No. 21-506

IN THE

Supreme Court of the United States

AMEC FOSTER WHEELER PLC,

Petitioner,

v.

ENTERPRISE PRODUCTS OPERATING LLC,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

BRIEF IN OPPOSITION

DENISE LAMBERT DRAKE
Counsel of Record
ROBIN C. GIBBS
MARK A. GIUGLIANO
CHARLES MCCULLOUGH ROSSON
MICHAEL DAVIS
GIBBS & BRUNS LLP
1100 Louisiana St., Suite 5300
Houston, TX 77005
(713) 650-8805
ddrake@gibbsbruns.com

Counsel for Respondent

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QUESTION PRESENTED

Texas law requires that an agent be authorized to commit the acts giving rise to specific jurisdiction over a principal. Petitioner's Texas-based employees managed a Texas project under a "Delegated Authorities" document in which they were "mandated by [Petitioner's Chief Executive] to direct and manage the day-to-day business operations" of Texas projects on Petitioner's behalf. Did the Houston court of appeals err in finding Petitioner subject to specific jurisdiction for claims arising from those employees' Texas acts?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Enterprise Products Operating LLC states that it is a limited liability company, 99.999% of which is owned by Enterprise Products Partners L.P., a publicly traded limited partnership.

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JURISDICTION

As set forth below, this Court lacks jurisdiction over the first Question Presented because Petitioner failed to preserve it in the Texas courts.

STATEMENT OF THE CASE

I. Factual Background

This case concerns an engineering and construction project in Texas that Petitioner's Texas-based employees managed in Texas for a Texas company, Respondent Enterprise Products Operating LLC ("Enterprise"). In July 2013, Enterprise hired Foster Wheeler USA Corporation, a Delaware corporation with its principal place of business in Texas, to design and build a propane dehydrogenation plant in Mont Belvieu, Texas (the "Project"). Pet. App. 2a. The parties agreed that Texas law would govern the contract and consented to jurisdiction and venue in Houston, Texas. *Id.* 3a. After Foster Wheeler USA mismanaged the Project, Enterprise called for a complete engineering standdown in October 2014 to assess the Project's status and forecast. *Id.* Contemporaneously, Amec plc acquired Foster Wheeler USA, and from this acquisition a new company emerged: Petitioner Amec Foster Wheeler plc. *Id.*; Pet. iii. Far from a mere "holding company," Pet. 6, the evidence showed and the trial court found that Petitioner "is organized and operates as a single, top-down controlled and fully integrated entity" that "exerts significant control over its subsidiaries, . . . including with respect to [Foster Wheeler USA's] daily business operations in Texas."

Alarmed that Foster Wheeler USA might be fired from the lucrative Project immediately after the acquisition, Petitioner assigned its top executives to assume ultimate control over the Project—among them, (1) Simon

Naylor, Petitioner's "Group President, Americas"; and (2) Jeff Reilly, Petitioner's "Group President, Business Development." Pet. App. 4a–5a, 20a. Although Petitioner now contends that neither Naylor nor Reilly "was even an employee of [Petitioner]" but rather was employed by "another one of [Petitioner's] subsidiaries," Pet. 7, the evidence showed and both the trial and appellate courts found that Naylor and Reilly were "employee[s] . . . of [Petitioner]." Pet. App. 24a. Petitioner did not challenge that finding in its petition for review in the Texas Supreme Court. For good reason: It is undisputed that Petitioner executed an "Employment Agreement" with each, in a contract that defines Petitioner as being Naylor's and Reilly's employer and under which Naylor and Reilly reported directly to Petitioner's CEO. *Id.* 15a–16a, 19a–20a. Petitioner's CEO expressly authorized Naylor and Reilly to act on Petitioner's behalf in a formal charge titled "Delegated Authorities of the Group Presidents, Granted by the Chief Executive of [Petitioner]." *Id.* 16a–17a, 20a.

Thereafter, Naylor and Reilly, based in Houston, took control of the Project and met regularly with Enterprise at Enterprise's Houston headquarters. Their message was that Petitioner took full responsibility for the Project's failures and would use its "global resources" to get the Project back on track. *Id.* 4a–5a. Each routinely sent emails to Enterprise in their efforts to turn the Project around, with signature blocks bearing only Petitioner's name. Simultaneously, Naylor and Reilly reported their progress directly to their boss, Petitioner's CEO. *Id.* 4a, 15a, 19a. Although Enterprise had been prepared to terminate the contract, it relented because Petitioner stepped in, brought in its own personnel, and took over. *Id.* 4a–5a.

Petitioner's promises were short-lived. By late 2015, the cost overages and delays grew so extreme that Enterprise was forced to hire a replacement contractor. *Id.* 5a–6a. In September 2016, Enterprise terminated the contract for cause.

II. Proceedings Below

1. Enterprise then sued Foster Wheeler USA and Petitioner Amec Foster Wheeler plc for, among other things, breach of contract, breach of warranty, and negligence based on the words and actions of Naylor and Reilly in Texas after November 13, 2014, when Petitioner took over the Project. Enterprise also sued Petitioner for fraud and negligent misrepresentations committed by its employees Naylor, Reilly, and others in Texas. Pet. App. 23a.

Despite its extensive Texas contacts, Petitioner filed a special appearance in which it contested the Texas court's jurisdiction. After reviewing more than 8,000 pages of briefing and evidence, the trial court overruled Petitioner's special appearance based on specific jurisdiction and an alter-ego theory. It found, among other things, that specific jurisdiction existed over each of Enterprise's claims because Naylor and Reilly were "[Petitioner's] employees, agents, and/or apparent agents"; Petitioner "exerts significant and extraordinary control over its subsidiaries', including [Foster Wheeler USA's], daily business"; and Petitioner, through Naylor and Reilly, "[d]irected, controlled, and managed the [P]roject in Texas" and "[m]ade representations to Enterprise in Texas that gave rise to" each of Enterprise's claims. Pet. App. 13a–15a.

