No. 17-733

In the Supreme Court of the United States

MURCO WALL PRODUCTS, INC.,

Petitioner,

v.

MICHAEL D. GALIER,

Respondent.

On Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The decision below is indefensible. In addressing personal jurisdiction, the Court of Civil Appeals applied its longstanding precedent that focuses on the "totality" of a defendant's "contacts" with Oklahoma. Pet. App. 22a. This "totality" test is not a measure of general jurisdiction, which is essentially limited to evaluating whether the defendant is incorporated or headquartered in the forum. And it is not a measure of specific jurisdiction, which is limited to only those forums with which a defendant has sufficient *suit-related* contacts. In sum, Oklahoma's gestalt standard for personal jurisdiction is irreconcilable with this Court's precedents and violates due process.

Apparently recognizing as much, respondent makes no effort to defend the "totality of the contacts" test that was central to the decision below. That is reason enough for this Court to reverse: Oklahoma courts have repeatedly flouted the limitations due process imposes on the exercise of personal jurisdiction, and respondent does not argue otherwise. Correction of this persistent and pernicious error is warranted.

Respondent speculates that, *if* the state court had applied the proper test governing specific jurisdiction, it would have arrived at the same result. Opp. 8-16. That argument is, at best, a consideration for remand. In all events, respondent is manifestly wrong. He has not offered any proof that petitioner's suit-related conduct has a concrete connection to Oklahoma.

A. The Court should summarily reverse.

Summary reversal is warranted because Oklahoma courts are defying the federal due process limitations on the scope of personal jurisdiction.

1. We showed in the petition that the state court's approach to personal jurisdiction—which considered "the totality of the contacts"—is at odds with the limits that due process imposes. See Pet. 12-14. The Court of Civil Appeals impermissibly blended aspects of general and specific jurisdiction to arrive at a test that has no basis in—and indeed eviscerates—this Court's holdings.

Respondent does not appear to disagree. He has chosen not to defend the "totality" test.[1]

The decision below is obviously not defensible as an application of general jurisdiction, a conclusion that respondent now concedes. See Opp. 8 n.2. Petitioner is not incorporated or headquartered in Oklahoma, and the courts below made no findings that would support treating this as an "exceptional case" warranting a deviation from the governing standard for general jurisdiction. See Pet. 12-13.[2]

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[1] To the contrary, citing two Oklahoma cases that are more than a decade old, he suggests that Oklahoma does not, in fact, apply the "totality" test. See Opp. 16 (citing *Gilbert* v. *Security Fin. Corp. of Okla., Inc.*, 152 P.3d 165, 174 (Okla. 2006); *Lively* v. *IJAM, Inc.*, 114 P.3d 487, 494-495 (Okla. Civ. App. 2005)). But the opinion that the state court found to govern here, *Guffey* v. *Ostonakulov*, 321 P.3d 971 (Okla. 2014), post-dates those decisions. *Guffey*, this case, and several other Oklahoma decisions *do* invoke the "totality" test (see Pet. 15 n.4; pages 3-4, *infra*), confirming the need for this Court's intervention.

[2] The trial court asserted that it had general jurisdiction over petitioner. See Pet. 4; Pet. App. 26a. Respondent now contends

Yet the Court of Civil Appeals' reasoning makes apparent that it considered contacts that are flatly irrelevant for purposes of specific jurisdiction. The court explained that petitioner "entered into an agreement with Flintkote Company in Oklahoma City whereby Murco would apply a Flintkote label onto its Murco product for resale by Flintkote." Pet. App. 23a; see also Opp. 6. Respondent never alleged that he was exposed to or injured by *Flintkote* products, however. Because it is not "suit-related conduct" (*Walden* v. *Fiore*, 134 S. Ct. 1115, 1121 (2014)), Murco's business relationship with Flintkote is inapposite to a specific jurisdiction analysis. But the Court of Civil Appeals expressly found it to be material. Thus, the lower court's analysis proves that its "totality of the contacts" test does not accord with the strictures of specific jurisdiction.

