No. 20-374

IN THE

Supreme Court of the United States

CONTINENTAL RESOURCES, INC.,

Petitioner,

v.

ZACHARY BUCKLES EX REL. NICOLE R. BUCKLES AND NICOLE R. BUCKLES,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

REPLY BRIEF FOR PETITIONER

W. SCOTT MITCHELL
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St.,
Suite 1500
P.O. Box 639
Billings, MT 59103

ANDREW M. GROSSMAN
Counsel of Record
DAVID B. RIVKIN, JR.
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

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REPLY BRIEF FOR PETITIONER

Respondents stake their opposition on the false premise (at 1) that "[i]t was petitioner Continental's allegedly tortious conduct in Montana…that caused the plaintiffs' claims." That is not what the Montana Supreme Court held. It subjected Continental to jurisdiction in Montana because "it may be held liable for the torts, if any, of its independent contractors," alleged to have occurred in North Dakota, not in Montana. Pet.App.15. This turns not on Continental's own tortious conduct but on "vicarious liability" through the acts of others. Pet.App.12 (citation omitted).

This misapprehension has steered Respondents' opposition off course. First, this case is not "the opposite" of the *Ford Motor* cases. BIO.13. If the Court adopts the specific-jurisdiction test advocated by the petitioner in that case—that the defendant's forum contacts cause the plaintiff's claims—then the assertion of jurisdiction here will plainly be precluded: Continental's acts in Montana could not have caused Respondents' claims because none of its acts—anywhere—caused them. Reversal in the *Ford Motor* cases would, as a result, be dispositive here.

Second, Respondents cannot explain how any conceivable minimum-contacts test could leave room for the lower court's theory of vicarious jurisdiction. By failing to confront what the court below actually decided, Respondents fail to address the many strains of this Court's precedent rejecting it—including those decisions holding that acts of third parties are irrelevant to personal jurisdiction, that the choice-of-law

and specific-jurisdiction inquiries are distinct, and that specific jurisdiction is not merely a watered-down form of general jurisdiction. Respondents also cannot explain how Montana's assertion of jurisdiction respects basic "interstate federalism," *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1781 (2017), when North Dakota's interest in safety at a well site within its borders (an interest Respondents wrongly downplay), and Oklahoma's interest in conduct of a corporate entity headquartered within its borders (which Respondents totally ignore), leave Montana nothing but the role of an officious intermeddler.

In short, the Montana Supreme Court's wayward doctrine finds no defense in a brief that ignores it. It cannot stand, the time to strike it down is now, and this case presents an optimal vehicle.

ARGUMENT

I. This Petition Raises Issues that Overlap Substantially, If Not Completely, with Those the Court Will Decide in the *Ford Motor* Cases

As the Petition explains (at 12–15) this Court's forthcoming ruling in the *Ford Motor* cases may resolve the questions presented here. The decision below would plainly fail any test requiring that "the defendant's forum contacts caused the plaintiff's claims," Petition for Certiorari, *Ford Motor Co. v. Mont. Eighth Judicial District Court*, No. 19-368, at (i) (Sept. 18, 2019), and the Court may adopt that test

before the Term is out. The opposition is able to conclude otherwise only by disregarding the legal basis of the decision below.

A. The opposition repeatedly cites as fact Continental's actionable conduct "in Montana" as the asserted basis of specific personal jurisdiction. BIO.(i), 1, 13, 18. No such assertion can be found in the decision below. It posits instead that Continental can "be subject to personal jurisdiction in Montana…based on its liability for tortious conduct, if any, by its independent contractor or contractors." Pet.App.15. This is by operation of "vicarious liability." Pet.App.12 (citation omitted). Respondents *agree* that this is what the court held. *See* BIO.7 ("The majority's logic was that whether Continental was subject to specific personal jurisdiction in Montana in this case depended on whether Continental was vicariously liable for the torts of its contractors[.]"); *see also id.* at 9.

