The Court of Appeals has counseled that "the interpretation of a Federal constitutional question by the lower Federal courts"—while not binding—"may serve as useful and persuasive authority." *People v. Garvin*, 30 N.Y.3d 174, 182 n.6 (2017) (quoting *People v. Kin Kan*, 78 N.Y.2d 54, 60 (1991)). That authority is crystal clear: The Second Circuit has "always required some *causal* relationship between an entity's in-forum contacts and the proceeding at issue." *del Valle Ruiz*, 939 F.3d at 530. In the Second Circuit, if "the defendant has had only limited contacts with the state . . . he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts," but if "the defendant's contacts with the jurisdiction that relate to the cause of action are more substantial, . . . the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury." *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018) (quoting *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998)).

Under that standard, specific jurisdiction would not lie over Ford and Goodyear. Their New York contacts in no way relate to this cause action, and what New York contacts they did have did not proximately cause Plaintiffs' injury.

"stemm[ed] from transactions that occurred in" other States); *see also Francis v. Bridgestone Corp.*, No. 2010/30, 2011 WL 2650599, at *7 (D.V.I. July 6, 2011) (finding stream-of-commerce theory inapposite in tire product-defect case where cause of action did not arise from the defendant's forum contacts).

See supra pp. 11-16; *cf. Kommer*, 2019 WL 2895384, at *2-3 (no specific jurisdiction over Ford "regarding the purchase of Ford trucks" in other States because the claims "are clearly unrelated in any way to Ford's activity within New York"). The Court should not break with the federal courts and create a situation where foreign defendants' amenability to suit in New York depends on whether a suit is filed in the New York Supreme Court or U.S. District Court. For this reason as well, this Court should reverse the Supreme Court.

C. The Stream Of Commerce Does Not Save The Supreme Court's Analysis.

The Supreme Court apparently believed that there was a nexus between Plaintiffs and U.S. Tires's claims and Ford and Goodyear's New York contacts because Ford and Goodyear placed the Explorer and tire "into the stream of commerce as a result of the[ir] purposeful business activities . . . in this state . . . targeted at New York residents," and that the Explorer and tire "wound up in New York, and harmed plaintiffs, residents of New York." R11; *see also* R12 ("Both third-party defendants assure the flow of their products to New York through their myriad assortment of purposeful activities in which they partake."). But the stream-of-commerce metaphor cannot bridge the divide between Ford and Goodyear's New York contacts and this cause of action.

First, the Supreme Court fundamentally misunderstood the stream of commerce. The metaphor "refers to the movement of goods from manufacturers

through distributors to consumers." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality op.). Or, as Justice Brennan put it, the stream of commerce is "the regular and anticipated flow of products from manufacture to distribution to retail sale." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring in part). Crucially, then, the stream of commerce ends with the product's first retail sale. *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 273 (5th Cir. 2006); *see also Schmitigal*, 2019 WL 4689228, at *4 ("[T]he stream of commerce discussion ends when a retailer makes a sale to a consumer.").

As the Oklahoma Supreme Court has held, the U.S. Supreme Court's recent cases reject a "totality of the contacts" approach to specific jurisdiction, and a third person's "unilateral choice" to bring a product into the forum "cannot serve as a basis for subjecting [a manufacturer] to suit" in the forum—even under a stream-of-commerce theory. *Montgomery v. Airbus Helicopters, Inc.*, 414 P.3d 824, 833-834 (Okla. 2018). Or, as the Utah Court of Appeals has explained, there is no specific jurisdiction under the stream of commerce when a case "does not involve the movement of manufactured goods through distribution channels to retail sale in the forum state." *Venuti v. Continental Motors Inc.*, 414 P.3d 943, 951 (Utah Ct. App. 2018). The stream-of-commerce metaphor therefore does not supply specific jurisdiction when a product arrives in a State "through a series of third-party

sales." *Id.* at 950; *see also Irvin v. Southern Snow Mfg., Inc.*, 517 F. App'x 229, 232 (5th Cir. 2013) (finding stream-of-commerce theory irrelevant where the defendant "sold the machine to a Louisiana customer and had no knowledge that, years later," the plaintiff "unilaterally transported it into Mississippi"). Or, as the Fourth Department has put it, the stream of commerce provides specific jurisdiction under the Due Process Clause only where the defendant "undertook the affirmative act of delivering its product to the ultimate purchaser in this State." *Prentice v. Demag Material Handling Ltd.*, 80 A.D.2d 741, 742 (4th Dep't 1981).

