24 McKesson distributed 700,000 pills of Plavix outside
25 California a week, and we think that's quite significant

1 for multiple reasons. It is a choice by BMS, a contact
2 that involves California in the nationwide distribution.
3 In addition --

4 JUSTICE KAGAN: But not necessarily to all
5 the plaintiffs here.

6 MR. GOLDSTEIN: Okay. A -- a couple things
7 about that. It is impossible to trace a particular pill
8 to a particular person, because what happens is you're
9 admitted to a hospital, you're given Plavix, you then go
10 see your doctor who gives you a sample, and then
11 prescribes it to you, and then you may be in an assisted
12 living facility. It's not possible for us to track
13 particularly to McKesson.

14 My point is simply is that they made a
15 choice to contract with a major national distributor of
16 the drug located in California, and that has a
17 significant point for California-specific interests in
18 this litigation.

19 CHIEF JUSTICE ROBERTS: Counsel, I -- I
20 think Justice Ginsburg's question is still pending.

21 MR. GOLDSTEIN: Excellent. Thank you.

22 And, Justice Ginsburg, you're quite right
23 that we don't have a perfect solution, but what we can
24 do is aid the States' judicial systems by allowing the
25 litigation to be centralized. You just compare our rule

1 with theirs. The upshot of their rule, precisely
2 because in multi-defendant mass tort actions, you don't
3 have a common general jurisdiction, is that there's
4 going to be a bunch of litigation in Ohio and Nevada and
5 Texas and --

6 JUSTICE KENNEDY: But that's a very
7 patronizing view of federalism. California will tell
8 Ohio, oh, don't worry, Ohio, we'll take care of you.
9 That's not -- that's -- that's not the idea of the
10 Federal system. The Federal system says that States are
11 limited.

12 MR. GOLDSTEIN: Sir, let me just analogize
13 this case to Keeton, if I might, because there you have
14 a very similar situation. And that is, you have the New
15 Hampshire State courts -- or a New Hampshire court, and
16 it is adjudicating a claim --

17 JUSTICE KENNEDY: There was an injury in New
18 Hampshire to that plaintiff.

19 MR. GOLDSTEIN: That's --

20 JUSTICE KENNEDY: And that's not present
21 here.

22 MR. GOLDSTEIN: That is absolutely correct.
23 But what the Court said was that that wasn't the special
24 feature of it, and that was that that claim would
25 otherwise be litigated in the 50 States, and that the

1 States had an interest in centralizing it.

2 If I could just make the final point about
3 McKesson --

4 JUSTICE GINSBURG: That's peculiar to -- to
5 libel claims.

6 JUSTICE KENNEDY: Right.

7 JUSTICE GINSBURG: I mean, they -- what are
8 they called, the single --

9 MR. GOLDSTEIN: Publication.

10 JUSTICE KENNEDY: Single publication.

11 JUSTICE GINSBURG: Yes, yes.

12 CHIEF JUSTICE ROBERTS: Exactly. And -- and
13 that -- that's why, I mean, you've cited Keeton twice,
14 it's cited innumerable times in your brief. It is
15 completely sui generis in that respect.

16 I -- it involved the single publication
17 rule, and what that is, it says, this is a restatement,
18 as to any single publication, only one action for
19 damages can be maintained. All damages suffered in all
20 jurisdictions can be recovered in that one action and a
21 judgment for or against the plaintiff upon the merits of
22 that bars any other action.

23 It's a very, very unique situation that --
24 that, you know, maps on a position you want to apply
25 generally. And -- and it seems to me that that's a real

1 overuse of -- of Keeton.

2 MR. GOLDSTEIN: Okay. If I could just give
3 you my thoughts about that.

4 It has never been cited subsequently by --
5 the Court has cited Keeton multiple times, never limited
6 in that sense. And though the single publication rule
7 exists in most, not all, States, remember Keeton quite
8 clearly says it doesn't exist in every State, but all of
9 the claims are allowed in New Hampshire, but it still
10 has to be constitutional, is my point. And that is, the
11 States can make whatever decisions they like, but Keeton
12 makes quite clear that each publication is a separate
13 libel, each arises under each individual State's laws.

14 My general point is that there are two
15 federalism interests here. I quite take the point that
16 California doesn't have an interest in adjudicating
17 Ohio's claim, and it is territorially limited.

18 On the other hand, the Court has recognized
19 in cases like Keeton that the States do have an interest
20 in trying to make this simpler, not more complicated.