The history of Oklahoma's "totality" test perhaps explains the Court of Civil Appeals' error. This "totality" test has existed in Oklahoma for decades, where it long served as an encompassing standard for *general* jurisdiction. See, *e.g.*, *Hough* v. *Leonard*, 867 P.2d 438, 440 (Okla. 1993) ("While each individual contact made by the non-residents may not be sufficient standing alone to maintaining minimum contacts, the totality of the contacts are sufficient to exercise personal jurisdiction over the non-

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that this was a "typographical error." Opp. 8 n.2. That is revisionist history. At the hearing on jurisdiction, the trial court discussed both specific and general jurisdiction. The judge concluded: "I find that I do have jurisdiction here in Oklahoma, general jurisdiction * * *. I do have general jurisdiction in this case." Transcript of Proceedings at 32-33, *Galier* v. *Borg-Warner Morse Tec, Inc.*, No. CJ-2012-6920 (Okla. Dist. Ct. June 21, 2013). The order memorializing this finding was not a typographical error.

residents."); *Gregory* v. *Grove*, 547 P.2d 381, 383 (Okla. 1976) ("Totality of contacts between the parties in Oklahoma are to be considered in determining the sufficiency to exercise jurisdiction under long-arm service."); *Fidelity Bank, N.A.* v. *Standard Indus., Inc.*, 515 P.2d 219, 223 (Okla. 1973) ("[T]he totality of contacts between plaintiff and defendants in Oklahoma was sufficient to justify the District Court in exercising jurisdiction over the defendants."); *Crescent Corp.* v. *Martin*, 443 P.2d 111, 115 (Okla. 1968) ("The question of application of the long-arm statute of necessity * * * depends on the totality of the contacts with Oklahoma.").

While that far-reaching standard may have accorded with earlier views that "continuous and systematic" contacts sufficed for general jurisdiction (see Pet. 7 & n.2), it is incompatible with this Court's recent decisions in *Daimler* and *Tyrrell*. Pet. 8-9. And given the Court of Civil Appeals' own application of the test in this case, it certainly cannot be salvaged as a touchstone for specific jurisdiction. Pet. 9-11.

2. That is all the Court need conclude to summarily reverse. Application of the correct standard is a question properly left for the lower courts on remand.

That is the approach the Court typically takes when summarily reversing. For example, in *Marmet Health Care Center, Inc.* v. *Brown*, 565 U.S. 530 (2012), the Court summarily reversed the West Virginia Supreme Court's departure from governing arbitration law. It directed the state courts to apply that law on remand, considering whether the arbitration clauses at issue "are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Id.* at 534.

Similarly, the Court recently "vacate[d]" the Nevada Supreme Court's "judgment because it applied the wrong legal standard" and "remand[ed] the case for further proceedings not inconsistent with [the Court's] opinion." *Rippo* v. *Baker*, 137 S. Ct. 905, 907 (2017); see also *Amgen Inc.* v. *Harris*, 136 S. Ct. 758, 760 (2016) (same).

This accords, moreover, with the Court's traditional practice of deciding just the legal issue resolved below—and then leaving for remand application of the proper standard to the particulars of the case. See, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009).

3. In any event, respondent is mistaken that his proof suffices to establish specific jurisdiction.

Respondent rests principally on a stream of commerce argument; he asserts that petitioner sold some products in Oklahoma, and thus it is liable for any injuries that its products caused there. See Opp. 12-15. Respondent relies substantially on the Court of Civil Appeals' conclusion that there was evidence that respondent "was regularly and significantly exposed to [petitioner's] asbestos-containing product." Opp. 15 (quoting Pet. App. 20a). But this reasoning is defective in two principal respects.

