IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.* HECTOR H. BALDERAS, ATTORNEY GENERAL,
Plaintiff-Respondent,

v.

GILEAD SCIENCES, INC., GILEAD SCIENCES, LLC, and TEVA PHARMACEUTICALS USA, INC.,
Defendants-Petitioners,

No. S-1-SC-39381

and

BRISTOL MYERS SQUIBB,
Defendant.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* SUPPORTING THE PETITIONERS

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The Chamber of Commerce of the United States of America ("Chamber") and the American Tort Reform Association ("ATRA") respectfully request leave to file the accompanying brief as *amici curiae* in support of the petitioners in *New Mexico v. Gilead Sciences, Inc.*, Case No. S-1-SC-39381. *See* Attachment A.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that concern the Nation's business community. The Chamber has filed *amicus* briefs in many of the leading cases addressing the permissible scope of specific personal jurisdiction. *See, e.g.*, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021); *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (plurality opinion); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their

resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues.

Both the Chamber and ATRA have a substantial interest in ensuring that courts enforce the protections the Due Process Clause affords to out-of-state defendants. Predictable jurisdictional rules are essential for enabling businesses to make rational investment decisions, comply with applicable laws and regulations, and otherwise structure their affairs. In this case, the trial court exercised specific personal jurisdiction over several out-of-state pharmaceutical companies based on the impermissibly sweeping "stream of commerce" theory advanced in *Sproul v. Rob & Charlies, Inc.*, 304 P.3d 18 (N.M. Ct. App. 2012), a sharply divided appellate decision involving products liability. *Sproul* permits the exercise of specific personal jurisdiction over any company whose products are sold nationwide in any State—even if the company has established no deliberate contacts with that State. *Sproul*'s theory of specific personal jurisdiction would thus make it impossible for businesses to predict where they will be sued and tailor their conduct accordingly, especially if that theory is extended from products liability to the sort of antitrust claims at issue here.

As explained below, such a theory is irreconcilable with U.S. Supreme Court precedent, including the Court's most recent decision in *Ford Motor Company v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021). And the Chamber and ATRA are uniquely situated to assist the Court in understanding how any departure from that binding precedent will impact the business community.

In accordance with New Mexico Rule of Appellate Procedure 12-302(E)(2), a State Bar Registration Certificate of Non-Admitted Lawyer and An Affidavit by Non-Admitted Counsel are included as Attachment B.

Accordingly, the Chamber and ATRA respectfully request leave to file the attached brief of *amici curiae* in support of the Petitioners.

Respectfully submitted,
By: */s/ William R. Levi*

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2023, a true and correct copy of the foregoing was served upon all counsel entitled to receive notice via the Court's e-file and serve system, as more fully described in the Notice of Electronic Filing.

By: */s/ William R. Levi*
William R. Levi

Attachment A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* SUPPORTING THE PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that concern the Nation's business community. The Chamber has filed *amicus* briefs in many of the leading cases addressing the permissible scope of specific personal jurisdiction.[1] *See, e.g.*, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021); *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (plurality opinion); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and

[1] Pursuant to N.M. R. App. P. 12-320(C), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* notified counsel for the parties of their intention to file this brief on January 12, 2023.

professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues.

Both the Chamber and ATRA have a substantial interest in ensuring that courts enforce the protections the Due Process Clause affords to out-of-state defendants. Predictable jurisdictional rules are essential for enabling businesses to make rational investment decisions, comply with applicable laws and regulations, and otherwise structure their affairs. In this case, the trial court exercised specific personal jurisdiction over several out-of-state pharmaceutical companies based on the impermissibly sweeping "stream of commerce" theory advanced in *Sproul v. Rob & Charlies, Inc.*, 304 P.3d 18 (N.M. Ct. App. 2012), a sharply divided appellate decision involving products liability. *Sproul* permits the exercise of specific personal jurisdiction over any company whose products are sold nationwide in any State—even if the company has established no deliberate contacts with that state. *Sproul*'s theory of specific personal jurisdiction would thus make it impossible for businesses to predict where they will be sued and tailor their conduct accordingly, especially if that theory is extended from products liability to the sort of antitrust claims at issue here.