21 JUSTICE KAGAN: Well, how about the interest
22 of the State that Bristol-Myers resides in? In other
23 words, they might have an interest in not having their
24 citizens haled into court against their will in another
25 part of the country.

1 MR. GOLDSTEIN: Yeah. I don't think that
2 can be right. And I would point out that Mr. Katyal and
3 the United States agree that specific personal
4 jurisdiction outside the home forum is entirely
5 appropriate here. They just want it to be in
6 New Jersey.

7 I don't understand how any of their
8 arguments map onto the concession that a New Jersey
9 State court, which is not their home State, could
10 adjudicate the claims from Ohio, Nevada, and Texas, just
11 like California here, when all of the same things are
12 true. That State is adjudicating a claim from another
13 place.

14 If I could just make the final --

15 JUSTICE BREYER: The obvious is that this is
16 your home State.

17 MR. GOLDSTEIN: It isn't, though.

18 JUSTICE BREYER: But let's imagine it's a
19 home or whatever, and you say that a business is in that
20 State. You make it -- you -- you do business here, you
21 make things here. I don't care if you're home or not.
22 Make things here, do business here, incorporate here.

23 Now, you can be sued in any State still,
24 under special jurisdiction, where you cause harm, but
25 you can't be sued in States where you didn't. Now,

1 that, I think, is what -- I think that's what they're
2 saying is the special federalism interest of either the
3 home State or the State where they did the
4 manufacturing, or the State where they, you know,
5 whatever the other one is where you count as a home
6 State. That does sound special.

7 MR. GOLDSTEIN: Well, all I can say is that
8 in New -- the example of New Jersey and specific
9 jurisdiction, they would be adjudicating the claim of
10 somebody who was harmed in Ohio, even though it's not
11 their home.

12 But I did really want to focus on the -- the
13 special interest that California has here because of the
14 role of McKesson. You know, the Court is involved in --

15 JUSTICE GORSUCH: Well, but, Mr. Goldstein,
16 that's a very fact-specific argument. And we took this,
17 I thought, to decide the legal question whether we have
18 some sort of causation requirement or permit this
19 sliding scale business that California engages in, as a
20 legal matter. And on that, I just wonder if -- if we
21 move to this all-things-considered approach, are we
22 collapsing what had been previously two separate due
23 process inquiries, one was purposeful availment, and the
24 other was fundamental fairness. And as I hear it,
25 really, it all just boils down to fundamental fairness.

1 And as Judge Silverman said, a length of the
2 chancellor's foot.

3 So I'm just wondering what happens
4 doctrinally to the first test? Does it have any bite?
5 And if it doesn't, does that suggest some problem
6 doctrinally, formally, with your position?

7 MR. GOLDSTEIN: If I could give you a
8 narrower answer and then a bigger picture answer.

9 The -- the narrow answer is that our view of
10 the relatedness inquiry that is articulated in
11 International Shoe does require that they engage in what
12 Keeton and International Shoe refer to as the continuous
13 and systematic exploitation of the market. That's a
14 contact. And the relationship has to be that it is the
15 same claim on the same operative facts.

16 There's no general --

17 JUSTICE KAGAN: But that's like saying,
18 Mr. Goldstein, that the claim relates to another claim
19 that relates to contacts with the forum. I mean, I
20 guess I'm -- I'm missing what the relationship is
21 between an Ohio plaintiff's claim and the defendant's
22 contacts with the forum that doesn't go through another
23 claim.

24 MR. GOLDSTEIN: Well, here is how we
25 understand that it would operate, and that is, the

1 California court is providing a forum to adjudicate a
2 claim about the lawfulness of BMS's design and
3 manufacturing and distribution of this drug Plavix.
4 That is activity that didn't occur in California. Okay?
5 That is activity that they quite clearly say happened in
6 New Jersey.

7 So the California court is going to make an
8 adjudication of that. Our point is simply that when the
9 California court has the unquestioned power to determine
10 under a legal standard that that was lawful and a set of
11 facts, it's not limited --

12 JUSTICE KAGAN: No, I understand that that's
13 your point. But I guess what I've always thought that
14 our personal jurisdiction cases require is somebody to
15 state in -- state something like this: The plaintiff's
16 claim relates to or arises out of the defendant's
17 contacts with the forum State. So here, Bristol-Myers'
18 contacts with California. And I just want you to tell
19 me how an Ohio plaintiff's claim arises out of or
20 relates to the defendant's contacts with California.
21 Just it -- it does because why?

