No. 20-515

In The
Supreme Court of the United States

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Petitioner,

v.

GATEWAY HOSPITALITY GROUP, INC.; WESTERN HOSPITALITY GROUP, LP D/B/A HILTON GARDEN INN MISSOULA; KALISPELL HOTEL, LLC D/B/A HILTON GARDEN INN KALISPELL; BOZEMAN LODGING INVESTORS, LLC D/B/A HILTON GARDEN INN BOZEMAN; JWT HOSPITALITY GROUP, LLC D/B/A HILTON GARDEN INN BILLINGS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Montana

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Montana had specific personal jurisdiction where Philadelphia's insurance policy specifically identified and insured persons, property and risks located in Montana at the time the policy was issued, but when requested, denied defense to Respondents in a Montana lawsuit filed against them, which ultimately resulted in a Montana state court judgment being entered against and paid by Respondents in Montana.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondent Gateway Hospitality Group, Inc. is an Ohio corporation. Gateway Hospitality Group, Inc. does not have a parent corporation. No publicly held company owns 10% or more of its stock.

Respondent Western Hospitality Group, LP d/b/a Hilton Garden Inn Missoula is a Montana limited partnership. Western Hospitality Group, LP does not have a parent corporation. No publicly held company owns 10% or more of Western Hospitality Group, LP.

Respondent Kalispell Hotel, LLC d/b/a Hilton Garden Inn Kalispell is a Montana limited liability company. Kalispell Hotel, LLC does not have a parent corporation. No publicly held company owns 10% or more of Kalispell Hotel, LLC.

Respondent Bozeman Lodging Investors, LLC d/b/a Hilton Garden Inn Bozeman is a Montana limited liability company. Bozeman Lodging Investors, LLC does not have a parent corporation. No publicly held company owns 10% or more of Bozeman Lodging Investors, LLC.

Respondent JWT Hospitality Group, LLC d/b/a Hilton Garden Inn Billings is a Montana limited liability company. JWT Hospitality Group, LLC does not have a parent corporation. No publicly held company owns 10% or more of JWT Hospitality Group, LLC.

Petitioner Philadelphia Indemnity Insurance Company is a Pennsylvania corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTRODUCTION

The Montana Supreme Court's decision was a straightforward application of Montana's long-arm statute, Montana Rule Civil Procedure ("M.R.Civ.P.") 4(b)(1) and this Court's decision in *BNSF Ry. v. Tyrell*, 137 S.Ct. 1549 (2017), which holds that "[i]n short, the business [a company] does in Montana is sufficient to subject the [company] to specific personal jurisdiction in that State on claims related to the business it does in Montana."

In its effort to avoid personal jurisdiction in Montana, Philadelphia Indemnity Insurance Company ("Philadelphia") misstates the Montana Supreme Court's decision and Philadelphia's relationship with Montana and the Respondents which led to Philadelphia being sued for breach of its duty to defend Respondents in Montana.

Philadelphia represents that the Montana Supreme Court found that Montana had personal jurisdiction because the Policy[1] stated it applied anywhere in the world. This representation is incorrect. As the Montana Supreme Court explained, the territory of coverage clause was not what determined specific personal jurisdiction, but rather, specific personal jurisdiction was determined by the relationship among Philadelphia, Montana and Respondents' litigation. The Court considered "the entirety of Philadelphia's actions."

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[1] The Policy is set forth in the Petition as pages 77a-183a. Pet. 75a-76a do not appear at the beginning of the policy. Those pages should and do appear in the Policy as Pet. 96a-97a.

The Montana Supreme Court first looked to see if jurisdiction existed under Montana's long-arm statute. After finding it did, the Court determined that exercising jurisdiction over Philadelphia comported with the Due Process Clause's traditional notions of fair play and substantial justice. Philadelphia does not cite, and Respondents have not found, any case holding that a state does not have specific personal jurisdiction over an insurer that requested and received authorization to sell and does sell insurance in that state, appointed the state's insurance commissioner as its agent for service of process, is regularly sued and defends itself in that state, issued a policy insuring persons, property and risks located in that state when the policy was issued, denied defense when requested by its insureds for a lawsuit filed in that state, and which ultimately resulted in a judgment being entered against and paid by the insureds in that state. Philadelphia did each of those things here.

Philadelphia argues that traditional notions of fair play and substantial justice were not met because, based on the Policy's arbitration provision, it could not have reasonably anticipated being sued in Montana for claims Philadelphia breached its duty to defend Respondents in the Montana Class Action. Philadelphia did not request, let alone mention, arbitration when it denied Respondents' defense request or prior to judgment being entered against and paid by Respondents to resolve the Montana Class Action. After being sued by Respondents, Philadelphia initially asserted it had to be sued in "Ohio *or* Pennsylvania." Respondents have sued Philadelphia for declaratory judgment /breach of

duty to defend – a question that is not covered by the Policy's voluntary arbitration provision. Whether it is Montana or Ohio, both states hold that when an insurer breaches its duty to defend, the insureds are relieved of any obligation to cooperate and the insurer cannot enforce policy provisions against the insureds. Ohio has gone so far as to hold that it is disingenuous for an insurer to deny coverage and then claim that insureds must comply with policy requirements. Ohio has also held that an insurer waives arbitration – even mandatory arbitration – because the failure to request arbitration before the underlying matter is resolved prejudices the insureds. Philadelphia does not cite, and Respondents have not found, any case, state or federal, that allows an insurer to deny defense, force its insureds to fend for themselves resulting in a judgment against them which they must and do pay, and then, only after the insurer is sued for those injuries, try to assert an arbitration provision.

Finally, Philadelphia makes two new arguments. First, Philadelphia argues the Court should accept the writ because COVID has introduced uncertainty into the insurance industry. Second, Philadelphia argues the Court should address the relationship between the Federal Arbitration Act and McCarran-Ferguson Act to give future guidance to the insurance industry. As neither argument was raised below, they should not now be considered. Even if considered, each argument lacks merit.

This Court should deny the petition.

STATEMENT

The question in this case is whether Philadelphia is subject to specific personal jurisdiction in Montana for injuries caused in Montana by issuing a policy specifically insuring persons, property or risks in Montana at the time the policy was issued and then, when requested, denying defense to Respondents, which ultimately resulted in a judgment being entered against and paid by Respondents in Montana.