As explained below, *Sproul*'s theory is irreconcilable with U.S. Supreme Court precedent, including the Court's most recent decision in *Ford Motor Company v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021). And the Chamber and ATRA are uniquely situated to assist the Court in understanding how any departure from that binding precedent (and further extension of *Sproul*'s reasoning) will impact the business community. Therefore, they now respectfully submit this *amici curiae* brief in the hope that their experience litigating the issue of specific personal jurisdiction in the U.S. Supreme Court and courts across the Nation will assist this Court in resolving the question presented and ensuring that the requirements of due process apply with full force in New Mexico courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment limits a State's power to exercise personal jurisdiction over a nonconsenting out-of-state defendant. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945). The extent of a State's authority to do so depends on a "defendant's relationship to the forum State." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1779. For this reason, U.S. Supreme Court decisions have recognized two types of personal jurisdiction: "general" (or "all-purpose") jurisdiction and "specific" (or "case-linked") jurisdiction. *See Goodyear*, 564 U.S. at 919. When an out-of-state defendant's in-state activities do not suffice to make it "essentially at home" in the forum State,

as *general* jurisdiction requires, a State may still exercise *specific* jurisdiction over the defendant—"but only as to a narrower class of claims." *See Ford Motor Co.*, 141 S. Ct. at 1024–25.

Federal due process imposes two fundamental conditions on the "narrower class of claims" over which a State may exercise specific jurisdiction. *First*, a defendant must have sufficient contacts with the forum State such that the defendant can be said to have "purposefully avail[ed] itself of the privilege of" doing business there. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). *Second*, there must be a "substantial connection" between the defendant's forum contacts and the plaintiff's claims. *Walden*, 571 U.S. at 284; *see also Bristol-Myers Squibb Co.*, 137 S. Ct at 1780 (a plaintiff's claims "must arise out of or relate to the defendant's contacts" (alterations omitted)). Satisfying these two conditions, the U.S. Supreme Court has explained, is necessary to promote the "two sets of values" that underly the specific-jurisdiction doctrine: "treating defendants fairly" and "protecting interstate federalism." *Ford Motor Co.*, 141 S. Ct. at 1025 (quotation marks omitted).

Here, by relying on *Sproul*'s expansive "stream of commerce" theory to exercise specific jurisdiction over an antitrust complaint challenging *out-of-state* conduct by *nonresident* pharmaceutical companies, the trial court disregarded these constitutional values—and the jurisdictional rules crafted to protect them.

The thrust of the complaint was that the pharmaceutical companies, petitioners here, engaged in anticompetitive conduct that led other companies to charge excessive prices for HIV medications in New Mexico, thereby causing the State's Medicaid agency to pay excessive reimbursements. In other words, the trial court's exercise of personal jurisdiction was predicated not on petitioners' own purposeful availment of New Mexico's market but rather, as *Sproul* purports to allow, on the downstream commercial effects of petitioners' allegedly anticompetitive conduct.

Sproul's untethered "stream of commerce" theory of specific jurisdiction is irreconcilable with U.S. Supreme Court precedent. In particular, it eliminates a plaintiff's need to show that an out-of-state defendant's contacts with the forum State rise to the level of "purposeful availment." And by dispensing with the proper minimum-contacts analysis (which also vitiates the substantial-connection requirement), *Sproul* subverts the constitutional values of fairness and federalism that underly these rules. If adopted by this Court, and especially if extended beyond products liability to the antitrust context, *Sproul*'s theory will impose needless costs and uncertainty on businesses across the Nation, leading to higher prices and fewer choices for New Mexico consumers.

The Court should vacate the ruling below and direct the trial court to grant petitioners' motion to dismiss for lack of personal jurisdiction.

ARGUMENT

I. *Sproul*'s Pure "Stream of Commerce" Theory Conflicts With U.S. Supreme Court Precedent.

The U.S. Supreme court has repeatedly (and recently) reaffirmed that a state court's exercise of specific personal jurisdiction is limited to those instances in which a plaintiff can show both (i) that a defendant has "purposefully avail[ed] itself of" the forum State, and (ii) that "the plaintiff's claims . . . arise out of or relate to the defendant's contacts with the forum." *Ford Motor Co.*, 141 S. Ct. at 1024–25 (quotation marks omitted). By permitting courts to predicate specific jurisdiction on the downstream commercial consequences of a defendant's activity and *not* the defendant's own contacts with the forum State, *Sproul*'s pure "stream of commerce" theory eviscerates the first of these conditions, renders the second meaningless, and subverts the constitutional values of fairness and interstate federalism that these conditions are meant to safeguard.