22 MR. GOLDSTEIN: It does because the relevant
23 contact is the nationwide activity. That has to be
24 correct, by the way, because just take a company that is
25 trying to exploit -- it manufactures something in

1 New Jersey, hands it off to a distributor, knowing that
2 the distributor will exploit the California market.

3 The only thing the defendant does is do
4 something in New Jersey, right? It's not activity in
5 California that gives rise to specific jurisdiction.
6 The California court's jurisdiction attaches to the
7 activity outside. It's the same conduct. It is not --

8 JUSTICE KAGAN: Let me see if I understand
9 that, because you're saying -- usually we say how does
10 the claim relate to the contacts in a particular State,
11 say in California. Here we can't answer that question,
12 really. So we say now the contacts in California are
13 nationwide contacts, and the plaintiff's claim relates
14 to those nationwide contacts.

15 MR. GOLDSTEIN: It arises from those same
16 nationwide contacts. But I have a second answer --

17 JUSTICE KAGAN: Those nationwide contacts
18 being a nationwide advertising campaign, a nationwide
19 marketing campaign, and so forth.

20 MR. GOLDSTEIN: Right. Exactly. But I have
21 a second answer, and that is, there is a critical
22 additional contact here that gives rise to a very
23 significant interest of California.

24 And understanding, Justice Gorsuch, there's
25 a big picture question about the standard, but then we

1 do have a set of facts here. The California court did
2 draw on McKesson's role. It can't just be taken away
3 from us, and it would be very confusing to the lower
4 courts to simply cast it aside. And that is, California
5 has a very significant interest --

6 JUSTICE GORSUCH: What's confusing, though,
7 about simply saying here's the correct test, reverse,
8 remand, go apply the correct test?

9 MR. GOLDSTEIN: Well, you're going to have
10 to say something about McKesson is all I'm saying.
11 The -- the other side really wants to put it entirely to
12 the side. And there have been a lot of important
13 questions here about the interests of California. And I
14 just don't think you can get rid of BMS's most
15 significant contacts with California and say that it's
16 irrelevant here. And that is, California has a very
17 significant interest in providing a complete
18 adjudication of this claim, and so do all of the States.

19 The problem in mass torts is that you can
20 have multi-defendant actions, and you're going to
21 require that they be litigated multiple times so that --

22 JUSTICE GINSBURG: Could one of these
23 Plavix -- could the Plavix claim have been brought as a
24 class action?

25 MR. GOLDSTEIN: The Plavix claim could

1 have -- it depends on who we're talking about, but yes,
2 there could have been a class action. And I take the --
3 the necessary implication.

4 JUSTICE GINSBURG: And where -- if -- if so,
5 where could it be brought?

6 MR. GOLDSTEIN: The -- it could be
7 brought -- depending on whether you think McKesson plays
8 a significant role, it would have been brought, I think,
9 in California is the place where the class action would
10 have been brought. I will -- can I just bracket one
11 important thing for you to realize about all of this
12 litigation, Justice Ginsburg? It will illustrate, I
13 think, how the States do work together.

14 You mentioned all of the cases are out
15 there, and Mr. Katyal has stressed that. He just
16 doesn't mention that there is a special master that --
17 who is responsible for disputes relating to all of the
18 litigation all around the country, both Federal and
19 State. There is a great deal of collaboration here.

20 Now, my point about --

21 JUSTICE GINSBURG: Special master is where?

22 MR. GOLDSTEIN: In New York. It's by
23 agreement of the parties. And if there's -- there's --
24 discovery is handled through all of the cases in all
25 the --

1 JUSTICE KENNEDY: In the State court or the
2 Southern District?

3 MR. GOLDSTEIN: It is -- I think it's --

4 JUSTICE KENNEDY: Is it a Federal or State
5 master?

6 MR. GOLDSTEIN: I don't think it is actually
7 regarded that way. It's probably best regarded as
8 Federal, but it's -- it's a person who resolves by
9 agreement all of the discovery disputes, for example,
10 across all of the litigation. The United States has a
11 discussion of this in its brief about how this is
12 relatively common.

13 But the important thing about McKesson's
14 role in the case is that California does have a
15 significant interest in providing a single forum where
16 this case against McKesson can be resolved, because look
17 at the dilemma to McKesson. If McKesson loses the
18 case -- remember, the out-of-State plaintiffs
19 unquestionably can sue McKesson in California. If they
20 win against McKesson, what is McKesson supposed to do?
21 It is going to have to go litigate against Bristol-Myers
22 somewhere else and try and get indemnification --

23 JUSTICE BREYER: Why isn't the answer to
24 this, to my question, your question, which you raise a
25 lot, this is going to be a terrible problem for mass

1 torts. Answer: Bring your case in Federal court. Now,
2 why couldn't these 572 or whatever people bring their
3 cases in Federal court?