Ford and Goodyear here did not "target[ ]" the Explorer and tire at New York. R11. To the contrary, Ford and Goodyear could not have foreseen the products' movements once they exited the stream of commerce at their first retail sale outside New York. *See Seiferth*, 472 F.3d at 273. And although the Explorer and tire may have "wound up" in New York, R11, they did so through "a series of fortuitous circumstances independent of any distribution channel [Ford or Goodyear] employed," *D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 106 (3d Cir. 2009). To the extent that there was *any* stream of commerce here, it had long since dried up by the time Jose Aybar purchased the ten-year-old Explorer and the tire. It therefore cannot be used to find specific jurisdiction over Ford and Goodyear. *Cf. Schmitigal*, 2019 WL 4689228, at *4 (no

specific jurisdiction over Ford based on stream-of-commerce theory where "the plaintiff moved the vehicle into a different forum after its purchase").

Second, the stream-of-commerce theory has nothing to do with the arising-out-of prong of specific personal jurisdiction. The stream-of-commerce metaphor is a method of determining whether a nonresident defendant has contacts with the forum State. *See Nicastro*, 564 U.S. at 881-882 (plurality op.) ("[A] defendant's placing goods into the stream of commerce 'with the expectation that they will be purchased by consumers in the forum State' may indicate purposeful availment." (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980))). Even as the U.S. Supreme Court has fractured on the exact contours of the stream-of-commerce theory, the Justices agree on at least that. *See Asahi*, 480 U.S. at 112 (plurality) ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."); *id.* at 116 (Brennan, J. concurring in part and concurring in judgment) (reasoning that the placement of a product into the stream of commerce shows that a foreign defendant "purposely avail[ed] itself of the" forum's "market"); *Nicastro*, 564 U.S. at 886-887 (plurality op.) (finding the stream of commerce insufficient to evince purposeful availment); *id.* at 905 (Ginsburg, J., dissenting) ("In sum," the non-resident defendant "availed itself of the" forum State's market by "promot[ing] and sell[ing] its machines in the United States.").

But both the long-arm statute and the Due Process Clause require more than just *contacts*; they both mandate that "the plaintiff's claim . . . *arise out of or relate to* the defendant's forum conduct." *U.S. Bank Nat'l Ass'n*, 916 F.3d at 150 (emphasis added) (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1786); *see also Spir Star AG v. Kimich*, 310 S.W.3d 868, 874 (Tex. 2010) ("[S]pecific jurisdiction is limited to claims arising out of" the stream of commerce); *Montgomery*, 414 P.3d at 833 (rejecting stream-of-commerce metaphor where "[t]he adjudication of issues" does not "derive from" or is not "connected with, the very controversy that establishes jurisdiction"). Invoking the stream of commerce is not a way to "amend the general rule[s] of personal jurisdiction." *Nicastro*, 564 U.S. at 882 (plurality op.); *see also Schmitigal*, 2019 WL 4689228, at *4 ("The stream of commerce doctrine is not a tool by which a plaintiff may circumvent the . . . 'arises from' requirement for specific jurisdiction.").

The New York Supreme Court's cited cases are not to the contrary. The court cited *McGowan v. Smith* as suggesting that the stream of commerce can supply the necessary causal nexus regardless of "whether Ford or Goodyear sold the particular product directly to plaintiffs." R11. But *McGowan* says nothing of the sort. In *McGowan*, the foreign defendant placed a fondue pot into the stream of commerce, where it was sold at retail at a Buffalo department store and eventually injured the plaintiff in Ontario, Canada. 52 N.Y.2d at 270. The Court of Appeals

held there was not specific jurisdiction under the long-arm statute's transacting-business prong because "[i]t is well established . . . that the long-arm authority conferred by this subdivision does not extend to nondomiciliaries who merely ship goods into the State." *Id.* at 271. Moreover, although the plaintiff showed that the fondue-pot maker engaged in some business in New York—its representatives visited New York on marketing-research trips—those visits were not "sufficiently related to the subject matter of the lawsuit to justify the exercise of in personam jurisdiction under" CPLR 302(a)(1). *Id.* at 272-273.