A. *Sproul*'s Pure "Stream Of Commerce" Theory Conflicts With U.S. Supreme Court Precedent Requiring Purposeful Availment.

It has "long been settled" that a state court may exercise specific "personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (citation omitted). These requisite contacts "often go by the name of 'purposeful availment.'" *Ford Motor Co.*, 141 S. Ct. at 1024 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475

(1985)). In other words, an out-of-state defendant must have taken "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State" before the exercise of specific personal jurisdiction is appropriate. *Hanson*, 357 U.S. at 253. As explained below, *Sproul*'s expansive "stream of commerce" theory negates this requirement.

The U.S. Supreme Court has held that purposeful availment must entail conduct by the defendant that deliberately targets the forum State, thereby "invoking the benefits and protections of [that State's] laws." *Id.* (quoting *Int'l Shoe Co.*, 326 U.S. at 319). Importantly, this means that purposeful availment can only "arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden*, 571 U.S. at 284. For this reason, "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id.* at 286. And so an "injury to a forum resident is not a sufficient connection to the forum." *Id.* at 290. The "defendant's conduct" must be connected to the forum, "not just to a plaintiff who lived there." *Id.*; *see also Bristol-Myers Squibb Co.*, 137 S. Ct. at 1783 (out-of-state defendant's contract with in-state drug distributor "is not enough to establish personal jurisdiction in the State").

Along the same lines, a defendant's "random, isolated, or fortuitous" contacts with the forum State cannot constitute purposeful availment. *See Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984). So a single contract with an in-

state plaintiff does not "automatically establish sufficient minimum contacts in the [plaintiff's] home forum." *Burger King Corp.*, 471 U.S. at 478. But "entering a contractual relationship that 'envision[s] continuing and wide-reaching contacts' in the forum State" could well suffice. *Walden*, 571 U.S. at 285 (citation omitted). Likewise, the isolated "sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place." *Nicastro*, 564 U.S. at 888–89 (2011) (Breyer, J., concurring in judgment).

Nor is it ever "enough that the defendant might have *predicted* that its goods will reach the forum State." *Id*. at 882 (plurality opinion) (emphasis added); *see also id.* at 889 (Breyer, J., concurring in judgment). As the U.S. Supreme Court has explained, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State," but instead "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297. Put differently, "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum." *Nicastro*, 564 U.S. at 882 (plurality opinion).

Sproul's "stream of commerce" theory repudiates these settled rules. The lead opinion in *Sproul* held that New Mexico courts could exercise specific personal jurisdiction over a foreign bicycle parts manufacturer that took no steps (either direct or indirect) to target or exploit the New Mexico market. *Sproul*, 304 P.3d at 28–29 (Opinion of Vanzi, J.).[2] To be sure, *Sproul* did not purport to jettison purposeful availment as the governing test; instead, *Sproul* characterized the "stream of commerce theory" as an independent basis for establishing purposeful availment, rejecting the idea that purposeful availment requires "a defendant [to] take additional acts directed at the forum state or have actual knowledge that its products are marketed there." *See id.* at 25, 29. Thus, *Sproul* held that whenever the "manufacturer of an allegedly defective component part . . . has otherwise placed it into a distribution channel with the expectation it will be sold in our national market," the manufacturer cannot defeat jurisdiction "simply because it does not specifically target or know its products are being marketed in" the forum State. *Id.* at 29.

[2] *Sproul* itself did not result in a controlling opinion—one judge dissented, *see* 304 P.3d at 36 (Kennedy, J., dissenting in part) and another specially concurred in the result, *see id.* at 35 (Vigil, J., specially concurring). Here, Respondent based its jurisdictional argument on the "stream of commerce" analysis in Judge Vanzi's lead opinion. *See* Pls.' Mem. In Opp. To Defs.' Mot. To Dis. at 6, *New Mexico v. Gilead Sciences, Inc*., No. D-101-cv-2021-00377 (N.M. Santa Fe Cnty. Ct. Sept. 17, 2021). Unless otherwise noted, therefore, this brief's discussion of *Sproul* refers only to the lead opinion.