In August 2014, Gateway, on behalf of all Respondents, submitted an application to Philadelphia requesting insurance for their operations, locations and risks in Montana. Pet. 162a-183a. The application asked for "all [ ] offices and/or subsidiaries" to be listed for which "coverage [was] desired." Pet. 163a (Question No. 6). In response to that question, Gateway wrote, in capital letters, "SEE ATTACHED SHEETS" for offices and subsidiaries to be insured. *Id.* The attached sheets identified each Respondent. Pet. 177a (Gateway, Western Hospitality), 178a (Kalispell Hotel, JWT Hospitality), 179a (Bozeman Lodging Investors). The attached sheets identified offices (Hilton Garden Inns in Missoula, Kalispell, Billings, and Bozeman, MT ("Montana HGIs")) and subsidiaries (JWT Hospitality Group, Kalispell Hotel, and Western Hospitality Group). Pet. 182a, 183a. The Policy did not exclude Gateway's management activities in Montana, the Montana HGIs, or Montana, but instead specifically provided that "the application form, its attachments and material incorporated therein, which are incorporated herein and deemed a part of the policy." Pet. 124a. The Policy provided that Philadelphia "shall have the right and duty

to [ ] defend . . . any claim. . . . " Pet. 124a ("Defense and Settlement").

In March 2015, Respondents notified Philadelphia they had been sued and requested defense and indemnity of a Montana lawsuit, *Pam Walter, et al. v. Hilton Garden Inns Franchise, LLC, et al*. ("Montana Class Action"). Resp. 1a-2a. Philadelphia acknowledged that Respondents were all insureds under the Policy. Resp. 1a-16a. It nevertheless denied defense based on its conclusion that the claims alleged in the Montana Class Action were for undefined "employment practices" which were excluded under the Policy. Resp. 9a. Philadelphia did not request arbitration. Resp. 1a-16a. Being left to fend for themselves and after litigating the case for almost one year, in February 2016, Respondents settled the Montana Class Action. Pet. 47a. Eight months later, in August 2016, the Montana state district court approved the settlement and entered judgment against Respondents. *Id.* Respondents paid the judgment against them in Montana. Pet. 9a, *Gateway Hospitality Group, Inc. v. Philadelphia Indemnity Company* ("*Gateway*"), 464 P.3d 44, 50, ¶ 10 (Mont. 2020).

In 2018, Respondents sued Philadelphia in Montana state district court. Pet. 9a, *Gateway*, 464 P.3d at 50-51, ¶ 11. Respondents requested a declaratory judgment that Philadelphia breached its duty to defend them in the Montana Class Action. *Id*. Respondents requested damages for that breach. *Id.*

Philadelphia responded by moving to dismiss, arguing that Montana had no personal jurisdiction because the Montana HGIs were not insureds –

contradicting its prior acknowledgment they were insureds – or alternatively, to transfer the action to "Ohio or Pennsylvania" based on the doctrine of *forum non conveniens*. Pet. 10a, *Gateway*, 464 P.3d at 50-51, ¶ 11; Resp. 32a-37a, 39a; *cf*. Resp. 1a-16a. Philadelphia asserted that jurisdiction did not exist under Montana's long-arm statute because it did not "contract with 'any person, property or risk located in Montana at the time of contracting.' " Resp. 25a. For whatever reason, when making that argument, Philadelphia omitted the words "to insure" when referencing Montana's long-arm statute. *See* M.R.Civ.P. 4(b)(1)(D). Philadelphia also argued it had no contact with Montana with respect to the Montana Class Action because it refused to defend. Resp. 28a-32a. In the Montana state district court, Philadelphia devoted one paragraph to the arbitration clause: the Policy had an arbitration clause for insurance coverage disputes, the policy was purchased from a Pennsylvania corporation by an Ohio corporation, and did not reference Montana. Resp. 30a.

The Montana state district court rejected each of Philadelphia's arguments. Pet. 36a-72a. The Montana state district court pointed out that contrary to Philadelphia's argument, Montana's long-arm statute provides that jurisdiction exists over companies "contracting *to insure* any person, property, or risk

located within Montana at the time of contracting." Pet. 52a (emphasis added); *see also* M.R.Civ.P. 4(b)(1)(D)[2]. The Montana district court found that even if there was a dispute over whether the Montana HGIs (persons and properties) were insureds, Gateway indisputably obtained the Policy to insure its management activities (a risk) in Montana at the time Philadelphia issued the Policy because Gateway and all its operations and subsidiaries (which included the Montana HGIs) were identified in the application, which Philadelphia itself made part of the Policy. Pet. 43a-44a. Additionally, the Montana state district court pointed out that Philadelphia denied defense to Respondents for the Montana Class Action and judgment was entered against Respondents in Montana to resolve that matter. Pet. 47a. The Montana state district court pointed out that neither Philadelphia nor Respondents requested arbitration when Philadelphia denied defense or during the Montana Class Action. Pet. 46a.

On appeal to the Montana Supreme Court, Philadelphia argued the Montana state district court erred on its personal jurisdiction and arbitration rulings. Pet. 1a-35a. It did not challenge the court's *forum non conveniens* ruling. *Id.*

The Montana Supreme Court began its personal jurisdiction analysis explaining that it applies a two-part analysis. Pet. 14a, *Gateway*, 464 P.3d at 52, ¶ 20.

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[2] M.R.Civ.P. 4(b)(1)(D) is codified at Montana Code Annotated § 25-20, Rule 4.

First, the Montana Supreme Court determined whether jurisdiction exists under Montana's long-arm statute, M.R.Civ.P. 4(b)(1). *Id.* The Court held that at the time of contracting, Philadelphia was clearly aware, in fact acknowledged it knew, Gateway could provide and was providing hotel management services in Montana because the Montana HGIs were specifically disclosed and individually listed in the application which Philadelphia itself expressly made part of the Policy. Pet. 19a-20a, *Gateway*, 464 P.3d at 54, ¶ 26. The Montana Supreme Court noted that Philadelphia failed to appear and defend Respondents in the Montana Class Action, an alleged breach of contract and common law, which occurred in Montana. *Id.* The Court noted Philadelphia's denial letter, sent by its counsel, identified all Respondents as insureds under the Policy. Pet. 20a, *Gateway*, 464 P.3d at 54, ¶ 26; *see also* Resp. 1a-16a.