2. Petitioner perfected an interlocutory appeal, and the Fourteenth Court of Appeals in Houston (hereinafter, following Petitioner's convention, the "Houston

court") affirmed. In a unanimous 30-page opinion authored by Chief Justice Frost, the Houston court agreed that specific jurisdiction existed over each of Enterprise's claims because the evidence established that "Naylor and Reilly were acting as employees of [Petitioner]" on Petitioner's behalf and that their "Texas contacts are [thus] attributable to [Petitioner]." Pet. App. 23a–24a, 30a.

The Houston court also explained how Naylor's and Reilly's Texas contacts gave the Texas courts jurisdiction over each of Enterprise's claims arising from those contacts. Extensively citing *Moncrief Oil Int'l Inc.* v. *OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013)—the Texas Supreme Court case that requires a claim-by-claim analysis of specific jurisdiction—the Houston court examined the evidence showing that Naylor and Reilly met with Enterprise about the Project in Texas, made representations in Texas about Petitioner's ability to turn the failing Project around, and managed the day-to-day operations of the Project in Texas. Pet. App. 11a–12a, 27a–28a; *see id.* 15a–25a. The court ultimately concluded that both Enterprise's breach claims and its misrepresentation claims are "base[d]" on the "words and actions" by Naylor and Reilly in Texas on Petitioner's behalf. *Id.* 23a.

The Houston court thoroughly explained why the evidence supports the trial court's finding that when Naylor and Reilly performed the acts in Texas that were the basis of Enterprise's claims, they were acting under Petitioner's direct authority and on its behalf. Pet. App. 15a–25a. Naylor's and Reilly's employment agreements not only defined their employer as Petitioner, but also required them to report directly to Petitioner's CEO and made them subject to termination by Petitioner if they failed to carry out Petitioner's

orders. *Id.* 15a–16a, 19a–20a. Naylor and Reilly were also each subject to a formal "Delegated Authorities" document, which granted them express authority to act on Petitioner's behalf in Texas. *Id.* 16a–18a, 20a–22a. The Delegated Authorities document authorized Naylor and Reilly "to direct and manage the day-to-day business operations" of the Project in Texas and execute contracts on Petitioner's behalf. *Id.* 16a–17a, 20a. In their meetings with Enterprise and on their business cards and email signatures, Naylor and Reilly held themselves out to be working on Petitioner's behalf. *Id.* 17a.

Petitioner sought rehearing, which the Houston court denied.

3. Petitioner presented two issues for review to the Texas Supreme Court. The first issue was the same as Petitioner's second Question Presented in this Court: whether due process requires a court to determine that a company authorized an individual to perform the jurisdictional acts on the company's behalf. Opp. App. 2a. (Texas Supreme Court Petition at "Issues Presented"). The second issue Petitioner presented to the Texas Supreme Court involved an alter ego question that Petitioner does not press in this Court. *Id.* 2a–3a. The Texas Supreme Court denied review on both of Petitioner's issues presented. Petitioner did not seek review in the Texas Supreme Court on the first Question Presented in this Court, concerning whether due process requires a court to conduct a claim-by-claim analysis of specific jurisdiction. *See id.*

REASONS FOR DENYING THE WRIT

Petitioner's path to certiorari is blocked by nearly every legal and prudential consideration that guides this Court. As to the first Question Presented, Petitioner neither sought review from the state court of last resort nor preserved it in the intermediate appellate court. There is in any event no disagreement on that question: not by the Texas Supreme Court, which Petitioner admits is in unequivocal and controlling agreement; not by Respondent, who likewise agrees and would not advocate otherwise; and least of all by the Houston court below, which conducted the very analysis that the first Question Presented advocates. Indeed, Petitioner's excerpt from a Houston court of appeals footnote that allegedly rejects the need for a claim-by-claim analysis is an opinion in a different case from nearly a decade ago—and one that has been *expressly overturned*. At best, Petitioner's request for certiorari is one for fact-bound error correction allegedly justified by disagreement among *other* states in *other* cases. But even that cannot withstand scrutiny, as there is no split of authority that warrants review, and the exercise of jurisdiction over Petitioner is amply supported by the decision below and the extensive factual record.

Similar shortcomings sound the death knell for Petitioner's second Question Presented. The Houston court agrees with Petitioner that a court must determine an agent's authority—which is why its opinion expressly addressed Naylor's and Reilly's authority again and again. Every other court cited in the Petition also agrees. There is no split of authority on the face of the Petition, let alone one implicated by this case. On this question, like the first, Petitioner seeks only fact-bound error correction in circuit-split guise,

an exercise that is both inappropriate for certiorari review and futile on this record.

I. This Court Cannot And Should Not Review The First Question Presented.

A. This Court Lacks Jurisdiction Over The First Question Presented.

Petitioner waived its right to seek review of the first Question Presented by failing to preserve it properly in the Texas Supreme Court. Like in this Court, a petition for review in the Texas Supreme Court contains a section of "Issues Presented" that "must state concisely all issues or points presented for review." Tex. R. App. P. 53.2(f). But Petitioner's "Issues Presented" identified three issues—none of which puts the question of claim-by-claim analysis before that court. Opp. App. 2a–3a. Instead, Petitioner's first Issue Presented in Texas sought review of the agent authority question (the second Question Presented in the Petition here). *Id.* 2a. Petitioner's second Issue Presented in Texas sought review of an alter ego issue that Petitioner abandons here. *Id.* 2a–3a. And Petitioner identified an "unbriefed *third issue*" (emphasis in original) regarding whether the Houston court's holding "violates 'traditional notions of fair play and substantial justice.'" *Id.* 3a. In so doing, Petitioner took advantage of a Texas procedural rule that allows a party to preserve an issue without briefing it—so long as this issue is "included in the statement of issues or points." Tex. R. App. P. 53.2(i).