4 MR. GOLDSTEIN: Well, I -- it would depend
5 on things --

6 JUSTICE BREYER: Not all can. Not all can.

7 MR. GOLDSTEIN: Right.

8 JUSTICE BREYER: But -- but a very large --

9 MR. GOLDSTEIN: Right.

10 JUSTICE BREYER: -- number. And then that
11 very large number is no problem. They bring the case in
12 the place where there is jurisdiction, it's consolidated
13 in a multidistrict panel, and the multidistrict panel
14 sends it to that venue for trial, which is convenient
15 for all.

16 Now, what they'll say, yeah, I'll agree with
17 that. And then they'll say, the solution to this great
18 mass tort problem is that's what Federal courts are for.
19 It doesn't work perfectly, but neither does -- does
20 yours work perfectly.

21 JUSTICE GINSBURG: Here that's not
22 possible --

23 JUSTICE BREYER: So what is the response to
24 that?

25 JUSTICE GINSBURG: This -- the -- this case

1 couldn't be in Federal court because there's no complete
2 diversity.

3 MR. GOLDSTEIN: That's what --

4 JUSTICE GINSBURG: McKesson is California.

5 MR. GOLDSTEIN: That's what --

6 JUSTICE BREYER: Well, what you do is --

7 MR. GOLDSTEIN: Justice Breyer says you
8 could redesign the case.

9 JUSTICE BREYER: Yeah. Correct.

10 MR. GOLDSTEIN: Okay. A couple things about
11 that -- that's true. Okay? A couple of things about
12 that.

13 Remember that a bunch of Mr. Katyal's points
14 about one forum making choice of law decisions, or
15 having its own procedures that are different from the
16 home forum are obviously true in MDL litigation. It
17 raises the same constitutional question.

18 JUSTICE GORSUCH: But in MDL litigation,
19 you're in Federal court. So the procedures are common
20 across courts, in theory.

21 MR. GOLDSTEIN: Well -- but remember --

22 JUSTICE GORSUCH: Maybe more in theory than
23 in practice.

24 MR. GOLDSTEIN: Maybe so. And also, choice
25 of law is the substantive law, is his concern. And

1 the -- so I do think there's a lot of --

2 But the other thing is this. Two points,
3 Justice Breyer. The first is, yes, there are other ways
4 to do it, but that doesn't make the way we are doing it
5 unconstitutional. What the Court has talked about here
6 is minimum due process. Remember this: If Mr. Katyal
7 walked up to me in California and handed me a subpoena,
8 he could sue me in California on absolutely anything.

9 Now, his client sold \$918 million worth of
10 Plavix in California and says it violates the
11 Constitution. Now, that may not be a lot of money
12 necessarily to some people, but it is greater than the
13 gross domestic product of 21 countries. But --

14 CHIEF JUSTICE ROBERTS: Counsel, we're
15 dealing with the jurisdictional rule, and when we do
16 that, we want the rules to be as simple as possible.

17 MR. GOLDSTEIN: Yes.

18 CHIEF JUSTICE ROBERTS: And you have -- you
19 started out with the four different factors and all
20 that. But I'm particularly concerned -- your brief at
21 page 54, you say, well, if there were only a handful of
22 people from California and hundreds from Texas or
23 Tennessee, that would be a different case. By which, I
24 think, you mean it wouldn't satisfy due process, right?

25 MR. GOLDSTEIN: Yes. And that is --

1 CHIEF JUSTICE ROBERTS: Okay. Well, you
2 have 86 in California and 575 elsewhere. And there's a
3 difference, I suppose, between handfuls and hundreds and
4 86 and 575, but where exactly that difference is, it
5 seems to me is going to be impossible to determine.

6 MR. GOLDSTEIN: Right. So, Mr. Chief
7 Justice, it's true.

8 CHIEF JUSTICE ROBERTS: But that's right.
9 You say handful in California, hundreds Tennessee and
10 Texas, no good. 86 in California, 575 somewhere else,
11 okay.

12 MR. GOLDSTEIN: Right. And let me explain
13 why that's true. Because I agree that when the Court
14 announced International Shoe, it said quite clearly,
15 they're not going to be formulaic. They are going to be
16 case-by-case judgement.