In response to Philadelphia's argument that the arbitration provision broke the connection between the reason for Respondents' declaratory judgment/breach of duty to defend action and the Policy, the Montana Supreme Court noted that Philadelphia never requested arbitration when the claim was made or when Philadelphia denied defense. Pet. 20a, *Gateway*, 464 P.3d at 55, ¶ 27. The Court noted that the arbitration provision was voluntary, not mandatory. *Id.* The Court noted that even had arbitration been requested, the provision designated only one particular issue for arbitration: "when the parties 'do not agree whether

coverage is provided for a claim made against the insured.'" Pet. 22a, *Gateway*, 464 P.3d at 55, ¶ 27. The Court held that the arbitration provision did not apply when litigation occurred about other issues, such as here: "state court civil litigation regarding an insured's claim against the insurer for breach of the duty to defend." *Id.* The Court also noted that the duty to defend is broader than the question of coverage. *Id.*[3] Thus, the Court concluded jurisdiction existed over Philadelphia under Montana's long-arm statute because there was a "direct affiliation, nexus, or substantial connection" between the basis for the cause of action – a breach of the duty to defend and indemnify Respondents against claims made in the Montana Class Action – and the act falling under the long-arm statute – "contracting to insure any person, property, or risk located within Montana at the time of contracting" by issuance of the Policy. *See* Pet. 13a-23a, *Gateway*, 464 P.3d at 52-55, ¶¶ 17-28.

Next, the Montana Supreme Court determined whether exercising specific personal jurisdiction over Philadelphia comported with traditional notions of fair play and substantial justice under the Due Process Clause. It did so by determining whether (1) Philadelphia purposefully availed itself of the privileges of conducting activities in Montana, (2) Respondents' declaratory judgment/breach of duty to defend case arose out of Philadelphia's contact with Montana, and (3)

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[3] Ohio also holds that an insurer's duty to defend is broader than and distinct from its duty to indemnify. *Sharonville v. Am. Employers Ins. Co.*, 846 N.E.2d 833, 837 (Ohio 2006).

exercising jurisdiction over Philadelphia would be unreasonable. The Montana Supreme Court considered the entirety of Philadelphia's actions.

Contrary to Philadelphia's representation that the Montana Supreme Court found jurisdiction should be exercised because of Philadelphia's "nationwide territory of coverage clause" (Pet. 4), i.e., "the policy shall extend to any wrongful act anywhere in the world," the Montana Supreme Court specifically stated that the clause *was not* what determined specific personal jurisdiction. Pet. 29a, *Gateway*, 464 P.3d at 57-58, ¶ 35. The Court stated:

> We recognize that "[w]hile a promise to provide coverage throughout the United States may establish that an insurer has agreed to submit to jurisdiction in any forum that has jurisdiction to adjudicate claims against its insured, this agreement to defend and indemnify its insured in any state does not imply an agreement to allow its insured to bring suit against it in any state." [citation omitted]. . . . "*[I]t is the defendant's forum-related conduct that is at issue*. . . ."

Id. (emphasis added); *see also Walden v. Fiore*, 571 U.S. 277, 284 (2014) (specific personal jurisdiction "focuses 'on the relationship among the defendant, the forum, and the litigation' "); *Tyrell*, 137 S.Ct. at 1559 (the business a company does in Montana is sufficient to subject the company to specific personal jurisdiction on claims related to the business it does in Montana).

In addressing the relationship between Philadelphia, Montana and Respondents' claims against Philadelphia, the Montana Supreme Court first determined Philadelphia purposely availed itself to the benefits and protections of the laws of Montana and established a connection with Montana such that it reasonably should have anticipated "being haled into court" in Montana. Pet. 26a-28a, *Gateway*, 464 P.3d at 57, ¶ 33. In reaching that decision, the Court noted that there was more than a mere foreseeability that a claim could arise in Montana. *Id.* Philadelphia had sought and obtained authorization from the Montana Commissioner of Insurance to sell insurance products and to conduct related business transactions in Montana since 1992, sold policies of insurance for risks and persons within Montana, and authorized the Commissioner as its agent for service of legal process in Montana. *Id.* Then, Philadelphia processed an application that listed, on several attachments, Gateway's active business locations in Montana. *Id.* Using that knowledge, Philadelphia then issued the Policy that incorporated those materials and insured Gateway "and, consistent therewith, Philadelphia's counsel later identified the Entities as insureds under the Policy when Gateway presented a claim." *Id.*

The Court found that Philadelphia issued an indemnity insurance policy under which Philadelphia ostensibly provided coverage for Gateway's businesses operations, including those located in Montana. Pet. 32a, *Gateway*, 464 P.3d at 59, ¶ 39. The Court noted

that Philadelphia could have excluded Montana from the Policy's coverage area but did not do so. Pet. 27a-28a, *Gateway*, 464 P.3d at 57, ¶ 33. The Court held that nothing in the Policy, including the arbitration provision, prohibited Montana courts as serving as a forum for this dispute between Respondents and Philadelphia. *Id.* The Court noted that Gateway's businesses were sued in Montana. Pet. 32a, *Gateway*, 464 P.3d at 59, ¶ 39. After receiving the claim, Philadelphia denied a defense to the Respondents in the Montana Class Action. *Id.* The Respondents therefore sustained the loss of the Policy's benefit and acted on their own behalf to fend for themselves in the Montana case. *Id.* Thus, the Court found that Respondents' claim against Philadelphia arose out of or resulted from Philadelphia's forum-related activities with Montana. Pet. 32a, *Gateway*, 464 P.3d at 59, ¶ 40.

Finally, the Montana Supreme Court noted that even though Philadelphia essentially ignored any argument on whether it was reasonable for Montana to exercise jurisdiction over Philadelphia, the Court would nevertheless go through that analysis. Pet. 33a-34a, *Gateway*, 464 P.3d at 59, ¶ 42. The Court noted that not only is Philadelphia authorized to, it does in fact, sell insurance and by extension litigates claims in Montana. Pet. 34a, *Gateway*, 464 P.3d at 59, ¶ 43. Thus, defending against the underlying lawsuit would cause little burden to Philadelphia, which it is well positioned to undertake. *Id.* Philadelphia presented no argument on a conflict between Pennsylvania or Montana. *Id*. Montana courts provide a forum for the most convenient and efficient resolution of the

controversy as Respondents and their agents are in Montana. *Id*. The Court concluded that Montana has a significant interest in adjudicating Respondents' declaratory judgment action against Philadelphia because the underlying suit was brought in Montana and Philadelphia did not defend its insureds in the Montana Class Action. Pet. 34a, *Gateway*, 464 P.3d at 59-60, ¶ 43. The Court held that Philadelphia had not presented a compelling case that jurisdiction would be unreasonable. Pet. 35a, *Gateway*, 464 P.3d at 60, ¶ 44.