Nowhere did Petitioner identify the claim-by-claim question as an issue presented for the Texas Supreme Court's review. *See* Opp. App. 1a–3a. The only mention of it in the Texas petition appears in a footnote on page 22, where Petitioner observes in passing

that the "court of appeals also failed to conduct a claim-by-claim analysis," without asking for reversal on that basis. In so doing, Petitioner runs afoul of the preservation requirements of Texas Rule of Appellate Procedure 53.2, thereby depriving this Court of jurisdiction under Supreme Court Rule 14.1(g)(i). *Ramos* v. *Richardson*, 228 S.W.3d 671, 673 (Tex. 2007) ("We need not address this argument because the petitioners waived it by failing to advance it in their petition for review. *See* Tex. R. App. P. 55.2 (stating that a petitioner's brief on the merits must be confined to issues or points stated in the petition for review)."); *Guitar Holding Co., L.P.* v. *Hudspeth County Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008) ("We, of course, agree that issues not presented in the petition for review and brief on the merits are waived.").[1]

A grant by this Court also risks running headlong into further waiver issues reaching down to the Houston court of appeals. Supreme Court Rule 14.1(g)(i) requires a party to identify where "in the court of first instance and in the appellate courts . . . the federal questions sought to be reviewed were raised" to show that "this Court has jurisdiction to review the judgment on a writ of certiorari." Tellingly, Petitioner purports to have done so by identifying only sweeping portions of its Houston court brief encompassing

[1] While the Texas Supreme Court has addressed requests for incidental relief like attorney's fees, when those issues were briefed but not identified as an Issue Presented, those briefs expressly sought reversal and remand of the issue—which Petitioner did not do in its petition to the Texas Supreme Court. *Fort Worth Transp. Auth.* v. *Rodriguez*, 547 S.W.3d 830, 849 (Tex. 2018); *Kachina Pipeline Co., Inc.* v. *Lillis*, 471 S.W.3d 445, 455 (Tex. 2015).

dozens of pages. Pet. 11 (identifying Amec's Houston Court of Appeals Br. 26–49; Amec's Reply 11–29); *see Adams* v. *Robertson*, 520 U.S. 83, 89 n. 3 (1997) (dismissing writ as improvidently granted where a similarly "general citation fail[ed] to comply with our requirement that petitioners provide us with '*specific* reference to the places in the record where the matter appears,' see this Court's Rule 14.1(g)(i)" (emphasis in original)). The truth is that while Petitioner cited the legal standard that a jurisdictional analysis must be done claim by claim, it never argued that specific jurisdiction might be proper for some claims but not others, or that a claim-by-claim analysis might otherwise affect the outcome. Amec's Houston Court of Appeals Br. 26; *see id.* 26–49. In other words, while Petitioner challenged the trial court's interpretation of the *evidence* supporting specific jurisdiction, *id.* 26–49, it never challenged either court's *methodology*, on which Petitioner's first Question Presented now seeks review. *Walling* v. *Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993) ("We have held repeatedly that the courts of appeals may not reverse the judgment of a trial court for a reason not raised in a point of error."); *Del Lago Partners, Inc.* v. *Smith*, 307 S.W.3d 762, 776 (Tex. 2010) (holding that a "ground for reversal was waived" because a court should not "stretch for a reason to reverse that was not raised").

Petitioner's methodology challenge first appeared when it moved the Houston court for rehearing, which was too late under Texas law to preserve any error arising from Petitioner's loss in the trial court. *See Gilbert Tex. Const., L.P.* v. *Underwriters at Lloyd's London*, 327 S.W.3d 118, 125 (Tex. 2010) ("[A] complaint . . . may be [first] raised either in a motion for rehearing in [the court of appeals] or in a petition for review" in the Texas Supreme Court only if it

"aris[es] from the court of appeals' judgment" where the party "prevailed on [that] issue in the trial court."); *see also Adams*, 520 U.S. at 87–88 (dismissing writ as improvidently granted because the question presented was not "raised at the time and in the manner required by the state law" or with "fair precision and in due time," which can constitute "an adequate and independent ground for the state court to disregard that claim") (citations and quotation marks omitted). In any event, because the point was not preserved in the Texas Supreme Court petition, this Court's jurisdiction is not properly invoked.

Even if this Court's claim preservation requirements were prudential and not jurisdictional, principles of judicial restraint counsel in favor of declining to review an issue that was not fairly presented to the state courts in the first instance. *Adams*, 520 U.S. at 90–92 (dismissing writ as improvidently granted because, even if the preservation requirement is prudential rather than jurisdictional, the "interest of comity" and "practical considerations" require that an issue be adequately presented to the state supreme court); *City & County of San Francisco, Calif.* v. *Sheehan*, 575 U.S. 600, 609 (2015) (dismissing question as improvidently granted because "[t]he Court does not ordinarily decide questions that were not passed on below"). Had Petitioner asked the Texas Supreme Court to review the claim-by-claim question, that court could have chosen to grant review and opine. Having failed to do so, Petitioner should not now expect this Court to have the first word.

B. Even If This Court Has Jurisdiction Over The First Question Presented, This Case Is Not An Appropriate Vehicle.

Jurisdictional problems aside, the first Question Presented still is not apt for certiorari review. That question comes to this Court with no adversarial posture: the Houston court conducted a claim-by-claim analysis, and Respondent agrees with Petitioner that specific jurisdiction is claim specific. That the Texas Supreme Court holds as much, and that other state and federal courts have widely recognized that this Court's precedent requires as much, leave this Court with nothing to review except a futile request for fact-bound error correction.

1. This case does not pose the first Question Presented because there is no dispute on it—least of all by the Houston court, which conducted the analysis that Petitioner contends is required. Petitioner's unquoted characterization of the Houston court as "refusing to conduct a claim-by-claim analysis," Pet. 22, is dispelled on the face of that court's opinion.