To begin with, *Sproul* misunderstood the U.S. Supreme Court's use of the "stream of commerce" metaphor. That phrase does not denote any independent "theory" for establishing purposeful availment, as *Sproul* supposed. *Cf. Nicastro*, 564 U.S. at 877 (plurality opinion) (reversing state court whose reliance on "'stream of commerce' metaphor carried [its] decision far afield"). Indeed, the U.S. Supreme Court has only ever *rejected* assertions of specific personal jurisdiction predicated solely on the downstream sale of a defendant's goods by third parties in the forum State. *See generally Nicastro*, 564 U.S. 873; *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102 (1987) (plurality opinion); *see Nicastro*, 564 U.S. at 891 (Breyer, J., concurring in judgment) (noting that the U.S. Supreme Court "has rejected the notion that a defendant's amenability to suit travels with the chattel" (cleaned up)).[3]

Instead, the U.S. Supreme Court has made clear that the flow of a manufacturer's products into the forum State is—rather than an independent basis or "theory" for establishing jurisdiction—simply probative evidence that can "bolster" the case for specific jurisdiction. *See Daimler AG v. Bauman*, 571 U.S. 117, 132 (2014) (quoting *Goodyear*, 564 U.S. at 927); *see also Nicastro*, 564 U.S. at 881–83 (plurality opinion) ("a defendant's placing goods into the stream of

[3] Although neither *J. McIntyre* nor *Asahi* produced a majority opinion, the U.S. Supreme Court rejected the state court's assertion of specific personal jurisdiction in each case by votes of 6-3 and 9-0 respectively.

commerce 'with the expectation that they will be purchased by consumers in the forum State' *may indicate* purposeful availment" (emphasis added) (quoting W*orld-Wide Volkswagen*, 444 U.S. at 298)). But this means that there still must be other evidence of purposeful availment to "bolster"—a concept "often called the 'stream of commerce plus' theory." *E.g.*, 4 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1067.1 (4th ed. 2022).

U.S. Supreme Court decisions bear out the way in which evidence regarding the flow of a defendant's goods into the forum State may "bolster"—but not supplant—purposeful availment. For instance, the Court has held that "specific jurisdiction may lie over a foreign defendant that places a product into the 'stream of commerce,' [*and*] *also* 'design[s] the product for the market in the forum State, advertis[es] in the forum State, [or] establish[es] channels for providing regular advice to customers in the forum State." *Daimler*, 571 U.S. at 128 n.7 (emphasis added) (quoting *Asahi*, 480 U.S. at 112 (plurality opinion)). Likewise, the Court has held that a California-based magazine could be sued for libel in New Hampshire (where copies of the magazine circulated) given *additional* evidence demonstrating the magazine had "continuously and deliberately exploited the New Hampshire market." *Keeton*, 465 U.S. at 780–81 (noting monthly circulation of 10,000 to 15,000 copies of the magazine in New Hampshire); *see also World-Wide Volkswagen Corp.*, 444 U.S. at 297 (holding

that jurisdiction based on in-state sales would be permissible if the sales "arise[] from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in" that State).

As these cases make clear, the fact that a defendant's products reach the forum State via the stream of commerce may "bolster" a case for specific jurisdiction, but it does not relieve a plaintiff of otherwise showing more—namely, that the defendant has deliberately targeted the forum State in some way. And for good reason. As explained above, purposeful availment requires *deliberate*—not random or fortuitous—contacts with the forum *by the defendant*. *See supra* at 7–8. And it is not enough for specific jurisdiction that a defendant might *predict* or *expect* that one of its products will wind up in the forum State. *See supra* at 8. Thus, a manufacturer's placement of goods in the stream of commerce bound for the national market cannot, by itself, constitute a sufficient basis for specific personal jurisdiction whenever independent third parties sell those goods in the forum State. *Sproul* erred in holding otherwise.

The U.S. Supreme Court's recent decision in *Ford Motor Company* is not to the contrary. In fact, that decision exemplifies the sort of additional evidence that suffices to show purposeful availment of the forum State. There, the Court highlighted not only Ford's in-state advertising (*e.g.*, "[b]y every means imaginable . . . Ford urges Montanans and Minnesotans to buy its vehicles") and

sales (*e.g.*, "Ford cars . . . are available for sale, whether new or used, throughout the States, at 36 dealerships in Montana and 84 in Minnesota"), but also Ford's additional efforts "to foster ongoing connections to its cars' owners" within the forum States, including by "regularly maintain[ing] and repair[ing] Ford cars" and "distribut[ing] replacement parts both to its own dealers and to independent auto shops in" those States. 141 S. Ct. at 1028.