Accordingly, the Court held that Montana may exercise specific jurisdiction over Philadelphia regarding Respondents' claims. Pet. 35a, *Gateway*, 464 P.3d at 60, ¶ 45.

REASONS FOR DENYING THE WRIT

I. No case (federal or state) has concluded specific personal jurisdiction does not exist and should not be exercised over an insurer when at the time of contracting the policy identified persons, properties and risks in the State, the insureds were subsequently sued and requested defense in that State, the insurer denied the defense request, and the underlying suit resulted in a judgment being entered against and paid by the insureds in that State.

Philadelphia argues this Court should accept its writ because COVID has introduced uncertainty into the insurance world. Pet. 4, 5. COVID was not an issue

raised below. Pet. 1a-35a, *Gateway*, 464 P.3d 44, ¶¶ 1-45. In fact, COVID was not known to exist when the Montana Supreme Court issued its decision. Moreover, as is clear from the Policy, the Montana state district and Supreme Court decisions, and Philadelphia's denial letter (Resp. 1a-16a), COVID was not identified as an alleged reason Respondents were sued or sought defense or why Philadelphia denied defense to Respondents in the Montana Class Action.

Because this argument was not raised below, it should not now be considered. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond, Inc.*, 527 U.S. 308, 318 n. 3, 118 S.Ct. 1961, 1968, 144 L.Ed.2d 319 (1999) (party's injunction argument was not considered nor raised in underlying matter and would not be considered); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 61, n. 2, 101 S.Ct. 1559, 1562, 67 L.Ed.2d 732 (1981) (Court declined to consider argument that a 6-month statute of limitations under National Labor Relations Act applied; argument was not raised nor considered below); *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162 (1969) (Court would not consider federal question not raised nor passed upon in the state court below).

A. The Montana Supreme Court considered the entirety of the relationship among Philadelphia, Montana and Respondents' litigation, not simply the Policy's territory of coverage clause.

In determining whether specific personal jurisdiction exists and should be exercised, a court considers a variety of interests. A state court may exercise specific personal jurisdiction, if "the *suit*" "aris[es] out of or relat[es] to the defendant's contacts with the *forum*." *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773, 1780 (2017) (emphasis in original), citing to *Daimler AG v. Bauman*, 134 S.Ct. 746, 754 (2014); *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011). A court should consider "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice." *Bristol-Myers Squibb*, 137 S.Ct. at 1780. The court should consider the burden on the defendant and the affiliation between the forum and the underlying controversy. *Id.*, 137 S.Ct. at 1780-1781. The Montana Supreme Court considered each of these interests.

First, as discussed above, the Montana Supreme Court determined jurisdiction existed over Philadelphia pursuant to M.R.Civ.P. 4(b)(1). Philadelphia does not challenge that analysis. Then, after reaching that conclusion, the Montana Supreme Court analyzed whether exercising specific personal jurisdiction over

Philadelphia comported with traditional notions of fair play and substantial justice embodied in the Due Process Clause. Pet. 23a-35a, *Gateway*, 464 P.3d at 55-60, ¶¶ 29-45. The Court analyzed whether Respondents' declaratory judgment/breach of duty to defend suit against Philadelphia arose out of or related to Philadelphia's contacts with Montana. Pet. 23a-33a, *Gateway*, 464 P.3d at 55-59, ¶¶ 29-40. The Court considered Montana's interests and those of Respondents in proceeding in Montana. Pet. 33a-35a, *Gateway*, 464 P.3d at 59-60, ¶¶ 41-44. The Court considered the burden on Philadelphia and the affiliation between Montana, Respondents' suit against Philadelphia, location of witnesses, and the overall reasonableness of exercising jurisdiction over Philadelphia. *Id.*

Philadelphia does not challenge that it did acts by which it purposefully availed itself of the privilege of conducting activities in Montana, thereby invoking its laws. *See* Pet. 1-21 Philadelphia requested and was given authority from the Montana Insurance Commissioner to sell casualty insurance in Montana and has done so since 1992. Pet. 27a, *Gateway*, 464 P.3d at 57, ¶ 33. The Policy specifically identified persons, property, and risks (the four Montana HGIs and Gateway's management in Montana of them) to be insured in Montana at the time the Policy was issued. *Id.* Philadelphia processed and expressly made the application part of the Policy. *Id.* When it denied Respondents' request for defense in the Montana Class Action, Philadelphia identified all Respondents as insureds under the Policy. *Id.*; *see also* Resp. 1a-16a.

Philadelphia does not dispute that Respondents' declaratory judgment/breach of duty to defend claims arise out of or result from Philadelphia's forum-related activities in Montana. *See* Pet. 1-21 Respondents were sued in Montana in the Montana Class Action. Pet. 9a, *Gateway*, 464 P.3d at 50, ¶ 10; Resp. 1a-16a. Philadelphia denied Respondents' request for defense of the Montana Class Action. *Id.*; Resp. 1a-16a. Left to fend for themselves, after litigating the Montana Class Action for nearly a year, the Montana state district court entered judgment against them, which Respondents paid in Montana. *Id*.

Philadelphia never argued below that exercising specific personal jurisdiction over it was unreasonable. Pet. 33a-34a, *Gateway*, 464 P.3d at 60, ¶ 42. Philadelphia concedes it sells insurance and litigates in Montana. *See* Pet. 1-21. Philadelphia does not argue there is any burden, let alone any significant burden, in defending in Montana. *See* Pet. 1-21; *Gateway*, 464 P.3d 44, ¶¶ 1-45. Philadelphia did not point to any conflict with Pennsylvania law, where it is domiciled, and Montana law. *Id*. Philadelphia does not dispute that all Respondents, other than Gateway, are businesses located in Montana. *Id*. Philadelphia did not dispute that Montana has a significant interest in adjudicating Respondents' declaratory judgment/breach of duty to defend claims when the Montana Class Action from which this matter arose, and for which Philadelphia denied defense, was a Montana case. *Id*.

Instead, Philadelphia asserts the Montana Supreme Court's analysis of the Due Process Clause's

traditional notions of fair play and substantial justice was flawed for two reasons; neither argument has merit.