17 What happened here is that there were two,
18 per se, categorical rules. The first is there used to
19 be general jurisdiction because they're doing business,
20 and Pennoyer said that we could get any -- that
21 California could adjudicate anything in California, and
22 with respect -- insofar as they had assets in the State.
23 Those were clear, categorical rules. You were convinced
24 that those clear, categorical rules could produce some
25 unfairness.

1 And so the Court announced a rule that is
2 much more encompassing of the facts that it accounts
3 for. If the Court wanted a clearer rule, clearer rules
4 have existed. The Court has abandoned them in fairness
5 to defendants. It's very hard, I think, to blame us for
6 saying, now we're going to look at the factors
7 involved --

8 CHIEF JUSTICE ROBERTS: I know, but you're
9 articulating a rule that requires businesses trying to
10 figure out where to do business and plaintiffs where to
11 sue and courts whether it's real. Your rule depends
12 upon some line between handful and -- and hundreds, and
13 86 and 575.

14 Where is it, exactly?

15 MR. GOLDSTEIN: It -- there -- there is no
16 precise number. I will say --

17 CHIEF JUSTICE ROBERTS: If there were 20 in
18 California and 575, would that satisfy due process?

19 MR. GOLDSTEIN: I think that it is -- I
20 cannot answer that question, because --

21 CHIEF JUSTICE ROBERTS: But it's your case.
22 You ought to be able to at least answer --

23 MR. GOLDSTEIN: Well, I know my case is
24 Constitutional, Mr. Chief Justice. All I'm saying is
25 that -- that when you have the continuous and systematic

1 exploitation of the market, when you have the ability to
 2 bring a bunch of cases together for the benefit of all
 3 of the States, it is true that there is going to be --
 4 and the reason that this is not a practical problem, I
 5 will tell you, is that the bar does what it did here,
 6 and that is, it tries, for efficiency purposes, even if
 7 for its own sake, to bring these cases together. So you
 8 really don't end up in situations where you have five in
 9 one place, and people try and --

10 JUSTICE KAGAN: Mr. Goldstein, it seems to
 11 me, on your theory, it could be zero California
 12 plaintiffs, because here's what you told me. You told
 13 me that the reason that this -- that an Ohio citizen's
 14 claim arises out of the contacts in California is
 15 because the contacts in California are really nationwide
 16 contacts. And if that's so, it's met regardless of
 17 whether there are any California plaintiffs are not.

18 MR. GOLDSTEIN: Right.

19 JUSTICE KAGAN: So if that's your theory, it
 20 doesn't matter whether there are 86 or 20 or zero,
 21 because the contacts arise out of the
 22 nationwide/California contacts.

23 MR. GOLDSTEIN: That's not correct.

24 JUSTICE KAGAN: The claim arises out of
 25 that.

1 MR. GOLDSTEIN: That's not correct, because
2 your test that you've articulated has two core parts to
3 it. The first is, the minimum contacts, the
4 relationship between the contacts with the State and the
5 litigation. And the second is the fairness of the
6 litigation, and what is absolutely critical to our case
7 and was critical to the --

8 JUSTICE KAGAN: Yeah. I don't think that's
9 right, Mr. Goldstein. Our arising out of relating to
10 test, has always been about the first part of the
11 inquiry, and then all of the four factors is a backstop
12 to that. It's an additional test after we decide
13 whether your claim arises out of the forum contacts.

14 MR. GOLDSTEIN: I agree. But we have to
15 satisfy both in order for there to be specific
16 jurisdiction. Justice Kagan, remember that it is the
17 case that not that much weight in your prior precedents
18 has been placed on the reasonableness factors, because
19 these have always been general jurisdiction cases.
20 These cases have always been brought as we're describing
21 them.

22 JUSTICE SOTOMAYOR: Mr. Goldstein, go back
23 to articulating for me.

24 MR. GOLDSTEIN: Yes.

25 JUSTICE SOTOMAYOR: What is your definition

1 of "related to"?

2 MR. GOLDSTEIN: That is -- it is -- it is
3 the claim that is the same legal claim arising from the
4 same operative facts. And the conduct is the same
5 conduct that gives rise to the State litigation. And
6 that is, it maps on perfectly. And that is really
7 important because it means --

8 JUSTICE SOTOMAYOR: So is that a yes to
9 Justice Kagan's question about it wouldn't matter if
10 there were no California plaintiffs?

11 MR. GOLDSTEIN: It would relate to, but it
12 would not be constitutional because it would not be
13 reasonable under the second part of the test. Because
14 they're already in California, en masse. They are
15 facing dozens upon dozens upon dozens of the same claim.