As a result, nothing supports Respondents' insistence that "Continental Resources' allegedly tortious conduct in Montana…caused the plaintiffs' claims." BIO.1. Montana is like most states in treating "direct liability for [one's] own tortious conduct" as "[d]istinct from" doctrines of "vicarious liability" for acts of others. *Brenden v. City of Billings*, 470 P.3d 168, 172 (Mont. 2020); *see also Beckman v. Butte-Silver Bow Cnty.*, 1 P.3d 348, 354 (2000) (calling "a rule of personal or individual liability separate and distinct from an employer's vicarious liability"). The *Beckman* decision relied on below, Pet.App.12, "looked to the Restatement (Second) of Torts for guidance" in formulat-

ing these doctrines, 1 P.3d at 351, and it too recognizes that they "do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable…irrespective of…fault," Restatement (Second) of Torts, div. II, ch. 15, topic 1, intro. note (1965). The Montana Supreme Court could not have been clearer that Continental must defend itself *in* Montana because of acts or omissions of independent contractors *in* North Dakota attributed to Continental by operation of Montana law, not because of any actionable conduct of Continental's own *in* Montana.

B. Respondents try to locate their personal-liability theory in the concurring opinion of only three Montana justices. *See, e.g.*, BIO.10–12, 18. This is a red herring. The majority opinion obtained six votes and is singularly "the Opinion of the Court." Pet.App.2. Opinions garnering less than a majority do not govern in Montana. *See, e.g.*, *State v. Charlie*, 239 P.3d 934, 944 (Mont. 2010); Mont. Const. art. VII, § 3(1). By consequence, they do not control here. *See Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 554 (1940) (refusing to consider the syllabus in interpreting a Minnesota court opinion under review because "we are not referred to any Minnesota authority which, as in some states, makes the syllabi the law of the case" (footnote omitted)); *see also Murdock v. City of Memphis*, 87 U.S. 590, 627–28 (1874) (limiting review of state-court decisions to the federal question that "was decided" in the controlling opinion).

That aside, the concurring opinion also does not predicate jurisdiction on any actionable conduct of

Continental "in Montana." BIO.1. Instead, it cites activity by Continental personnel in North Dakota "*from* Montana," Pet.App.22, a phrase it consistently uses to describe its theory, *see* Pet.App.24–25. Respondents' transposition of prepositions—*in* for *from*—cannot change the fundamental fact that only North Dakota acts or omissions here are germane to potential liability, and thus only they could plausibly be considered to have caused Respondents' claims. In fact, the activity of Continental personnel the opposition brief itself cites all occurred in North Dakota. *See, e.g.*, BIO.4 (describing how Production Superintendent "circulated among the sites," including the site *in* North Dakota); *id.* at 5 (describing how "the Montana office's lease operator was responsible for checking equipment *at the subject site*" (emphasis added)); *id.* ("The Montana office also was closely involved in managing safety *at the sites* it supervised" (emphasis added)); *id.* ("[W]hen company representatives working out of the Montana office observed an independent contractor not following safety guidelines"—in North Dakota—"they would give direction to address the problem").

Even the alleged omissions occurred (if they can be said to have occurred anywhere and to have established a minimum contact) in North Dakota: the "adequate or appropriate air monitoring equipment" that would have allegedly prevented the harm to Mr. Buckles would have had to have been utilized or implemented *in North Dakota*, not in Montana, to be of any use to him. Pet.App.92. So even if the minimum-contacts theory were one of "inadequate supervision,"

BIO.13—which is completely different from the vicarious-liability theory the controlling opinion adopted—that would not transform North Dakota contacts into Montana contacts.[1]

C. Respondents' confusion about what the Montana Supreme Court held steers their opposition past the relevant questions. Their conclusion that this case and the *Ford Motor* cases are "essentially the opposite" follows from the erroneous premise that "the acts or omissions giving rise to Continental's liability…occurred within the forum (in Montana)." BIO.13. As discussed, the "acts or omissions giving rise to Continental's liability" were, according to the controlling opinion, not Continental's at all. Consequently, this case is like the *Ford Motor* cases in the relevant respect that Ford's contacts with the forum did not give rise to the claims there, and neither did Continental's here.

The only distinguishing factor is that Ford's contacts *somewhere* gave rise to the claims in those cases, whereas Continental's actions *nowhere* did here. But that difference only makes this the weaker candidate for Montana's jurisdiction. That is, at base, all Respondents' discussion of "mass-market products lia-

[1] By the same token, even if Respondents are correct (at 16) that "[the] purpose of vicarious liability is to cause employers to take protective measures that they might prefer to contract out," they have only identified a North Dakota omission—since that is where the "protective measures" needed to be taken—and a North Dakota interest in safety in North Dakota.

bility cases" shows. *See* BIO.15. It is true that "a manufacturer's efforts to serve an out-of-state market 'directly or indirectly'" has "little relevance to the question here." *Id.* But that is not because Continental's own acts in Montana gave rise to the claims, as Respondents wrongly believe (at 15), but because even the indirect ties between the defendant and the forum states in the *Ford Motor* cases are absent here.