First, Philadelphia misrepresents that the Montana Supreme Court found specific personal jurisdiction because of Philadelphia's "nationwide territory of coverage clause." Pet. 4-6. The Montana Supreme Court specifically stated that the nationwide territory of coverage clause *was not* what determined specific personal jurisdiction. Pet. 29a, *Gateway*, 464 P.3d at 57-58, ¶ 35. Rather, the Court held that it was Philadelphia's forum-related conduct which was at issue and formed the bases for Montana to have specific personal jurisdiction over Philadelphia for Respondents' declaratory judgment/breach of duty to defend claims. Pet. 23a-25a, *Gateway*, 464 P.3d at 55-60, ¶¶ 29-44. In support of its representation, Philadelphia argues there is a conflict between the Montana Supreme Court and the Fourth, Ninth, Seventh and Tenth Circuit Courts of Appeals purported decisions on "territory of coverage" clauses. Pet. 5-10. Not only is Philadelphia's representation of the Montana Supreme Court's decision untrue, no purported "territory of coverage" clause conflict exists between those circuits.

Second, Philadelphia argues that based on the arbitration clause, it could never have foreseen being sued in Montana for breach of its duty to defend in Montana. Pet. 10-16. Thus, Philadelphia argues that by Montana exercising personal jurisdiction over it, the Due Process Clause's traditional notions of fair

play and substantial justice are not met. *Id.* This argument lacks merit. Philadelphia acknowledges it knew the Policy was issued to insure Gateway's management of the Montana HGIs, its denial letter acknowledged that all Respondents were insureds under the Policy, and it denied defense of Respondents in the Montana Class Action. Further, Philadelphia did not request arbitration when it denied defense nor before judgment was entered against and paid by Respondents in the Montana Class Action. Additionally, the arbitration provision is voluntary and does not apply to disputes such as Respondents' declaratory judgment/breach of duty to defend action. Finally, both Montana and Ohio hold that where an insurer breaches its duty to defend, the insurer has waived and cannot enforce policy provisions. Ohio specifically holds that arbitration and forum selection provisions are waived and it would be unjust and "disingenuous" for an insurer to deny defense and then attempt to enforce arbitration or forum selection provisions.

B. The question Philadelphia presents – a purported conflict between the Montana Supreme Court and the Fourth, Ninth, Seventh and Tenth Circuit Courts of Appeals – does not exist.

Philadelphia argues the Montana Supreme Court's decision and the decisions of the Fourth and Ninth Circuit Courts of Appeals in *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282 (4th Cir. 1987) and *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins.*

Co., 907 F.2d 911 (9th Cir. 1990) conflict with the decisions of the Seventh and Tenth Circuit Courts of Appeals in *Lexington Ins. Co. v. Hotai Ins. Co*., 938 F.3d 874 (7th Cir. 2019) and *OMI Holdings v. Royal Ins. Co. of Can.*, 149 F.3d 1086 (10th Cir. 1998). Even if the Court reaches this argument, which Respondents submit it should not because the Montana Supreme Court made clear that it was not making its personal jurisdiction decision based on Philadelphia's territory of coverage clause but instead on Philadelphia's forum-related contacts with Montana and the litigation against it, this argument lacks merit.

In *Rossman*, the dispute arose over the rights and obligations of four insurers concerning their obligations on judgments entered in wrongful death and personal injury claims from an automobile accident in Virginia. *Rossman*, 832 F.2d at 284. Of the four insurers, only Consolidated Insurance Company ("Consolidated") challenged personal jurisdiction. *Id.*, 832 F.2d at 285. The Court found exercising personal jurisdiction in Virginia over Consolidated was proper for two reasons. First, the Court found there was no doubt Consolidated could foresee being haled into Virginia court. *Id.*, 832 F.2d at 286. It wrote its policy to cover its insured wherever the insured was hurt or sued. *Id.* Consolidated "specifically promised to defend its policyholders from any claim or suit arising from a loss or accident within its policy territory, which included the entire United States." *Id.* Further, the policy stated that "[w]e will settle or defend, as we consider appropriate, any claim or suit asking for damages" if the accident or loss "occurs within the policy territory [the

United States of America, its territories or possessions, Puerto Rico, or Canada]." *Id.*, 832 F.2d at 285.

Second, *Rossman* evaluated and addressed whether traditional notions of fair play and substantial justice precluded personal jurisdiction in Virginia. *Id.*, 832 F.2d at 287. The Court found those factors favored Virginia. The plaintiffs were Virginia residents, the accident occurred in Virginia, and the tort claims were tried in Virginia. Virginia "has a compelling interest in providing a forum for its residents when insurers refuse to pay a claim," it would be a "severe disadvantage if [plaintiffs] were forced to follow the insurance company to a distant state in order to hold it legally accountable," and "[w]hile [the Court did] not minimize the inconvenience of distant litigation for any party, Consolidated's greater resources may lessen its burden in this regard." *Id.* Contrary to Philadelphia's argument here, *see* Pet. 6, *Rossman* did not rely simply on the territory of coverage clause to find personal jurisdiction over Consolidated in Virginia was proper.

Farmers Ins. involved a lawsuit between two insurers over who was responsible to provide coverage for an automobile accident in Montana. Farmers Insurance Exchange ("Farmers") was a California insurer doing business in Montana and elsewhere and had issued a policy which insured the driver. *Farmers Ins.*, 907 F.2d at 912. Portage La Prairie Mutual Insurance Company ("Portage"), a Canadian insurer, had issued no policies in Montana. *Id.* The accident occurred in Montana; one of Portage's insureds was a passenger in

the vehicle. *Id.* Farmers, not the Portage insured, sued Portage because Portage denied coverage arguing Portage's policy indemnified any person driving with the insured's consent. *Id.* The Ninth Circuit looked first to Montana's long-arm statute and found Portage's act, alleged tortious denial of insurance coverage, came within the statute even though the decision is made out-of-state. *Id.*, 907 F.2d at 912-913, citing M.R.Civ.P. 4(b)(1)(B) ("any person is subject to jurisdiction of the courts of this state as to any claim arising from . . . the commission of any act which results in accrual within this state of a tort action").