McGowan thus *supports* dismissal here. Like the fondue-pot maker in *McGowan*, Ford and Goodyear cannot be found to have transacted business in New York merely through their sale of goods that happen to reach the State. And although Plaintiffs and U.S. Tires may have shown that Ford and Goodyear engage in *some* business in New York, they have not shown that that business is "sufficiently related to the subject matter of the lawsuit to justify the exercise of in personam jurisdiction under" CPLR 302(a)(1). *Id.* In fact, this case is even further afield than *McGowan*. In *McGowan*, the allegedly defective product was first sold at retail in New York. *Id.* at 270. Here, there is no evidence that the Explorer and tire were first sold at retail inside New York. R491, 147.

The Supreme Court next relied on *World-Wide Volkswagen v. Woodson*. R12. The court's preferred quotation from *World-Wide Volkswagen*—actually a

quotation from *Goodyear*, which was paraphrasing *World-Wide Volkswagen*—states that the "[f]low of a manufacturer's products into the forum . . . may bolster an affiliation germane to specific jurisdiction." R12 (quoting *Goodyear*, 564 U.S. at 927 (citing *World-Wide Volkswagen*, 444 U.S. at 297)). But *World-Wide Volkswagen* explains that the stream of commerce might make it "not unreasonable to subject" a foreign defendant "to suit in one of those States if its allegedly defective merchandise *has there been the source of injury to its owner or to others*." *World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added). *But see supra* p. 18 n.3 (explaining that the location of an injury is irrelevant). But here, Plaintiffs' injury occurred in Virginia, not New York. And *Goodyear*, the case in which the trial court's preferred paraphrase appears, goes on to explain that "[a] corporation's continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits *unrelated* to that activity." *Goodyear*, 564 U.S. at 927 (emphasis added and internal quotation marks omitted). Here, again, Ford and Goodyear's contacts with New York are unrelated to the cause of action. *See supra* pp. 10-23. The Supreme Court's paraphrased snippet from *World-Wide Volkswagen* has no bearing on this case.

The Supreme Court then "noted" two inapposite cases. R12. First, it noted that the Colorado Supreme Court denied general jurisdiction over Ford, but then remanded to determine whether the trial court had specific jurisdiction, in *Magill v.*

Ford Motor Co., 379 P.3d 1033 (Colo. 2016). R12. But the Colorado high court only did so because the trial court decided only the general-jurisdiction issue, and never considered specific jurisdiction. *Magill*, 379 P.3d at 1040. *Magill* has nothing to say about the specific-jurisdiction inquiry in this case.

Second, the trial court cited *Pitts v. Ford Motor Co.*, 127 F. Supp. 3d 676 (S.D. Miss. 2015), where the federal district court "ruled that Mississippi's long-arm statute subjected Ford to specific personal jurisdiction in that state." R12. True enough—but Mississippi's long-arm statute authorizes jurisdiction over foreign defendants who "commit a tort in whole or in part in this state against a resident or nonresident of this state." *Pitts*, 127 F. Supp. 3d at 681. And according to the district court, "the alleged tort was committed, in part, in Mississippi." *Id.* at 682. But CPLR 302(a)(1) is narrower; it contains no such tort-based geographical component. A decision under Mississippi's broader long-arm statute has nothing to say about the interpretation of New York's narrower one. *Cf. Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 380 (2014) (rejecting non-New York personal-jurisdiction cases that "involve[d] . . . personal jurisdiction statutes that are coextensive with the Federal Due Process Clause"). And beyond the long-arm statute, *Pitts* held as a matter of the Due Process Clause that personal jurisdiction *was not* proper over Ford in Mississippi when the allegedly defective product was not designed, manufactured, or first sold there, even though the accident occurred

in the State. 127 F. Supp. 2d at 685-686. *Pitts*, too, supports Ford and Goodyear, not Plaintiffs and U.S. Tires.