Although *Ford Motor Company* was not a close case when it comes to purposeful availment, the decision's analysis adds color to what the Court means by the requirement that a defendant must "exploit[] a State's market" such that it should "reasonably anticipate being haled into that State's courts." *Id.* at 1027 (cleaned up). There was no question, after all, that the vehicles in *Ford Motor Company* were released into the stream of commerce and ultimately wound up (and caused injuries) in the forum States. But the decision never suggests that such facts alone could serve as a sufficient basis for finding purposeful availment. Instead, the Court's analysis underscores how far afield its conception of purposeful availment is from the boundless "stream of commerce" theory advanced in *Sproul*.

In sum, by permitting the exercise of specific jurisdiction based only on a defendant's placement of goods in the stream of commerce bound for a national market, *Sproul*'s theory eliminates the need to show that a defendant has taken

deliberate steps to avail itself of the privilege of doing business in the forum State. Just consider the facts of this case. Petitioners' allegedly anticompetitive conduct—including patent lawsuits, settlements, and marketing decisions—took place entirely outside New Mexico. Nor did that conduct target the forum in any way. Put simply, petitioners did not purposefully avail themselves of the privilege of doing business in New Mexico in any meaningful sense.

Yet, under *Sproul*, the trial court's exercise of specific personal jurisdiction was proper on the ground the State's Medicaid agency suffered harm when independent third parties sold petitioners' allegedly overpriced medications within the State. Such a theory renders purposeful availment, as the U.S. Supreme Court has defined it, a dead letter.[4] And this Court should decline to adopt it—let alone extend it to a new context, as the trial court did here.

B. *Sproul*'s Pure "Stream Of Commerce" Theory Subverts The Values Of Fairness And Federalism Underlying The Doctrine Of Specific Personal Jurisdiction.

By jettisoning purposeful availment and permitting a state court to exercise jurisdiction where a defendant's deliberate contacts with the forum are non-

[4] By eliminating purposeful availment—and the minimum contacts that test requires—*Sproul*'s "stream of commerce" theory also renders meaningless the requirement that there be a "substantial connection" between the plaintiff's claims and the defendant's contacts with the forum. *Walden*, 571 U.S. at 284. That is, if jurisdiction may lie where a defendant has not established *any* deliberate contacts with the forum, as *Sproul* allows, then any connection between the plaintiff's claims and the defendant's forum contacts in such a case will be non-existent.

existent (or tenuous), *Sproul* undercuts the specific jurisdiction doctrine's "underlying values of ensuring fairness and protecting interstate federalism." *Ford Motor Co.*, 141 S. Ct. at 1025 n.2.

As the U.S. Supreme Court recently reiterated in *Ford Motor Company*, the rules constraining a state court's exercise of specific jurisdiction promote important constitutional values. *Id.* at 1025. *First*, they guarantee "fair warning" to defendants by insisting on "reciprocity between a defendant and a State." *Id.* That is, "[w]hen (but only when) a company 'exercises the privilege of conducting activities within a state[,]' . . . the State may hold the company to account for *related* misconduct." *Id.* (emphasis added); *see also Nicastro*, 564 U.S. at 881 (plurality opinion) (specific jurisdiction is a "limited form of submission to a State's authority," whereby a defendant subjects itself "to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State"). If a State could instead exercise jurisdiction over the company regarding conduct unrelated to the company's deliberate forum contacts, the requisite reciprocity would vanish, and States could assert the sort of in-for-an-ounce, in-for-a-pound theory that "elide[s] the essential difference between case-specific and . . . general jurisdiction," *Goodyear*, 564 U.S. at 927 (cleaned up), and is anathema to

"traditional notions of fair play and substantial justice," *Int'l Shoe Co.*, 326 U.S. at 316–17.

Second, the rules governing specific jurisdiction "protect[] 'interstate federalism.'" *Ford Motor Co.*, 141 S. Ct. at 1025 (citation omitted). That is, they "ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy." *Id.* (citation omitted). This is by no means a secondary consideration, and, "at times, this federalism interest may be decisive" of the jurisdictional inquiry. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780. In other words, "[o]ne State's 'sovereign power to try' a suit . . . may prevent 'sister States' from exercising their like authority." *Ford Motor Co.*, 141 S. Ct. at 1025 (citation omitted).