Next, the Court examined due process and found it was satisfied. *Farmers Ins.*, 907 F.2d at 913-915. The Court found that Portage satisfied the purposeful availment requirement because: 1) its policy coverage extends into Montana, 2) the insured event resulted in litigation there, 3) "[a]s an automobile liability insurer, Portage could anticipate the risk that its clients would travel in their automobiles to different states and become involved in accidents and litigation there," 4) "litigation requiring the presence of the insurer is not only foreseeable, but it was purposefully contracted for by the insurer," and 5) "unlike a product seller or distributor, an insurer has the contractual ability to control the territory into which its 'product' – the indemnification and defense of claims – will travel." *Id.*, 907 F.2d at 913-914. The Court found the "arising out of" requirement was met because "[b]ut for Portage's alleged breach of promise to defend its insured for

injuries caused in Montana, this suit would not have arisen." *Id.*, 907 F.2d at 914-915.

The Court found it was reasonable to exercise personal jurisdiction over Portage in Montana. *Farmers Ins.*, 907 F.2d at 915. Portage voluntarily contracted to provide insurance coverage for travel in Montana. *Id.* Portage's agents allegedly had actual knowledge that the vehicle would be driven to Montana. *Id.* The defense and settlement of the underlying suit occurred in Montana state court. *Id.* Thus, Portage's presence in Montana was foreseeable. Portage's burden of litigating in Montana would be minimal. *Id.* Montana has a "great interest in regulating bad faith by insurance companies in the state." *Id.* Montana would provide at least an efficient forum as Canada. The accident occurred in Montana. *Id.* Both insurers had undertaken investigations in Montana. *Id.* The driver's permissive use of the vehicle occurred in Montana. *Id.* Finally, it was Portage's refusal to defend in Montana that brought it into the Montana state court action. *Id*. Just as with this case, *Farmers Ins.* did not rely simply on the territory of coverage clause to find personal jurisdiction in Montana over the Canadian insurer.

In *Lexington*, Lexington, a Massachusetts based insurer, defended Trek, its insured in Texas, where Trek was sued and settled. *Lexington*, 938 F.3d at 877. Seeking reimbursement of the settlement payment, Lexington, not Trek, brought suit in Wisconsin against two Taiwan insurers who provided insurance coverage to two Taiwanese manufacturing companies. *Id.* 938

F.3d at 876. Lexington's argument for personal jurisdiction was based solely on the "worldwide coverage" provisions in the policies. *Id.*, 938 F.3d at 878, 880. The Taiwanese insurers did not do any business in Wisconsin. *Id.*, 938 F.3d at 879. The underlying case did not occur in Wisconsin. *Id*. The Taiwanese insurers' policies were with the two Taiwanese companies – neither of which was sued in the underlying matter. *Id*. "The 'worldwide coverage' clause defined the territorial scope of the insurers' obligation to Trek [the insured]," not another insurer. *Id.* 938 F.3d at 882. The Taiwanese insurers' policies provided the insurers had the right – not a duty – to defend Trek in any jurisdiction in which Trek incurred liability. *Id.*, 938 F.3d at 882, 883. Importantly, the Court held that where a policy contains a "duty to defend" clause, "the 'expectation of being haled into court in a foreign state [i]s an express feature of [the] policy'" because its presence in the state "was purposefully contracted for by the insurer." *Id*. Like with the Montana Supreme Court, *Rossman*, and *Farmers Ins*., in its due process analysis, *Lexington* reviewed the relationship among the insurer, forum and litigation.

OMI also does not support Philadelphia. OMI, an Iowa company headquartered in Minnesota, was a subsidiary of a Canadian brewer. *OMI*, 149 F.3d at 1089. OMI was sued in Kansas by a competitor of OMI. *Id.* Four years after being sued and after substantial discovery and settlement discussions had occurred and less than four months before trial, OMI notified its

insurers of the suit. *Id.*, 149 F.3d at 1089-1090[4]. All insurers denied coverage because of late notice and other reasons. *Id.* On the personal jurisdiction issue, the Court liberally construed Kansas's long-arm statute to allow jurisdiction and proceeded to the Due Process analysis. *Id.*, 149 F.3d at 1090. OMI's sole basis for asserting personal jurisdiction existed over the insurers in Kansas was the insurers' "territory of coverage" clauses. *Id.*, 149 F.3d at 1090, 1095.

Like with *Rossman* and *Farmers Ins., OMI* held that the fact that the insurers allegedly "wrongfully refused to defend" in Kansas was clearly a "forum-related activity," so that step of the Due Process analysis was met. *OMI*, 149 F.3d at 1095. All the *OMI* insurers, however, were Canadian entities; none were U.S. companies. *Id.* None of the insurers had licenses to conduct business in Kansas. *Id.* None of the insurers insured even a single Kansas resident. *Id.* The policies were all issued to a Canadian company, OMI's parent, in accordance with Canadian law. *Id.*, 149 F.3d at 1095, 1097. The Canadian insurers all would have to travel outside their home country to a foreign country unfamiliar with Canadian law governing the dispute. *Id.*, 149 F.3d at 1096. Neither party claimed the alleged tortious act occurred in Kansas or involved Kansas residents. *Id.* Very few witnesses lived in Kansas; most were from Canada or other states. *Id.*, 149 F.3d at 1097. Because the dispute involved Canadian insurers – none authorized to do business in the State – and a Canadian insured, Canada's sovereign interest was

[4] OMI appears to have notified one insurer after trial. *Id.*

implicated. *Id.*, 149 F.3d at 1098; *see also Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153 (10th Cir. 2010) (due process met and personal jurisdiction existed in Wyoming over Utah contractor because contractor purposefully availed itself of the benefits and protections of the laws by doing business in the State, the related litigation occurred in Wyoming, and there was minimal burden, if any, to litigate in Wyoming versus Utah). *OMI* conducted the same relationship between the insurer, forum and litigation as done by the Montana Supreme Court, *Rossman*, *Farmers Ins.* and *Lexington*.

As addressed above, Philadelphia refused to defend in Montana. Philadelphia requested and is authorized to and does sell insurance in Montana. The Policy involves Montana entities – the four Montana HGIs. Even ignoring that Philadelphia now asserts the Montana HGIs were not insureds – which is incorrect – the Policy was undisputedly issued for the purpose of insuring Gateways' acts and businesses in Montana. The Policy expressly states that Philadelphia "shall . . . have the duty to defend any claim." Philadelphia routinely is sued and defends itself in Montana. Philadelphia is a U.S. company, not a foreign company who has to travel from outside its home country to a foreign country. Nearly all witnesses are Montana citizens. Respondents' injury – they were denied defense in Montana and had judgment entered against and paid by them in Montana – occurred in Montana. Montana has a substantial interest in this dispute – the Montana Class Action judgment was entered against and paid by Montana entities in Montana. *See Tidyman's*

Management Services, Inc. v. Davis, 2014 MT 205, ¶ 20, 376 Mont. 80, 330 P.3d 1139; *Kemp v. Allstate Ins. Co.*, 183 Mont. 526, 532-533, 601 P.2d 20, 23-24 (1979).