16 Remember what the Court said in making the
17 move from Pennoyer to International Shoe, which I'd like
18 to come back to --

19 JUSTICE GORSUCH: Well, if you don't --
20 sorry, Mr. Goldstein -- but if you don't need a single
21 plaintiff to satisfy the first prong of the due process
22 inquiry, again, what function does that first prong have
23 left to do? Why doesn't it all just run into the second
24 fundamental fairness test?

25 MR. GOLDSTEIN: Well --

1 JUSTICE GORSUCH: What's left?

2 MR. GOLDSTEIN: Well, because it gives the
3 State the power, the territorial power, because it does
4 have the power to adjudicate with respect to that
5 conduct. It is both parts that are important.

6 I had said that I wanted to come back to you
7 about a bigger picture answer a -- a little while ago,
8 and that is, I do think it's really important that this
9 may be the beginning or the middle of a multi-decade
10 effort to try and take a look at the original
11 understanding of the due process clause, and do that
12 across the Court's body of precedent.

13 And we have urged the Court, if it is
14 serious about that endeavor, to take a look at the
15 relationship of International Shoe and Pennoyer, because
16 from the founding of the country up through the adoption
17 of the Fourteenth Amendment, it was perfectly clear and
18 undisputed that California could adjudicate this claim,
19 at least up to and including the assets that they have
20 in the State of California. They are within
21 California's territory. There is no dispute about that.

22 International Shoe and Shaffer say we are
23 going to modernize our understanding of the Fourteenth
24 Amendment.

25 JUSTICE GORSUCH: Great question. Is it

1 presented?

2 MR. GOLDSTEIN: Yes, it is. Because we
3 affirmatively argue to you that you should overrule this
4 Court's precedents or not extend them. We, of course,
5 could lay, as an alternative ground for defending the
6 judgment below, we specifically urge it in our brief.
7 It is squarely in front of you. I do not think you can
8 pass it by. And if the -- if the --

9 JUSTICE GINSBURG: What you're suggesting is
10 that the Court was wrong in -- in Daimler and in the one
11 before it --

12 JUSTICE ALITO: Goodyear.

13 MR. GOLDSTEIN: Goodyear and Daimler.

14 JUSTICE GINSBURG: -- Goodyear in confining
15 general jurisdiction. And in this -- this very case, it
16 was originally argued as a general jurisdiction case.
17 Then we came out with Daimler, and then they said oh,
18 no, we know it's not general jurisdiction. It's got to
19 be specific.

20 MR. GOLDSTEIN: Yes.

21 JUSTICE GINSBURG: So one comment that --
22 that you, no doubt, know has been made about this case,
23 is that it is an attempt to reintroduce general
24 jurisdiction, which was lost in Daimler, by the
25 backdoor.

1 MR. GOLDSTEIN: The backdoor. Yes, exactly.
2 So important things about why that can't be right. I do
3 think the driving concern in cases like Daimler and
4 Goodyear about general jurisdiction is that you can hail
5 somebody into the forum and sue them about absolutely
6 anything. And this is a world of difference because
7 this is being -- this suit is being brought on behalf --
8 on the basis of their conduct in the State with respect
9 to this drug.

10 And the second is, I do think the Court
11 recognized in Daimler quite explicitly that the
12 retrenchment of general jurisdiction, how these cases
13 had always been brought -- and so there's no argument
14 that we've -- we're disrupting the legal system -- the
15 retrenchment of general jurisdiction was going to induce
16 an examination of the Court's specific personal
17 jurisdiction to fill in the gaps.

18 JUSTICE BREYER: Can you -- this is answer
19 this in a sense -- all right. This is -- because you
20 just started to with Justice Ginsburg, no general
21 jurisdiction. Why am I here, says defendant. Because,
22 says the judge, you have enough activity in our State
23 for us to call you into court to answer to one of our
24 citizens who was hurt. That's special jurisdiction,
25 right?

1 MR. GOLDSTEIN: Specific, yes.

2 JUSTICE BREYER: But why am I here in
3 respect to Smith? Because, you see, Smith isn't a
4 citizen of our State.

5 So where that answer sounded -- this is
6 logic, and what's bothering about the whole case is its
7 logic, and I don't know the practicalities. All right.
8 But -- but the -- you see, the logic doesn't seem the
9 same.

10 MR. GOLDSTEIN: Right.

11 JUSTICE BREYER: I cannot say, because you
12 are a citizen of Texas, because that cuts no ice in
13 California. So what is it I say in a single sentence
14 that does make it clear to that defendant why he is
15 here?