Sproul's sweeping "stream of commerce" approach undercuts both constitutional values highlighted in *Ford Motor Company*. As to fairness, the pure "stream of commerce" theory permits a state court to exercise jurisdiction even where a defendant has not *deliberately* "exercise[d] the privilege of conducting activities within a state." *Id.* Under such a regime, "[t]he owner of a small Florida farm" who "sell[s] crops to a large nearby distributor . . . who might then distribute them to grocers across the country . . . could be sued in Alaska or any number of other States' courts without ever leaving town." *Nicastro*, 564 U.S. at 885 (plurality opinion). There is no meaningful "reciprocity between a defendant

and a State" or the concomitant "fair warning" when the Florida farmer—or one of the petitioners here for that matter—is haled into court in some far-flung State simply because an independent third party sold its products there.

As to federalism, *Sproul*'s "stream of commerce" theory effectively empowers "States with 'little legitimate interest' in a suit" to assert jurisdiction to the detriment of "States more affected by the controversy." *Ford Motor Co.*, 141 S. Ct. at 1025 (citation omitted). After all, the crux of *Sproul*'s "stream of commerce" theory is that specific jurisdiction may be asserted wherever the "stream of commerce" foreseeably carries a product, even when a defendant did not take any "additional acts directed at the forum state or have actual knowledge that its products are marketed there." 304 P.3d at 29. The theory therefore authorizes the State where a product is eventually sold to exercise jurisdiction even if some other State is vastly "more affected by the" underlying unlawful conduct. This gets specific jurisdiction backwards by focusing on the locus of the injury rather than the defendant's contacts with the forum. *See Walden*, 571 U.S. at 290 ("[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way"). Worse, it wholly disregards the "interests . . . of the States in relation to each other." *Ford Motor Co.*, 141 S. Ct. at 1025.

This case exemplifies the federalism implications of *Sproul*'s analysis. Respondent's antitrust complaint alleged anticompetitive conduct involving petitioners' patent litigation and settlements, their joint venture, and their development of certain HIV medications. That conduct occurred primarily in California and New York—not New Mexico. Nor was the alleged anticompetitive harm in any way unique to New Mexico; the alleged anticompetitive injury—payment of higher Medicaid reimbursements—could presumably have been asserted by the Medicaid agency of any State where petitioners' drugs were sold. There is thus little doubt that the New Mexico trial court's exercise of jurisdiction over this dispute may "encroach on States more affected by the controversy," *id.*, such as New York or California (where, in fact, two petitioners have their principal places of business and closely related litigation is already ongoing).

In sum, adopting *Sproul*'s unbounded "stream of commerce" approach to specific jurisdiction would impair the constitutional values the requirements for specific personal jurisdiction are meant to preserve. This Court should instead uphold fundamental fairness and interstate federalism and reject *Sproul*'s approach.

II. Adopting *Sproul*'s Pure "Stream Of Commerce" Theory Will Impose Needless Costs And Uncertainty On Businesses Throughout The Nation.

Based on the experience of the Chamber, ATRA, and their respective members, the rules cabining a state court's assertion of specific personal

jurisdiction provide much-needed clarity and predictability to the business community. Undercutting those rules by adopting *Sproul*'s reasoning—and extending it from products liability to antitrust—will harm businesses throughout the Nation, ultimately leading to higher prices and fewer choices for consumers.

To begin with, it is impossible to overstate the extent to which "[p]redictability is valuable" when it comes to making rational "business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Only if personal jurisdiction hinges on a company's own, deliberate actions targeting or exploiting a State's market—rather than on the downstream effects of sales by third parties in that forum—will a company have "clear notice" enabling it to predict where it may be exposed to suit. *Burger King Corp.*, 471 U.S. at 475 n.17 (quoting *World-Wide Volkswagen*, 444 U.S. at 297); *see also Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 14 (2015) ("Jurisdictional rules should be clear." (alteration omitted)). And only then can the company "do something about that exposure" and take steps "to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are [still] too great, severing its connection with the State" altogether. *Ford Motor Co.*, 141 S. Ct. at 1027.