In sum, contrary to Philadelphia's argument, the Montana Supreme Court and the Fourth, Ninth, Seventh and Tenth Circuits do not split. Montana and each of those Circuits first look to see if the state's long-arm statute applies and then, analyze the relationship among the insurer, the forum and the litigation for Due Process compliance to determine whether personal jurisdiction should be exercised.

II. The Montana Supreme Court properly applied the facts and law to the arbitration provision. The arbitration provision does not apply.

Philadelphia next argues that based on the arbitration provision[5], Philadelphia could never have anticipated being haled into Montana court for a lawsuit such as Respondents' declaratory judgment action/ breach of duty to defend suit. In support, Philadelphia cites *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917 (1989); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449 (1974); *Katz v. Katz*, 2108 WL 3184841, 2018 Ohio 3210 (Ohio Ct. App. 6th 2018); *Burger King Corp. v.*

[5] Philadelphia has added the heading "Policy Arbitration Forum Selection Clause" to Appendix C to the Petition. The arbitration provision does not contain those words. *Cf.* Pet. 73a; Pet. 152a.

Rudzewicz, 471 U.S. 462 (1985)[6]; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Walden*; and *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). While Philadelphia's reliance on *Concepcion* should not be considered because the Federal Arbitration Act ("FAA") was not raised below, neither *Concepcion* nor the other cases support its position.

The Policy's arbitration provision provides that "[i]f we and the insured do not agree whether coverage is provided under this Coverage Part for a claim made against the insured, then either party may make a written demand for arbitration." Pet. 152a. As the Montana Supreme Court pointed out, the Policy's arbitration provision was voluntary requiring arbitration only if requested by one of the parties; it does not mandate arbitration. Pet. 152a; Pet. 21a, *Gateway*, 464 P.3d at 55, ¶ 27. Further, the arbitration provision did not encompass litigation about other issues, such as here: state court civil litigation regarding insureds' claim against the insurer for breach of the duty to defend. *Id*.

Neither Respondents nor Philadelphia requested arbitration in 2015 when the claim was made against the insureds. Pet. 21a, *Gateway*, 464 P.3d at 55, ¶ 27. Philadelphia bypassed the voluntary arbitration by unilaterally denying Respondents' claim without requesting arbitration of whether coverage was provided,

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[6] Philadelphia represents that the Montana Supreme Court did not consider *Burger King*. Pet. 12. This is incorrect. Both Respondents and Philadelphia addressed *Burger King* in Philadelphia's appeal. As discussed below, it does not apply.

leaving Respondents to fend for themselves in the Montana Class Action. *Id.;* Resp. 1a-16a.

In *Rodriguez*; *Scherk*; *Concepcion*; and *Katz*, arbitration was mandatory, not voluntary. *See Rodriguez*, 109 S.Ct. at 1918-1919 ("any controversies" must be "through binding arbitration"; "agreement to arbitrate" "controversies is unqualified" unless arbitration provision "is found to be unenforceable under federal or state law"); *Scherk*, 94 S.Ct. at 2452 ("'any controversy or claim (that) shall arise out of this agreement or the breach thereof' would be referred to arbitration"); *Concepcion*, 563 U.S. at 336 (FAA applies; "[t]he contract provided for arbitration of all disputes between the parties"); *Katz*, 2018 WL 381481 * 4, 2018 Ohio 3210, ¶ 20 ("[a]ny controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be settled by arbitration"). In addition to those cases involving mandatory, not voluntary, arbitration clauses, those cases are noteworthy for two other reasons.

First, as *Rodriguez* made clear, even mandatory arbitration will not be required if arbitration is unenforceable under either federal or state law. Here, even

if the Policy's arbitration provision applied, which it does not, the arbitration provision is not enforceable under either Ohio or Montana law. Ohio holds that arbitration (and forum selection) clauses will not be enforced where it would be unjust and are waived where not requested before an insured has been injured or prejudiced by the insurer's actions. *See Tinker v. Oldaker*, 2004 WL 1405563 (Ohio App. 10th Dist. 2004) (insurer waived enforcement of arbitration clause because nonmoving party prejudiced by insurer's actions); *LexisNexis v. Moreau-Davila*, 95 N.E.3d 674, 680 (Ohio Ct. App. 2017) (forum selection clause unenforceable where it would be unjust); *inVentiv Health Communs., Inc. v. Rodden*, 108 N.E.3d 605 (Ohio Ct. App. 2018) (same). Ohio and Montana hold that where an insurer breaches its duty to defend, the insured is relieved of all obligations to cooperate under the policy and the insurer cannot enforce contract provisions. *Sanderson v. Ohio Edison Co.*, 69 Ohio St.3d 582, 586-587, 635 N.E.2d 19, 23-24 (Ohio 1994) (failure to defend is a material breach of contract for which insurer is estopped from asserting and has waived policy provisions); *Patterson v. Cincinnati Insurance Companies*, 91 N.E.3d 191, 199-200 (Ohio 2017) (insured relieved of complying with policy provisions where insurer denied coverage and failed to file declaratory judgment action where coverage could have been resolved before underlying action was resolved); *Bank One, N.A. v. Echo Acceptance Corp.*, 522 F.Supp.2d 959, 970 (S.D. Ohio 2007) (disingenuous for insurer to deny coverage and then claim insured must comply with policy requirements); *Draggin' Y Cattle Company, Inc. v.*

Junkermier, Clark, Campanella, Stevens, P.C., 2019 MT 97, ¶ 22, 439 P.3d 935 (Mont. 2019) (where insurer breaches duty to defend, insured relieved of duty to cooperate under contract and insurer estopped from denying coverage or raising other contract defenses); *J & C Moodie Properties, LLC v. Deck*, 2016 MT 301, ¶ 38, 384 P.3d 466 (Mont. 2016) (insurer forfeits any rights to contest coverage or assert policy limits when it breaches duty to defend); *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶ 28, 90 P.3d 381 (Mont. 2004) (where insurer breaches duty to defend, "it is estopped from denying coverage"); *Tidyman's*, 330 P.3d 1139, ¶ 28 (insurer not allowed to refuse to defend and then after insured settles, argue coverage provisions apply; to do so would allow insurers to circumvent duty to defend).