First, at the relevant time, petitioner sold different kinds of joint compounds; some had asbestos and some did not. Pet. App. 20a. While respondent asserts that petitioner sold joint compound generally in Oklahoma, he points to no evidence that petitioner sold joint compound *containing asbestos* in Oklahoma. The Court of Civil Appeals similarly focused on general sales by petitioner, not sales of products containing asbestos. Pet. App. 22a-23a. There is there-

fore no basis for assuming (as respondent requests) that any Oklahoma court made a proper finding that this necessary, but not sufficient, prerequisite for specific jurisdiction was satisfied.

Second, respondent identifies no evidence that the products that injured him stemmed from the in-forum sales. At his deposition, respondent recalled the identity of petitioner only after his counsel "refreshed" his memory. See Pet. 4. Respondent has no idea whether the products he barely remembers were sold in Oklahoma, Texas, or somewhere else entirely. Accordingly, here again, there is no basis for assuming that any Oklahoma court made the necessary finding that the Murco products to which respondent allegedly was exposed were sold in Oklahoma.

B. Alternatively, the Court should grant, vacate, and remand.

Respondent does not address our argument that the circumstances here are quite similar to those in *Simmons Sporting Goods, Inc.* v. *Lawson*, No. 17-109. In *Simmons*, the Arkansas Court of Appeals similarly employed an improperly broad standard for jurisdiction, failing to apply the limits that this Court has identified. See Pet. 17. Like respondent here, respondent Carolyn Lawson attempted to show that the lower court's holding was "[u]nremarkable" and consistent with this Court's precedents. See Brief in Opp. 10-12, No. 17-109. This Court granted, vacated, and remanded all the same. Respondent can offer no reason to do any less here.

C. That the Court of Civil Appeals' decision is unpublished is irrelevant.

Contrary to respondent's contention (Opp. 17-19), the Court of Civil Appeals' decision not to designate

its opinion for publication is not a reason for declining to correct its adherence to an improper standard. Were it otherwise, appellate courts could routinely depart from this Court's governing precedent, yet avoid review simply by declining to publish their dispositions. As Justice Thomas has explained, a court's decision to decline to publish a reasoned decision is "disturbing" and "yet another reason to grant review." *Plumley* v. *Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari).

Apart from this general prudential reason for refusing to permit lower courts to immunize themselves from review, there are two reasons why this case in particular warrants this Court's intervention despite the Court of Civil Appeals' decision not to publish its opinion.

First, as we explained in the petition (at 14), the decision below rested exclusively on the Oklahoma State Supreme Court's decision in *Guffey* v. *Ostonakulov*, 321 P.3d 971 (Okla. 2014). When, as here, the lower court's decision is an application of an earlier, published precedent, the unpublished nature of the case is no barrier to review. Indeed, "the Court grants certiorari to review unpublished and summary decisions with some frequency." Stephen M. Shapiro et al., *Supreme Court Practice* 264 (10th ed. 2013); see, *e.g.*, *Oil States Energy Serv., LLC* v. *Greene's Energy Group, LLC*, No. 16-712 (plenary review of summary affirmance order that rested on circuit precedent).

Second, respondent's argument is especially misplaced because we request summary action—not plenary review. The Court routinely summarily reverses unpublished opinions when the standards for such relief are satisfied. See, *e.g.*, *Tharpe* v. *Sellers*, No.

17-6075, 2018 WL 311568 (U.S. Jan. 8, 2018) (summarily reversing unpublished decision); *Christeson* v. *Roper*, 135 S. Ct. 891 (2015) (same).

This result is sensible. Appellate courts typically refrain from publishing their decisions when they view the legal rule at issue as settled. Oklahoma courts now believe that *Guffey*'s approach to personal jurisdiction is settled law. But that holding is plainly wrong. Summary reversal—or an order granting, vacating, and remanding—is thus warranted.

CONCLUSION

The Court should summarily reverse or, in the alternative, grant, vacate, and remand for further consideration in light of *Bristol-Myers Squibb*.

Respectfully submitted.

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