Today's economy, moreover, is increasingly national—even global. Businesses both large and small now routinely sell products across state and

international borders, including indirect sales through third-party distributors and other supply-chain partners. And goods of all kinds—such as computers, smart phones, automobiles, and even medicines—incorporate myriad components made throughout the world. For example, a report tracking the iPhone's supply chain identified 785 different suppliers in 31 countries. *See* Ian Barker, *The Global Supply Chain Behind the iPhone 6*, BetaNews (2014), https://betanews.com/2014/09/23/the-global-supply-chain-behind-the-iphone-6/. A similar analysis from just over a decade ago evaluated only a few of the hundreds of components in a typical laptop computer and identified: (1) a processor made in Arizona by Intel, (2) a body made in China by Taiwan-based Catcher Technology, (3) a display made in Korea by LG Display, (4) a hard drive made in Thailand by Hitachi, (5) RAM made in Boise by Micron Technology, (6) a wireless card made in either Germany, China Taiwan, or Singapore (likely by one of GlobalFoundries, Semiconductor Manufacturing International Corporation, United Microelectronics, or TSMC), and (7) a graphics chipset made in Taiwan by TSMC but branded by Nvidia. *See* Josh Fruhlinger, *Where Did I Come From? The Origin(s) of My MacBook Pro*, Computerworld (May 7, 2012), https://www.computerworld.com/article/2504001/where-did-i-come-from--the-origin-s--of-my-macbook-pro.html.

Of course, in most cases, these component suppliers have "little control"—if *any*—"over the final destination of [their] products once they [are] delivered into the stream of commerce." *Nicastro*, 564 U.S. at 908 (Ginsburg, J., dissenting) (quoting *A. Uberti & C. v. Leonardo*, 892 P.2d 1354, 1361 (Ariz. 1995)). And even the end-product manufacturers may not know where those products will end up if, as is the case here, they rely on third-party distributors who take title to the products and sell and set prices independently. Nonetheless, under *Sproul*'s pure "stream of commerce" approach, all of these businesses may be sued anywhere the end products are ultimately sold by third-party distributors or retailers.

The costs of adopting such a rule would be disastrous, especially given that, here, the trial court extended *Sproul*'s "stream of commerce" theory—typically associated with products-liability claims—to antitrust litigation. To be clear, the pure "stream of commerce" theory applied in *Sproul* is never consistent with due process. *See supra* at 6–18. But at least exposure to suit for product defects is limited (if only as a practical matter) by the need to identify an in-state plaintiff actually injured by the defective product. *Cf. Bristol-Myers Squibb Co.*, 137 S. Ct. at 1782. For antitrust violations, the anticompetitive injury may be incurred by any consumer who purchases the product at issue—or, as in respondent's case, anyone indirectly but adversely affected by those purchases. Thus, extending *Sproul* to antitrust, a business could be haled into state court

based on alleged anticompetitive activity wherever the downstream economic effects of that activity are felt even if the business had no intention to avail itself of those jurisdictions or any control over the sales of its products there.

Unable to predict where they might be subject to suit, businesses would be forced to learn not only the "law of every State, but also the wide variance in the way courts within different States apply that law." *Nicastro*, 564 U.S. at 892 (Breyer, J., concurring in judgment). Small and medium-sized manufacturers or component suppliers may well lack the resources to make those kinds of complex legal and factual assessments or procure expensive insurance coverage. To avoid such costs, even large businesses may have no choice but to contractually prohibit distributors and supply-chain partners from selling products in specific States—and even that might be insufficient if goods are eventually resold in those jurisdictions. U.S. manufacturers might then seek to limit their exposure to nationwide jurisdiction by restricting the size or number of the distributors with which they deal. Foreign manufacturers might even avoid selling to U.S. or New Mexico distributors completely. The inevitable result of these defensive measures is that New Mexico consumers will have fewer choices. And the higher costs borne by businesses that do not restrict their operations in this State will simply be passed on to those consumers in the form of higher prices.

CONCLUSION

For all these reasons, the Court should vacate the decision below and remand with instructions to dismiss for lack of personal jurisdiction.

Respectfully submitted,

By: */s/ William R. Levi*

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CERTIFICATE OF COMPLIANCE

As required by Rule 12-318(G), I certify that the foregoing brief complies with the type-volume limitation of N.M. R. App. P. 12-318(F)(3). According to Microsoft Office Word 2016, the body of this brief, as defined by Rule 12-318 (F)(3), contains 5,222 words.

/s/ *William R. Levi*
William R. Levi

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2023, a true and correct copy of the foregoing *Brief of the Chamber of Commerce of the United States of America and the American Tort Reform Association as* Amici Curiae *Supporting the Petitioners* was served upon all counsel entitled to receive notice via the Court's e-file and serve system, as more fully described in the Notice of Electronic Filing.