Meanwhile, Respondents' contention that it is irrelevant that "specific jurisdiction may turn on vicarious liability under Montana state law" is predicated, like their others, on their false assertion that Continental's Montana actions gave rise to the claims. *See* BIO.16. That premise failing, so does the conclusion. And even the non-controlling, concurring theory did not differentiate this case from *Ford*, nor did it mean to. The theory that North Dakota torts occurred "*from* Montana" flunks the but-for test just like the vicarious-jurisdiction theory because, in the end calculus, the actionable conduct alleged still occurred *in North Dakota*. The concurring opinion (like the majority) made no pretense that it was satisfying a but-for causation test.

It is therefore not true that, "regardless of how this Court decides the *Ford* cases, the outcome here is the same." BIO.14. To be sure, affirmance in those cases would not endorse the decision below, given how much weaker the assertion of jurisdiction is here than in those cases. But the converse does not follow. There can be no serious question that reversal in *Ford* will necessitate reversal here, no matter the theory of jurisdiction.

II. The Decision Below Extends Beyond the Montana Supreme Court's *Ford Motor Co.* Holding and Merits Review Even if the Court Affirms *Ford Motor Co.*

Vicarious jurisdiction has no place in this Court's minimum-contacts jurisprudence. Because Respondents ignore what the Montana Supreme Court held, they cannot even begin to defend it.

Respondents have no answer to this Court's ruling that "a defendant's relationship with a plaintiff or *third party*, standing alone, is an insufficient basis for jurisdiction." *Walden v. Fiore*, 571 U.S. 277, 286 (2014) (emphasis added). Jurisdiction over Continental "based on its liability for tortious conduct, if any, by its independent contractor or contractors," Pet.App.15, is necessarily swept away by that doctrine, *see Rush v. Savchuk*, 444 U.S. 320, 331–32 (1980). Respondents do not argue otherwise, even as they assert that the jurisdictional analysis requires courts "to disentangle the relationship….among [Continental's] various contractors and subcontractors." BIO.17. But those relationships, according to *Walden* and *Rush*, are irrelevant.

Respondents also do not address the holding "that choice-of-law analysis—which focuses on all elements of a transaction, and not simply on the defendant's conduct—is distinct from minimum-contacts jurisdictional analysis, which focuses at the threshold solely on the defendant's purposeful connection to the forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481–82 (1985). The court below found the reach of

Montana's jurisdiction "intertwined" with the reach of its law of vicarious liability, such that jurisdiction will attach if liability does and if not, then not. Pet.App.14–15. But choice of law is independent of "the defendant's purposeful connection to the forum." *Burger King Corp.*, 471 U.S. at 481–82. Indeed, the Montana Supreme Court has fashioned, in this litigation, an expansive choice-of-law test that practically guarantees the application of Montana law in any case, nationwide, where the victim is deemed a Montana resident. *See Buckles v. BH Flowtest, Inc.*, 476 P.3d 422, 426 (Mont. 2020). Treating choice-of-law and personal jurisdiction as "intertwined" therefore abrogates (through a state-law ruling) this Court's federal-law ruling that "the plaintiff cannot be the only link between the defendant and the forum" for specific jurisdiction to arise. *Walden*, 571 U.S. at 285. And it makes no practical sense to defer the question of the court's authority over the defendant until the *end* of the case—after discovery, trial, and possible appellate review—when the deficiency of jurisdiction over the defendant is apparent as a matter of federal law at the *outset* of the case. Respondents have no response to any of this, except to label the lower court's melding of personal jurisdiction with choice of law "utterly unremarkable." BIO.1. If that were so, Respondents should have been able to cite decisions supporting it. They cite none and identify no basis to distinguish the many decisions of this Court rejecting this approach. *See* Pet.22–23.