The Houston court first explained the direct contacts by Petitioner that form the basis of each of Enterprise's claims. Pet App. 3a–7a. Enterprise's claims for breaches of contract rely on Petitioner having "purposefully inserted itself into the contractual relationship between Enterprise and Foster Wheeler" and "assumed and ratified Foster Wheeler's obligations and benefits under the Contract." *Id.* 4a. Petitioner did so by "supplant[ing] Foster Wheeler's management of daily operations" in Texas through Petitioner's own Group President of the Americas Simon Naylor, who "assumed ultimate control over the project" in Texas and "met face to face many times with Enterprise management, executives, and board

members regarding the project at Enterprise's Houston, Texas headquarters [and] regularly reported back to [Petitioner's] Chief Executive Officer regarding the project's status and the efforts to turn the project around." *Id.* Naylor and Reilly, "on behalf of [Petitioner], controlled the project and its team thereafter and communicated directly with Enterprise management about the project's status." *Id.* 5a. But "Enterprise claims that failures continued, including negligent construction work, and that breaches of contractual duties, warranties, and common-law duties of care by [Petitioner] . . . directly caused enormous cost overruns and schedule delays." *Id.*

Enterprise's claims for Petitioner's misrepresentations rely on Petitioner itself having acted in Texas to deceive Enterprise about the Project's status and trajectory. Petitioner's Group Presidents Naylor and Reilly "met with Enterprise management several times in Houston" to dissuade Enterprise from "terminat[ing] the Contract," promising that Petitioner would "step[] in, bring[] in new legacy [Petitioner] personnel, and tak[e] over the project." *Id.* 4a–5a. In Texas, Petitioner "stated that it took full ownership and responsibility for Foster Wheeler's failures" and represented that it would "use its 'global resources' to get the project back on track[] and ensure that all future work on the project would be performed properly." *Id.* 5a. Enterprise's claims for fraud and misrepresentation contend that Enterprise "relied upon those representations in deciding" to move ahead with Petitioner on the Project, but that Petitioner's acts in controlling the Project in Texas thereafter showed the representations were intentionally false. *Id.* 5a–6a.

Having parsed the nature of the Texas contacts underlying each of Enterprise's claims, the Houston

court explained the legal standard that guided its jurisdictional analysis—the same legal standard that Petitioner contends the court blatantly defied. *Compare* Pet. App. 13a, *with* Pet. 14–15. As the Houston court acknowledged, "[s]pecific jurisdiction exists when the *claims* in question arise from or relate to the defendant's purposeful contacts with Texas." Pet. App. 13a (emphasis added); *see also id.* 22a ("[W]e review the *claims* in question and the evidence regarding the jurisdictional facts . . . .") (emphasis added).

The Houston court then set forth the trial court findings it was reviewing, which themselves distinguished in separate numbered paragraphs whether Texas contacts by Petitioner supported specific jurisdiction for *each* of Enterprise's claims: Texas misrepresentations underlying Enterprise's fraud, negligent misrepresentation, and estoppel claims, Pet. App. 14a at para. 6(c); acts and omissions in Texas on the Project underlying Enterprise's gross and professional negligence and unjust enrichment claims, *id.* at para. 6(d); and acts and omissions in Texas underlying Enterprise's assumption and breach of contract claims, *id.* 15a at para. 6(e).

The Houston court then dove into analyzing the evidence supporting each of those findings. The Petition contends that "a proper claim-by-claim analysis . . . would have examined whether Naylor's or Reilly's early representations in Texas" and their "subsequent actions in Texas" while managing the Project were "the sort of purposeful contacts with Texas *by [Petitioner]* that could support the exercise of specific jurisdiction" for claims arising out of those representations and actions. Pet. 21 (emphasis in original).

But the Houston court demonstrably did just that. It ultimately concluded that Petitioner purposefully

acted in Texas *both* with respect to its early representations (as relevant to Enterprise's "claims for 'string-along fraud' and negligent misrepresentation") *and* with respect to Petitioner's subsequent actions (as relevant to Enterprise's "claims for breach of contract, breach of warranty, [and] negligence" among others). Pet. App. 23a. That conclusion followed from 11 pages of detailed analysis, in which the court explained how Petitioner acted purposefully and directly in Texas by authorizing its executive employees to make representations to Enterprise in Texas and take control of the day-to-day operations of the Project there. *Id.* 15a–25a; *see* Factual Background, *supra*. The court explained how those actions—from early representations about the Project to its management thereafter—were attributable to Petitioner because they were committed by Petitioner's employees in Texas *within the scope of authority that Petitioner had expressly delegated to them*. And it did so in depth, explaining how the evidence showed: that Naylor and Reilly were Petitioner's employees and were directed by Petitioner to reside and work in Texas and report directly to Petitioner's CEO, *Id.* 15a, 19a–20a; that Petitioner directed Naylor's and Reilly's actions and could terminate their employment if they disobeyed those directions, *id.* 16a, 20a; that Petitioner's CEO "mandated" that Naylor and Reilly "direct and manage the day-to-day business operations" on the Project in Texas, *id.* 16a–17a, 20a; that Petitioner delegated authority in writing to Naylor and Reilly to enter into contracts on Petitioner's behalf, *id.* 17a, 20a; and that in speaking with Enterprise in Texas, Naylor held himself out as being Petitioner's Group President, *id.* Again differentiating between Enterprise's various claims, the Houston court explained that those contacts underlie not just the litigation generally, but

each of Enterprise's claims specifically, thereby affording Texas courts specific jurisdiction over each. *Id.* 23a–24a.

2. The Petition's grievance, then, can only criticize the lower court's drafting: that in summarizing its findings with respect to claims the court had already determined arise from the same jurisdictional facts, it failed to cut-and-paste its holding for each claim. But nothing requires a court to do that. On the contrary, this Court and others agree that although specific jurisdiction is claim specific, the same forum contacts by the defendant can underlie multiple claims. Once a court has determined that multiple causes of action arise from the same jurisdictional facts, there is no need for it to repeat its jurisdictional analysis for each claim.