Finally, the Supreme Court cited a trifecta of cases to support the notion that "the nature of the business activities of the parties satisfies the requirement for an arguable nexus." R12 (citing *Al Rushaid*, 28 N.Y.2d 316; *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, 443 P.3d 407 (Mont. 2019); and *Thomas v. Ford Motor Co.*, 289 F. Supp. 3d 941 (E.D. Wis. 2017)). None do. *Al Rushaid* concerned claims arising out of a money-laundering scheme using New York bank accounts. 28 N.Y.3d at 327-328. And *Al Rushaid* reinforces the New York and constitutional rule that "the cause of action" must "arise from the contacts with New York." *Id.* at 329. The cause of action there was closely linked to the New York contact: "[T]he money laundering could not proceed without the use of the correspondent bank account" in New York. *Id.* at 330. Here, by contrast, the cause of action has *nothing* to do with Ford and Goodyear's New York contacts. *See supra* pp. 17-19.

Ford Motor Company v. Montana Eighth Judicial District Court, meanwhile, concerned the exercise of specific jurisdiction over a tort that occurred in the forum State. 443 P.3d at 483; *see also id.* at 491 ("[W]e now hold that if a defendant's

actions resulted in the accrual of a tort action in Montana . . . ."). But the accident here did not occur in New York. *See supra* pp. 4-5.[5]

And the Supreme Court's final case, *Thomas v. Ford Motor Company*, is just wrong. The federal district court there held that "[t]he fact that Ford did not initially sell the . . . Ford Flex in Wisconsin is wholly irrelevant to the personal jurisdiction inquiry" and that specific jurisdiction could be proper based on Ford's marketing and selling of *other* cars in Wisconsin. 289 F. Supp. 3d at 947-948. Not so: "[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a *claim unrelated* to those sales." *Goodyear*, 564 U.S. at 930 n.6 (emphasis added); *see also Bristol-Myers Squibb*, 137 S. Ct. at 1781 ("When there is no . . .connection" between a defendant's contact and the cause of action, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."); *Spir Star AG*, 310 S.W.3d at 875 (selling "similar products" in the State does not create a "connection as to products that were not"); *Krajewski*, 111 A.D.2d at 906 (no jurisdiction over truck manufacturer

[5] Moreover, this case is on shaky ground. In January, the U.S. Supreme Court granted certiorari to review the opinion of the Montana high court. *See Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, No. 19-368, 2020 WL 254155 (Jan. 17, 2020) (mem). The Supreme Court reversed roughly 65% of the cases it heard during its October 2018 Term. *See* SCOTUSblog, *Final Stat Pack for October Term 2018: Circuit Scorecard*, *available at* https://bit.ly/30WWBqO (last visited February 3, 2020). But this Court need not wait for the Supreme Court's decision because (1) there is no specific jurisdiction under the long-arm statute and (2) even if the Montana decision were affirmed, this case is distinguishable.

that sold other models of the truck in New York); *see also* Michael Fabiani, *Post-Daimler AG v. Bauman: Stretching the Bounds of Specific Jurisdiction*, 60 No. 3 DRI For Def. 40 (Mar. 2018) (noting the *Thomas v. Ford Motor Company* opinion "has the feel of a court blurring the line between general and specific jurisdiction" and "given that the remaining facts show little connection between Ford and this specific vehicle in Wisconsin[,] [w]e would not be surprised if this result is ultimately reversed on appeal"). This Court should not follow an erroneous non-New York trial court decision.

CONCLUSION

For the foregoing reasons, the Supreme Court's order should be reversed.

Respectfully submitted,

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February 11, 2020

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—Second Department

JOSE AYBAR and JOSE AYBAR as Administrator of THE ESTATE OF CRYSTAL CRUZ-AYBAR,

Plaintiffs,

– and –

ORLANDO GONZALES, JESENIA AYBAR as Administrator of THE ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR as Legal Guardian on behalf of K.C., a minor, ANNA AYBAR and JESENIA AYBAR as Administratrix of THE ESTATE OF T.C.,

Plaintiffs-Respondents,

– against –

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Defendant-Respondent.

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Third-Party Plaintiff-Respondent,

– against –

THE GOODYEAR TIRE & RUBBER COMPANY and FORD MOTOR COMPANY,

Third-Party Defendants-Appellants,

– and –