Respondents also do not explain how the Montana Supreme Court's theory is anything other than "a

loose and spurious form of general jurisdiction." *Bristol-Myers*, 137 S. Ct. at 1776. So far as Continental's contacts are concerned, the court below identified nothing beyond "Continental's extensive business activities in Montana," which it found to "demonstrate that [Continental] purposefully availed itself of the privilege of conducting activities within this state." Pet.App.17. This is general jurisdiction in all but name.

Indeed, Respondents adopt this faux-general-jurisdiction concept, with the assertion that "Montana has a clear interest…in adjudicating whether corporate agents operating within its borders provide adequate supervision over dangerous well sites." BIO.19. That describes general jurisdiction and, here, the interest of *Oklahoma*, where Continental is at home. Oklahoma alone has general jurisdiction over Continental and has an interest in ensuring that this entity "within its borders" conducts *all* of its activities—everywhere—in a reasonably prudent manner. Montana does not have that interest because (1) it is not the state with omnibus responsibility over this corporate entity and (2) it is not concerned with "dangerous well sites" *in North Dakota*. The Sidney field office does not transform an Oklahoma entity into a Montana entity or render its North Dakota activities Montana activities. These other states' sovereignty "implie[s] a limitation on the sovereignty of" Montana. *Bristol-Myers*, 137 S. Ct. at 1780. "And at times, this federalism interest may be decisive." *Id.* It is here.

III. The Court's Intervention Is Necessary To Address Continued Resistance to Its Personal-Jurisdiction Precedents and To Prevent Further Mischief

Respondents' failure to confront what the court below held dooms their vehicle arguments. Without addressing the vicarious nature of jurisdiction adopted and imposed in that decision, they cannot address the mischief that is sure to follow or the wide-ranging impact that would result if this Court were to turn a blind eye to this new theory. The Petition's assertions on that (at 29–31) stand unrebutted. So, too, does the Petition's observation (at 27–28) that this Court has repeatedly reviewed important personal-jurisdiction questions even in the absence of a calcified split of authority between or among lower courts. This case presents an ideal vehicle for this Court's review, regardless of the outcome of the *Ford Motor* cases.

Respondents contend that "Continental seeks review of a factbound set of issues," BIO.16, but this assertion, too, is tainted by their erroneous reading of the decision below. There are, in fact, no material disputes of fact because Continental's own conduct is not the basis of jurisdiction. The Montana Supreme Court made clear that the question on remand is whether Respondents can establish a basis to hold Continental liable for its independent contractors' torts (if any), such as under a non-delegation theory of inherently dangerous activity (in North Dakota). Pet.App.17. But, if Continental is correct that it cannot be subject to jurisdiction on that theory, then no amount of fact-

finding under it can possibly matter.[2] Continental therefore does not seek this Court's review of any fact-bound issues, but rather of the legal question the Montana Supreme Court finally decided.

Respondents concede this in their frank (and inescapable) admission that the Montana Supreme Court's jurisdictional ruling "is plainly final on the federal issue and is not subject to further review in the state courts." BIO.17 (citation omitted). The question this Court has jurisdiction to resolve has been decided once and for all and will not be decided again in the state courts. There is no "prudential" reason, *id.*, to delay review of this erroneous and dangerous legal theory in favor of further resolution in the Montana courts that Respondents concede will not occur.

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[2] Respondents again try to rewrite the decision below, claiming that further factfinding will be warranted on "the relationship between Continental's Sidney, Montana office and its well sites, or among its various contractors and subcontractors." BIO.17. That is not what the court below said. *See* Pet.App.17. Nor would that have made sense when the jurisdictional discovery already taken has exhausted those questions, the Montana Supreme Court felt itself bound by the trial court's findings of fact on them, *see* Pet.App.7, 14–15, and those findings are now law of the case. Besides, for reasons already explained, further development on those questions would make no difference on the question of personal jurisdiction, properly understood.

CONCLUSION

The Court should grant the Petition and reverse or, at a minimum, grant the Petition, summarily vacate the judgment below, and remand for reconsideration in light of its forthcoming decision in the *Ford Motor* cases.

Respectfully submitted,

ANDREW M. GROSSMAN
Counsel of Record
DAVID B. RIVKIN, JR.
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

W. SCOTT MITCHELL
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St.,
Suite 1500
P.O. Box 639
Billings, MT 59103

Counsel for Petitioner

FEBRUARY 2021