In *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, for example, two consolidated cases raised "claims for a design defect, failure to warn, and negligence" as well as "products-liability, negligence, and breach-of-warranty claims." 141 S. Ct. 1017, 1023 (2021). This Court did not conduct a claim-by-claim analysis, because it had already determined that each claim was based on common facts—that a defective car caused a crash. *Id.* at 1028 ("Each plaintiff's suit, of course, arises from a car accident . . . ."). The in-state contacts for one claim were thus the same contacts that established specific jurisdiction for other claims. *See id.* Courts in Texas and elsewhere follow this common-sense direction. *See, e.g.*, *PREP Tours, Inc.* v. *Am. Youth Soccer Org.*, 913 F.3d 11, 21 n. 6 (1st Cir. 2019) ("[W]e are proceeding on the assumption in this case that the contract and tort claims arise from the same alleged activity or occurrence in the forum State, and thus we consider precisely the same set of contacts

as to both claims.") (internal citation and quotation marks omitted); *O'Connor* v. *Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 n. 3 (3d Cir. 2007) ("We note that our usual practice is to assess specific jurisdiction on a claim-by-claim basis. However, it may not be necessary to do so for certain factually overlapping claims.") (internal citation and quotation marks omitted); *Seiferth* v. *Helicopteros Atuneros, Inc.*, 472 F.3d 266, 275 (5th Cir. 2006) ("[I]f a plaintiff's claims relate to different forum contacts of the defendant, specific jurisdiction must be established for each claim."); *Moncrief Oil Int'l Inc.* v. *OAO Gazprom*, 414 S.W.3d 142, 150–151 (Tex. 2013) ("Of course, a court need not assess contacts on a claim-by-claim basis if all claims arise from the same forum contacts."). Petitioner's faulting of the lower court's drafting—that is, the court's determining that the same in-state contacts underlie more than one claim, then analyzing those common contacts, rather than drafting a separate section for each claim—is both misplaced and unworthy of certiorari.

3. The foundational premise of the first Question Presented—that the Houston "court refused to conduct a claim-by-claim-analysis"—is simply not true. *See* Pet. i, 21. No one—not Petitioner, not Respondent, not the trial court, and not the court of appeals—has ever contended in this matter that the court may exercise specific jurisdiction over all claims so long as it finds specific jurisdiction over one claim. On the contrary, Respondent has always briefed and argued how Petitioner's jurisdictional contacts supported each claim. Without a party to provide adversarial briefing or a judicial opinion to set forth the contrary view, that question is inapt for certiorari review. *See Sheehan*, 575 U.S. at 610 (dismissing as improvidently granted a question presented "in the absence of

adversarial briefing" where "[n]o one argues the contrary view"). If this Court were to grant certiorari and repeat that a claim-by-claim analysis is necessary, the Houston court will already have done so; if this Court held such an analysis is unnecessary (a position neither party espouses), then the Houston court went above and beyond. Either way, Petitioner cannot show, as a petition for certiorari must, that the first Question Presented matters to the outcome of the case.

C. Petitioner's Alleged Circuit Split Is Illusory.

In agreeing that a claim-by-claim analysis is required, Petitioner, Respondent, and the Houston court are in good company: there is no extant division of authority among the states on the Question Presented. As Petitioner admits, the Texas Supreme Court joins a litany of other states in requiring a claim-by-claim analysis. Pet. 17–18 (citing *Moncrief*, 414 S.W.3d at 150–151 and decisions from other state high courts). According to Petitioner, Ohio and Pennsylvania—in final matters not before this Court—create a division of authority that now justifies certiorari.

But neither in fact does. Petitioner's first citation, to a 27-year-old decision from Ohio, rejects the need for a claim-by-claim analysis not under the Fourteenth Amendment but under Ohio's long-arm statute. *U.S. Sprint Commun. Co. Ltd. P'ship* v. *Mr. K's Foods, Inc.*, 624 N.E.2d 1048, 1052–1053 (Ohio 1994) (analyzing Ohio Revised Code § 2307.382(A)(1)); *see also* Pet. 18 (citing this section of the *U.S. Sprint* opinion). And the Ohio court acknowledged that the long-arm inquiry is distinct from the Fourteenth Amendment inquiry: allowing claim joinder under its long-arm statute would be permissible only "as long as granting jurisdiction for all claims does not deprive defendant of the right

to due process of law." 624 N.E.2d at 1052. To be sure, the court went on to find due process satisfied in that instance, based on reasoning that may not have survived this Court's subsequent development of specific jurisdiction law, and in particular its decision in *Bristol-Myers Squibb Co.* v. *Superior Court of California, San Francisco Cty.* *See* 137 S. Ct. 1773, 1781 (2017) (requiring a "connection between the forum and the specific claims at issue"). But there is no reason to believe Ohio would adhere to an outdated decision—indeed, no Ohio Supreme Court decision has ever relied on *U.S. Sprint* to determine how to analyze specific jurisdiction over multiple claims.

The only other state that Petitioner contends to form a division of authority, Pennsylvania, likewise relied on reasoning that has subsequently been overruled by this Court. In *Hammons* v. *Ethicon, Inc.*, 240 A.3d 537, 557–560 (Pa. 2020), the court stated that it believed a connection between the forum and the litigation as a whole was sufficient under *Bristol-Meyers*, but that it was awaiting the "clarification" that this Court would provide in the then-pending case of *Ford Motor Co.* v. *Montana Eighth Judicial District Court*. 240 A.3d at 560 & n. 25. *Ford* has since provided that clarification, explaining that the required connection to the forum must be tied to specific claims. 141 S. Ct. 1017, 1025 (2021) ("The plaintiff's claims, we have often stated, must arise out of or relate to the defendant's contacts with the forum. Or *put just a bit differently*, there must be an affiliation between the forum and the underlying controversy . . . ."); *id.* at 1032 ("[T]he connection between the plaintiffs' claims and Ford's activities in those States—or *otherwise said*, the relationship among the defendant, the forum[s], and the litigation—is close enough to support specific jurisdiction.") (empha-

sis added and internal citations omitted in each). There is no reason to doubt Pennsylvania's expressed willingness to update its holding in light of *Ford*. At the least, it should be given an opportunity to do so before this Court intervenes.