The application, which is part of the Policy, identified Gateway's operations and the Montana HGIs as risks, persons and properties for which coverage was desired. Philadelphia denied defense to the Respondents for the Montana Class Action. A Montana state court entered judgment against them, which Respondents paid to resolve the Montana Class Action. Philadelphia did not request arbitration when it denied defense or before judgment was entered and paid by Respondents in the Montana Class Action. Respondents have sued requesting a declaration that

Philadelphia's denial of defense was a breach of its duty to defend and that they seek damages for that breach. In a situation like this, neither Ohio nor Montana allows an insurer to enforce policy provisions including any purported arbitration or forum selection provision.

Rodriguez, *Scherk*, *Concepcion* and *Katz* are also noteworthy for distinguishing arbitration clauses addressing "claims arising out of the agreement" versus claims "arising out of the breach thereof." The arbitration clauses in *Scherk, Rodriguez, Concepcion* and *Katz* clearly provided they applied to "any" or "all" controversies. Resolving any possible ambiguity, *Scherk* and *Katz* specially included claims "arising out of the breach" of the contract at issue. *See Katz*, 2018 WL 381481 * 4, 2018 Ohio 3210, ¶ 21 (under Ohio law, "party cannot be required to so submit to arbitration any dispute which he has not agreed to so submit"; and before dispute can be required to be arbitrated there must be "positive assurance that the arbitration clause is not susceptible" to other interpretation). In contrast, Philadelphia's arbitration provision does not say "any" or "all" controversies nor does it say claims arising out of breach of the agreement; it provides it is only for "whether coverage is provided under this Coverage Part." Pet. 152a; Pet. 21a-22a, *Gateway*, 464 P.3d at 55, ¶ 27.

Philadelphia also cites *Burger King*, *World-Wide Volkswagen*, *Walden* and *Concepcion* for its proposition that not enforcing the arbitration provision would violate traditional notions of fair play and substantial justice because the arbitration provision provides either

party "*may*" request arbitration and when requested that arbitration would be done in Ohio. Those cases do not support Philadelphia's argument. None of those cases involved a voluntary arbitration provision. Also, as *Rodriguez, Scherk, Katz* and the other Ohio and Montana cases cited above make clear, arbitration provisions will not be enforced under Ohio or Montana law if enforcement would be unjust, where not requested before resolution of the underlying suit, or where the insured was prejudiced by the insurer's actions.

In *Burger King*, this Court concluded that personal jurisdiction was proper over a nonresident defendant because the alleged injury arose out of or related to actions by the nonresident defendant that were purposefully directed toward forum residents, i.e., the nonresident created continuing obligations between himself and forum residents – fulfill contractual requirements – which in "no sense [could] be viewed as 'random,' 'fortuitous,' or 'attenuated.'" *Burger King*, 471 U.S. at 479-480. The Court held the nonresident could not avoid jurisdiction claiming it had never physically entered the forum; much business is now done by mail or wire. The nonresident was experienced and sophisticated and did not act under economic duress or disadvantage.

Similar to the non-resident in *Burger King*, Philadelphia is certainly experienced and sophisticated. Philadelphia entered a contract to fulfill activities in Montana, i.e., defend Respondents for claims made against them in Montana. Philadelphia did not act under economic duress or disadvantage when it issued

the Policy or did not request arbitration when denying defense leaving Respondents to fend for themselves with a resulting judgment being entered against and paid by them in Montana.

World-Wide Volkswagen involved a products liability claim filed in Oklahoma against two New York corporations by New York residents who bought a car in New York. *World-Wide Volkswagen*, 444 U.S. 286, 288-289. The New York corporations did not do any business in Oklahoma, have an agent to receive process in Oklahoma, or advertise in any media calculated to reach Oklahoma. *Id.* In contrast, Philadelphia does business in Montana, issued the Policy specifically insuring risks, people or properties in Montana and has an agent to receive process in Montana.

In *Walden*, personal jurisdiction did not exist because the plaintiff's alleged injuries occurred in Georgia, not Nevada where suit was filed. *Walden*, 571 U.S. at 288 (no part of defendant's actions occurred in Nevada). In contrast, Respondents' injuries – the denial of defense and judgment entered and paid – occurred in Montana.

Below, Philadelphia did not raise the FAA or *Concepcion*. Even if it is considered, *Concepcion* does not support its position. *Concepcion* did not involve a lawsuit over an insurer's breach of its duty to defend. And unlike here, the defendant immediately requested arbitration.

III. Philadelphia's FAA/McCarron-Ferguson Act argument should not be considered. Even if considered, it lacks merit.

Philadelphia argues the Court should address the relationship between the FAA and McCarran-Ferguson Act and this Court's personal jurisdiction jurisprudence to give guidance to the insurance industry. *See* Pet. 16-20[7]. Philadelphia acknowledges that neither act was raised below. Because this argument was not raised below, it should not be considered. *See Grupo Mexicano*, 527 U.S. at 318 n. 3; *United Parcel Service*, 451 U.S. at 61, n. 2; *Cardinale*, 394 U.S. at 438. Even if considered, this argument lacks merit.

Philadelphia argues that under the FAA, 9 U.S.C. § 2, arbitration clauses are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract". *See* Pet. 16-17. Philadelphia tries to make much out of the fact that under the McCarran-Ferguson Act, Ohio allows arbitration provisions in insurance policies while Montana does not. *See* Pet. 18-19.

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[7] Philadelphia asserts that the acts "certainly sit in the background and guided the parties' reasoning." Pet. 16. As is evident based on Philadelphia's lack of citation to any document (let alone a document from or by Respondents), there is nothing showing either act played any role in Respondents' reasoning.

But Philadelphia cites no case where an insurance company is sued for breach of its duty to defend and then is allowed to enforce an arbitration/forum selection clause after rejecting the insureds' request for defense and the insureds had a judgment entered against them, which they paid. Both Montana and Ohio have repeatedly held that where an insurer breaches its duty to defend or where it would be unjust, the insurer waives and cannot enforce policy provisions, including arbitration and forum selection clauses against its insureds. Thus, even had Philadelphia raised its new FAA/McCarran-Ferguson argument below and even if the Policy's arbitration provision applied, the Montana and Ohio cases provide more than enough grounds for not enforcing the arbitration, or as Philadelphia calls it, the forum selection provision.

CONCLUSION

This Court should deny Philadelphia's petition for a writ of certiorari.

Respectfully submitted,

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