16 MR. GOLDSTEIN: You're already here on this
17 claim, and there is nothing unfair about having you have
18 it with respect to another plaintiff, because that
19 plaintiff could quite clearly get you estopped on the
20 basis of --

21 JUSTICE BREYER: I was here for that
22 purpose, not --

23 MR. GOLDSTEIN: You're here.

24 JUSTICE BREYER: So once I'm here, I can now
25 sue him. And then --

1 MR. GOLDSTEIN: On the exact same.

2 JUSTICE BREYER: -- that's when lines -- all
3 right.

4 MR. GOLDSTEIN: Well, Justice Breyer, all --

5 JUSTICE BREYER: I'm not disagreeing with
6 you.

7 MR. GOLDSTEIN: Thank you.

8 JUSTICE BREYER: I'm trying to get the
9 answer in. I've got it.

10 MR. GOLDSTEIN: All right. Well, all I will
11 tell you is this point about nonmutual offensive
12 collateral estoppel is a big deal. And that is when you
13 have the identical claim, identical legal theory,
14 identical operative facts, it -- so take away all of his
15 it's all very different, the premise of this case is
16 that it's all the same.

17 JUSTICE KAGAN: Can I take you back?

18 CHIEF JUSTICE ROBERTS: Well, that's the
19 same thing applies, just completely flipped. They could
20 be doing the same thing in Ohio, saying, we've got a lot
21 of plaintiffs here from California, but we're going
22 to -- we're going to let them sue in Ohio. And the same
23 thing's going to happen in every other State. I don't
24 see that it increases the efficiency at all.

25 MR. GOLDSTEIN: Oh, well, sir, remember,

1 the -- the -- an important part of our analysis is that
2 there is the governmental interest in that the
3 litigation in this forum does consolidate things and
4 make it simpler. The State's interest in having 600
5 cases litigated together rather than in 50 different
6 forums, it's material to our case that it does simplify
7 things.

8 But at the very least, the role of McKesson
9 here does distinguish California from every other State.
10 If they contract with a California company for the
11 nationwide distribution of this drug so that it's
12 perfectly understandable that the legal issues that
13 arise from that agreement and the distribution would be
14 in this forum, it's completely predictable and does
15 distinguish California from everyone else, everywhere
16 else.

17 JUSTICE KAGAN: Can I take you back to
18 Justice Breyer's question about Federal courts --

19 MR. GOLDSTEIN: Yeah.

20 JUSTICE KAGAN: -- and multidistrict
21 litigation? Because you didn't say something that makes
22 me think, if you didn't say it, I don't understand.
23 Assuming that there was subject matter jurisdiction,
24 that there's diversity, it still it seems to me that the
25 way -- there's no nationwide service of process here.

1 So the Federal courts have to mimic the State courts;
2 isn't that correct?

3 MR. GOLDSTEIN: Right. Then -- then I can
4 get to the end of your question, and that is it's
5 generally understood that it's the transfer of court's
6 specific personal jurisdiction. So if it's -- what
7 would happen, Justice Breyer is saying, is you would
8 have a lawsuit, a class action that would be removed to
9 Federal court, specific jurisdiction would exist under
10 Federal Rule of Civil Procedure 4K there. Then it would
11 be transferred for pretrial purposes to the MDL forum
12 and then returned for purposes of trial.

13 And so his point, I think, would be that it
14 would be okay in Federal court in the -- in the MDL
15 system.

16 My answer back is that there are still lots
17 of other objections about it being inconvenient, it's
18 not where he's at, there'd be choice of law issues that
19 does really -- a lot of the fairness concerns that
20 Mr. Katyal is talking about do arise in MDL, do arise in
21 the New Jersey example he gives of specific personal
22 jurisdiction. But at the very least, what I would say
23 is that the Court can write an opinion that simply says,
24 this is not your ordinary case. If it were your
25 ordinary case and McKesson wasn't in it, if the members

1 of the Court believed it, there wouldn't be
2 jurisdiction. But they made this conscious choice to go
3 into California with respect to this -- with respect to
4 this drug.

5 And then the other argument that I do think
6 has to be confronted is that, at the very least, the
7 Court has to consider that when it went to International
8 Shoe, it excluded the Pennoyer basis of jurisdiction,
9 which is the traditional power of the States from the
10 founding within their territory that always existed. It
11 doesn't seem unfair to me to say his clients did almost
12 a billion dollars' worth of business in the State of
13 California. They have enormous assets that they have
14 placed in the State. That they could be held liable up
15 to the extent of those assets is not a violation of due
16 process.