Finally, Petitioner contends that the Houston court of appeals—in a footnote, in a different case—has defied the Texas Supreme Court to hold that a claim-by-claim analysis is unnecessary. Pet. 18–19 (citing *Hoagland* v. *Butcher*, 396 S.W.3d 182, 194 n. 14 (Tex. App.—Houston 2013)). Of course, a Houston intermediate court cannot create a cert-worthy division of authority under Supreme Court Rule 10, least of all when Texas's high court is to the contrary. But in any event, the footnote Petitioner quotes from *Hoagland* has since been expressly overruled. *ERC Midstream LLC* v. *Am. Midstream Partners, LP*, 497 S.W.3d 99, 107 (Tex. App.—Houston 2016) ("Relying on [the footnote at issue in] *Hoagland I*, [appellants] assert that jurisdiction exists over their fraud claim and that we need not address jurisdiction as to any other claims. 396 S.W.3d at 194 n. 14. But *Hoagland I* was decided before *Moncrief*, which established that appellate courts are required to analyze jurisdictional contacts on a claim-by-claim basis when they do not arise from the same forum contacts."); *see also Jutalia Recycling, Inc.* v. *CNA Metals Ltd.*, 542 S.W.3d 90, 94 (Tex. App.—Houston 2017) ("We analyze minimum contacts for specific jurisdiction on a claim-by-claim basis, unless all claims arise from the same forum contacts.").[2]

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[2] In a footnote, Petitioner suggests that some federal courts have held that "pendent" personal jurisdiction may allow courts with specific jurisdiction over one claim to exercise jurisdiction over others. Pet. 19 n. 5. Setting aside that it is difficult to

II. Certiorari Should Be Denied On The Second Question Presented.

The second Question Presented asks whether a court must determine that an agent's contacts were authorized by the defendant before attributing those contacts to the defendant. Petitioner frames its question that way to make it sound like a cert-worthy legal issue. But no one—not Petitioner, not Respondent, not the courts below—disagrees that such an analysis is required, as the Houston court opinion reflects. Nor does Petitioner allege that other state or federal courts are to the contrary. Petitioner's true dispute is simply a factual one, rooted in disappointment that the factfinding did not go its way. Even if this Court undertook that fact-bound review, it would be compelled to conclude on a vast record that Petitioner's employees were authorized by Petitioner to do the job Petitioner sent them to Texas to do.

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imagine claims with a "common nucleus of operative fact" in which only one relates to the defendant's in-state contacts, pendent personal jurisdiction is not a doctrine that can be raised by this Texas case because it is an exclusively federal doctrine, arguably consistent with the Fifth Amendment but not the Fourteenth. *See United States* v. *Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) ("[P]endent personal jurisdiction is not explicitly authorized by statute and remains, at least in the view of most commentators, 'a federal common law doctrine.'"); 4A Wright & Miller, *Federal Practice & Procedure* § 1069.7 (4th ed.) (explaining that any "pendent personal jurisdiction policy" in a *state* court could not allow that court "to capture claims that fall outside of the Fourteenth Amendment's due process limits").

A. This Case Is Not An Appropriate Vehicle To Address The Second Question Presented.

The decision below gives this Court no opportunity to review the second Question Presented because the Houston court agrees that an authority analysis is required—and conducted precisely that analysis. Petitioner admits that the "Houston Court itself has previously held that an agent's contacts with Texas cannot be attributed to the defendant for jurisdictional purposes if the agent was not authorized to perform the relevant acts on the defendant's behalf." Pet. 29 (citing *Huynh* v. *Nguyen*, 180 S.W.3d 608, 622–623 (Tex. App.—Houston 2005)). Yet according to Petitioner, the Houston court in this case inexplicably "disregarded" both "its own precedent" in *Huynh* and "Texas Supreme Court precedent" by "refus[ing]" to make that determination here. Pet. 30.

Even in the abstract, it strains credulity to think that Chief Justice Frost—who authored both *Huynh* and the opinion below—went rogue from both her own precedent in *Huynh* and the controlling precedent of the Texas Supreme Court. No one could be better positioned to believe an authority analysis was required than the Chief Justice who authored the opinion requiring that analysis in the Houston courts. That a unanimous panel (twice: in the first instance and on rehearing) and the Texas Supreme Court would all stand by in the face of open defiance of controlling precedent is legal fantasy.

It is also demonstrably false. With a telling lack of direct quotation, the Petition self-characterizes the opinion as "explicitly refus[ing] to determine whether [Petitioner] had authorized Naylor or Reilly to perform" the relevant jurisdictional acts and "simply conclud[ing]

that—because Naylor and Reilly were [Petitioner's] employees—all of their 'words and actions' were 'attributable' to [Petitioner]." Pet. 12.

The Houston court did no such thing. It first set forth the legal standards that governed its analysis—the very same legal standards that Petitioner uses to justify its second Question Presented to this Court. Its jurisdictional analysis was defined, the Houston court explained, by the "essential [requirement] that there be some act by which the defendant 'purposefully avails' itself of the privilege of conducting activities in the forum state." Pet. App. 12a; *compare* Pet. i. (alleging the second Question Presented because "the defendant's contacts with the forum 'must be the defendant's own choice,' and must show that the defendant 'deliberately reached out' or 'purposefully' avail[ed] itself' of the forum"), *and* Pet. 25 (similar). The Houston court went on to acknowledge specifically that the "purposeful availment" requirement in turn requires inquiry into whether acts were taken at the defendant's behest, not unilaterally and without authorization: "In analyzing personal jurisdiction, only *the defendant's purposeful contacts* with the forum count; personal jurisdiction over a defendant *cannot be based on the unilateral activity of another party*." Pet. App. 12a (emphases added). "For there to be purposeful availment," the court explained, "a defendant must seek some benefit, advantage, or profit by 'availing' itself of the jurisdiction," as jurisdiction can only "aris[e] from the defendant's conduct purposefully directed toward Texas." *Id.* 12a–13a; *compare* Pet. 25 (alleging the second Question Presented because jurisdiction cannot be based on the "unilateral activity of those who claim some relationship with a nonresident defendant").