By: */s/ William R. Levi*
William R. Levi

Attachment B

STATE BAR of NEW MEXICO

Office of the General Counsel
PO Box 92860, Albuquerque, NM 87199-2860
5121 Masthead St NE, Albuquerque, NM 87109

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REGISTRATION CERTIFICATE OF NON-ADMITTED LAWYER

(Admission Pro Hac Vice)

I, Jose Manuel Valle (Non-admitted Lawyer), certify pursuant to Rule 24-106 NMRA the following:

Attorney Information

Attorney's Name: Jose Manuel Valle
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Attorney's Firm: Sidley Austin LLP
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Street: 1501 K St NW
E-mail: manuel.valle@sidley.com

Action/Suit/Proceeding or Matter

Bold/Underlined Required

Title of case/Client Name/Identifier: New Mexico v. Gilead Sciences, et al.
Local Counsel: Mr. William Raney Levi
Case # (if any): S-1-SC-39381
Court (if any): New Mexico Supreme Court

Attorney Certification *(check all that apply)*

1. ■ I am admitted or licensed as an attorney in good standing in: District of Columbia; Michigan
   Enclosed is a Certificate of Good Standing from every State or Country in which I am admitted.
2. ■ I have not been disciplined, suspended, or disbarred in any jurisdiction.
3. ■ I have not had a pro hac vice admission revoked in any jurisdiction
   If you have been disciplined, suspended, disbarred, or had a pro hac vive admission revoked in any jurisdiction, you must submit the details of the same to the Disciplinary Board for investigation and recommendation to the court in which you seek to practice pro hac vice. (see 24-106 (C) NMRA)
4. ■ I will comply with applicable statues, laws and procedural rules of the State of New Mexico.
5. ■ I will comply with the applicable rules as noted in Rule 24-106 (B) (5) NMRA
6. ■ I will submit to the jurisdiction of the New Mexico courts and the Disciplinary Board with respect to acts and omissions occurring during my admission under this rule.
7. ■ I am submitting my 1st (1st–5th) registration certificate of this calendar year. Including corresponding fee of:
   ■ $450 1st ☐ $275 2nd ☐ $275 3rd ☐ $275 4th ☐ $275 5th
8. ☐ I am making a Rule 24-106 (D) NMRA fee waiver certification. (Explanation attached)

Attorney Signature

Notary Stamp

STATE of District of)
)ss.
County of Columbia)

SUBSCRIBED AND SWORN TO before me this 24th day of January 2023

by Jose Manuel Valle. My commission expires:

EVANGELA [illegible]
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires February 14, 2026

NOTARY PUBLIC

Credit Card

Credit Card #:
Exp. Date: 08/27
Name on Card Jose M Valle
Zip Code 22205
Email Address for receipt manuel.valle@sidley.com

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JAN 20 2023 $450

Return registration certificate to the address above with your check or pay by credit card and secured fax to 866-767-7281.

2/20

STATE OF NEW MEXICO
_____ COUNTY
_____ JUDICIAL DISTRICT

New Mexico,

No. S-1-SC-39381

v.

Gilead Sciences, et al.

AFFIDAVIT OF NON-ADMITTED LAWYER

~~STATE OF~~ District of Columbia)
)
~~COUNTY OF~~ Washington)

José Manuel Valle, (Non-admitted Lawyer) the affiant herein, having been duly sworn, states upon oath:

1. Affiant is admitted to practice law and is in good standing to practice law in District of Columbia, Michigan (state, territory, country).
2. Affiant has complied with Rule 24-106 NMRA.
3. Affiant has associated with William R. Levi, counsel licensed to practice law in good standing in New Mexico.

José Manuel Valle, Affiant, being first duly sworn, states upon oath, that all of the representations in this affidavit are true as far as affiant knows or is informed, and that such affidavit is true, accurate and complete to the best of affiant's knowledge and belief.

DATED: January 18, 2023.

Affiant

SUBSCRIBED AND SWORN TO before me this 18th day of January 2023.

NOTARY PUBLIC

My commission expires:

_____

LEIGH THAIN
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires January 14, 2026

LEIGH THAIN NOTARY PUBLIC DISTRICT OF COLUMBIA EXP. 1-14-26