17 JUSTICE ALITO: If -- if I heard you
18 correctly, you said something about overruling cases; is
19 that right?

20 MR. GOLDSTEIN: If it were necessary to. We
21 do not think it's necessary to for multiple reasons,
22 including that if you just simply say that the Pennoyer
23 basis of jurisdiction exists, in addition to, the
24 International Shoe basis of jurisdiction, we clearly
25 would prevail up to at least being able to get the

1 Bristol-Myers assets in California.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Three minutes, Mr. Katyal.

4 REBUTTAL ARGUMENT OF NEAL K. KATYAL

5 ON BEHALF OF THE PETITIONER

6 MR. KATYAL: Thank you, Mr. Chief Justice.

7 JUSTICE SOTOMAYOR: Mr. Katyal, assume a set
8 of facts that I know have not been proven.

9 Bristol-Myers sells the drugs to McKesson. McKesson
10 distributes the drugs to all the other States, and all
11 of the plaintiffs have taken McKesson drugs.

12 Under your theory, could they sue McKesson
13 and Bristol-Myer in California?

14 MR. KATYAL: Well, they might or might not.
15 That's a purposeful availment stream-of-commerce theory,
16 which we're not trying to, you know, push here. That's
17 a very different thing.

18 JUSTICE SOTOMAYOR: Articulate --

19 MR. KATYAL: But I definitely --

20 JUSTICE SOTOMAYOR: -- your theory in a way
21 that it wouldn't implicate -- articulate your --

22 MR. KATYAL: So my --

23 JUSTICE SOTOMAYOR: -- proximate cause and
24 your causation theories --

25 MR. KATYAL: Justice --

1 JUSTICE SOTOMAYOR: -- in a way that
2 wouldn't preclude that suit.

3 MR. KATYAL: So, Justice Sotomayor, my
4 theory is exactly what this Court said in Rush, which is
5 why his argument in McKesson doesn't work.

6 It's, quote, plainly unconstitutional to
7 exert jurisdiction over one defendant based on the
8 activities of another. The requirements of
9 International Shoe must be met as to each.

10 So McKesson doesn't answer -- help him, nor
11 does it move the ball. You still have to show that the
12 underlying conduct by the defendant did something.

13 So, here when he talks about \$918 million,
14 we have no problem saying we're liable for the sales
15 over there. The question was -- what Justice Breyer was
16 asking is, what about Mr. Smith? You know, I'm selling
17 to Mr. Smith in Ohio, and, yes, I'm also separately
18 selling \$918 million in California, but you can't add
19 those two things up together and confer personal
20 jurisdiction. This Court has never done that, which is
21 why his rule is a novel one.

22 So as Justice Kennedy said, I think that one
23 of the goals here, here in this jurisprudence, has been
24 to stay State A has an interest in combining State B's
25 adjudicatory authority.

1 JUSTICE SOTOMAYOR: But -- but my real
2 problem is that -- following your theory, I'm not sure
3 what Bristol-Myers is doing there in the California
4 case. They -- they -- it was McKesson who sold the
5 drugs to the plaintiffs, not Bristol-Myers directly.

6 MR. KATYAL: But I think that when -- when
7 they make an arrangement with the distributor to -- to
8 launch drugs in a particular location, they're liable
9 for that. That's -- we've done ceded that below.
10 That's, I think, the way specific jurisdiction works.

11 The reason why Federal -- Federal actions
12 are permissible, and they could have been permissible
13 here, Justice Breyer, is because the Fifth Amendment and
14 the Fourteenth Amendment operate differently. Justice
15 Kennedy's point about State A and B doesn't apply to
16 Federal government vis-à-vis States.

17 And CAFA allows for jurisdiction right now
18 over these claims. The only reason we're not in Federal
19 Court right now, Justice Ginsburg, is because they filed
20 less than a hundred claims in each action. They
21 smirked them. But, ordinarily, these would be Federal
22 court actions right now. And the rule we are seeking
23 doesn't disturb that in any way, shape, or form. All we
24 are saying is that when they have unrelated claims,
25 uncausal claims in California to -- with respect to the

1 33 other States, that's something as to which the other
2 States have an interest.

3 And the predictability here is incredibly
4 important. Your -- your opinion in Hertz, for example,
5 picking up on the Chief Justice's question about
6 business predictability, is important. This is a
7 jurisdictional matter and clean rules for businesses to
8 follow are important. They need to know if I sell to
9 Mr. Smith, what happens? Their rule doesn't tell you.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

12 (Whereupon, at 11:09 a.m., the case in the
13 above-entitled matter was submitted.)

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