Any notion that the Houston court then went on to "explicitly refuse" to follow the legal standards it had just set forth is laid to rest with the analysis that followed. The court proceeded to examine, in detail and at length, the scope of Naylor's and Reilly's authority as employees and whether that authority encompassed the words and actions in Texas that justified specific jurisdiction. It first determined that Naylor and Reilly were employees of Petitioner—not of a subsidiary or related entity, but of Petitioner directly. At the time of their relevant acts in Texas on Petitioner's behalf, Naylor and Reilly each worked under an employment agreement sent from London by Petitioner's Group Human Resources Director on Petitioner's letterhead. Pet. App. 15a, 19a. Each agreement designated Naylor and Reilly as one of Petitioner's "Group Presidents" working out of Petitioner's "Houston office" and reporting directly to Petitioner's Chief Executive Officer. *Id.* 15a–16a, 19a. The employment agreements each designated Naylor's and Reilly's employer as "AMEC," a defined term within the agreement "that includes Foster Wheeler PLC [*i.e.*, Petitioner]" and another entity, but "does not include Foster Wheeler"—the U.S. subsidiary on which Petitioner would now foist sole liability for Naylor's and Reilly's actions. *Id.* 16a, 19a–20a. The employment agreements also stated that Naylor and Reilly were subject to Petitioner's control, on pain of being terminated for cause if they "disobey 'lawful orders or directives of [Petitioner's] Board or the CEO." *Id.* 16a, 20a.

The Houston court then went on to scrutinize how Petitioner defined Naylor's and Reilly's authority, within the scope of their employment by Petitioner, to include acting on Petitioner's behalf when they performed the acts in Texas that subjected Petitioner

to jurisdiction. In addition to their employment agreements with Petitioner, Naylor and Reilly were each subject to a "Delegated Authorities" agreement, which Petitioner mentions only in passing. Pet. 7, 10, 30. As the Houston court explained, this document "*delegated authority* to Naylor as [Petitioner's] Group President of the Americas," and "*delegated authority* to Reilly as [Petitioner's] Group President of Strategy and Business Development." Pet. App. 18a, 21a–22a (emphases added). Indeed, in that document, Petitioner's CEO not only authorized but "mandated that [Reilly and] Naylor direct and manage the day-to-day business operations of [Petitioner] within [their] respective geographical regions[,]" including Texas. *Id.* 16a–17a, 20a. "Under th[at] document," Reilly and Naylor also "ha[d] authority to enter into certain types of contracts and take other actions." *Id.* 17a, 20a. The court explained in depth how Naylor's and Reilly's "encounters with Enterprise" in Texas were conducted pursuant to their delegated authority, with Naylor even "introduc[ing] himself to senior Enterprise personnel as 'the Group President of the Americas'" and issuing "business cards [reflecting that] he was 'Group President of the Americas'" with a Houston office. *Id.* 17a.

B. The Houston Court's Jurisdictional Analysis Is Correct.

1. For Petitioner to say, then, that the Houston court "refus[ed] to determine whether Naylor and Reilly were authorized to act on [Petitioner's] behalf"—a refrain the Petition repeats nearly a dozen times—is merely wishful repetition. Although the Petition does not provide any quotation to support those characterizations, its citation points to a single passage toward the end of the Houston court's opinion, in which the

court lists issues it need not decide given its preceding analysis and holdings. Pet. 29–30 (citing Pet. App. 23a–24a). Among them are "(5) a finding that Naylor, Reilly, or Bailey was an agent of [Petitioner] [and] (6) a finding that Naylor, Reilly, or Bailey had actual or apparent authority." Pet. App. 24a.[3]

Petitioner twists the meaning of that snippet by extracting it from its context. The issue before the Houston court was whether the evidence supported the trial court's findings that Petitioner performed acts in Texas, giving rise to Enterprise's claims, "through its employees, agents, and/or apparent agents." *Id.* 14a, 30a. The court affirmed on the grounds that "the evidence is legally and factually sufficient to support the trial court's finding that Naylor and Reilly were acting as employees of [Petitioner]" when they performed the "words and actions" on which "Enterprise bases its claims." *Id.* 23a–24a. Having so held, the court stated that it "need not and does not address" the trial court's alternative findings, including whether Naylor or Reilly were not employees but were instead Petitioner's non-employee "agents," or otherwise non-agents with "actual or apparent authority." *Id.* 24a.

Nothing required the Houston court to reach those moot alternate grounds. *See* Tex. R. App. P. 47.1 (appellate courts need only address issues "necessary to final disposition of the appeal"). Instead, its analysis determined that not only were Naylor and Reilly Petitioner's employees as a formal matter, they were also "*acting* as employees" within the delegated

[3] "Bailey" refers to Peter Bailey, whose contacts with Texas on behalf of Petitioner the Houston court explained it "need not" address because Naylor's and Reilly's jurisdictional contacts with Texas were sufficient. Pet. App. 24a.

authority of that employment when they performed the acts in Texas that subject Petitioner to jurisdiction there. Pet. App. 18a, 22a, 24a, 27a–28a, 30a.

2. The Houston court's thorough analysis of Naylor's and Reilly's authority reveals the Petition's true purpose to be merely disputing the *result* of that analysis. The Petition is replete with thinly veiled insistence that the Houston court *just got it wrong* when it determined that Petitioner had authorized Naylor and Reilly to act. *See* Pet. 7 (disputing that the Delegated Authorities document envisioned the type or size of project at issue here); *id.* 10 (same); *id.* 30 (same). On Petitioner's view of the evidence, the stakes are "magnified by the fact that the record shows clearly" that Naylor and Reilly had limited authority. *Id.* 30. Had it "*properly* considered" the evidence of Naylor's and Reilly's authority, Petitioner posits, "the Houston court might" have reached a different result. *Id.* 31 (emphasis added).

But there is nothing cert-worthy about Petitioner's wish that the lower courts' factual findings had been otherwise. This Court "does not sit" as a court of "error-correction." *Halbert* v. *Michigan*, 545 U.S. 605, 611 (2005). In any event, Petitioner's request for fact-bound error correction is doubly pointless without a showing that the panel erred in its jurisdictional decision. It is hard to imagine a case in which the evidence of delegated authority could be more on-point than the "Delegated Authorities" document here, in which Petitioner tasked Naylor and Reilly to manage the day-to-day operations of the Enterprise Project in Texas—the very same contacts that underlie jurisdiction. Pet. App. 16a–17a, 20a, 23a. A review by this Court would find no grounds to conclude otherwise.

Moreover, because the second Question Presented asks only *whether* a court must determine if an employee's jurisdictional contacts were authorized by the defendant—in a case where the lower court did just that, and no party would be positioned to argue otherwise—this case cannot serve as a viable vehicle. *See Sheehan*, 575 U.S. at 609–610.

C. There Is No Division of Authority On The Second Question Presented.

That no circuit split exists—or even is seriously alleged—on the second Question Presented is just one more voice in the chorus of reasons to deny. Petitioner's disjointed argument about the state of the law contends, on the one hand, that the Houston court "split from all other courts" by failing to conduct an authority analysis required by well-established law, Pet. 29—thereby setting forth no circuit split on the Question Presented, which asks only *whether* such an analysis is required. On the other hand, Petitioner alleges that there "appear[s]" to be disagreement among other courts on a different question involving how to apply state or federal law in such an analysis, *id.* 28—but that is neither the Question Presented nor is it even alleged to have arisen in the instant case. Either way, certiorari cannot follow.

1. In the first of these scenarios, Petitioner contends that the law requiring courts to determine an agent's authority for jurisdictional contacts is well established in this Court as well as state and federal courts. Pet. 24–26. As Petitioner puts it, "[b]ased on this Court's precedent," the "federal circuit courts have widely agreed" on this question, and "state courts have likewise agreed." *Id.* 27 (collecting cases). Petitioner is right about that.

It is *only* the Houston court below, Petitioner contends, that "disregarded its own precedent [in] *Huynh* . . . as well as Texas Supreme Court precedent," and "split from *all other courts*[,] when it refused" to conduct that analysis in this case. Pet. 29–30 (emphasis added). In other words, Petitioner alleges that a local state court went rogue from well-established law on which no division of authority exists. *Id.* 29–31.

But nothing about that scenario is cert-worthy. As already discussed, the decision below both recognized the legal standard requiring an authority analysis and proceeded to conduct that analysis. *See* Section II.A, *supra*. Even in an alternate universe where Chief Justice Frost had inexplicably defied both her own precedent in *Huynh* and the controlling precedent of the Texas Supreme Court, *see* Section II.A, *supra*, an erroneous decision from a state intermediate court cannot create a division of authority to invoke certiorari. Supreme Court Rule 10. In any event, by conceding that the law is well established in requiring that an agent have authority to commit the jurisdictional acts, Petitioner admits that the Question Presented is already answered. This Court, state courts, federal courts—and so too the court below, Petitioner, and Respondent—have all answered the second Question Presented with a resounding "Yes." With no division of authority or adversarial posture to argue the opposing view, certiorari cannot follow. *See Sheehan*, 575 U.S. at 610 (dismissing as improvidently granted a question presented "in the absence of adversarial briefing" where "[n]o one argues the contrary view").

2. In the second of these scenarios, Petitioner muses that "courts appear divided over how agency should be determined, or how an agency theory should be

applied." Pet. 27–28. Petitioner never explains what that alleged division of authority supposedly entails. Its first reference, to the Ninth Circuit's decision in *Daimler*, Pet. 28, is a throwaway. Courts cannot be confused about whether to follow the Ninth Circuit's parent/subsidiary jurisdictional theory in *Daimler* because this Court reversed it. *Daimler AG* v. *Bauman*, 571 U.S. 117, 142 (2014) ("*Reversed*.") (emphasis in original). Thereafter, the Petition suggests that courts "appear" divided on a different issue entirely: whether to analyze an agent's authority "under 'traditional' (i.e., federal) agency law" or under state law. Pet. 28–29. Petitioner contends that this possible division arises because two federal decisions "cit[e] mostly federal case law" to determine whether "an individual may be characterized as an agent," while "the state courts all seem to apply their own state law." *Id.* 28 (citing *CutCo Industries, Inc.* v. *Naughton*, 806 F.2d 361, 366 (2d Cir. 1986) and *Dickson Marine Inc.* v. *Panalpina, Inc.*, 179 F.3d 331, 338–339 (5th Cir. 1999)). But *CutCo* applied New York state law in determining personal jurisdiction under New York's long-arm statute. 806 F.2d at 366 (citing federal-court decisions that applied New York law). And *Dickson*, which is only about relationships between affiliated corporate entities, 179 F.3d at 338, does not address Petitioner's point of whether an "*individual* may be characterized as an agent," Pet. 28 (emphasis added). Petitioner impliedly concedes that there is no real division of authority here, noting "that this [state law] approach is consistent with the Court's recognition that 'federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.'" *Id.* 29 (citing *Daimler*, 571 U.S. at 125).

Nor could any split on whether federal common law can be used to analyze an agent's authority, if such a

split even existed, be before the Court in this case. It is not posed by the second Question Presented, which asks only whether such an analysis is required at all. It is not posed by the Petition, which contends that the Houston court failed to conduct any analysis of Naylor's and Reilly's authority, not that it joined any side of any division over *how* to conduct such an analysis. And it is not posed by the Houston court, which both conducted the authority analysis and did so citing only state law, as Petitioner contends to be required.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

DENISE LAMBERT DRAKE
Counsel of Record
ROBIN C. GIBBS
MARK A. GIUGLIANO
CHARLES MCCULLOUGH ROSSON
MICHAEL DAVIS
GIBBS & BRUNS LLP
1100 Louisiana St., Suite 5300
Houston, TX 77005
(713) 650-8805
ddrake@gibbsbruns.com

Counsel for Respondent

November 17, 2021

APPENDIX

APPENDIX

IN THE SUPREME COURT OF TEXAS

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No. 20-0617

No. 14-18-00133-CV

———

AMEC FOSTER WHEELER PLC,

Petitioner,

v.

ENTERPRISE PRODUCTS OPERATING LLC,

Respondent.

———

From the Fourteenth Court of Appeals,
Houston, Texas

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PETITION FOR REVIEW

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* * *

IDENTITY OF PARTIES & COUNSEL

Petitioner	Respondent
Amec Foster Wheeler plc	Enterprise Products Operating LLC

* * *

ISSUES PRESENTED

It is well established that the Due Process Clause precludes a Texas court from exercising specific jurisdiction over a foreign corporation unless the corporation "purposefully directed" relevant contacts with Texas. See, *e.g.*, *Searcy v. Parex Resources, Inc.*, 496 S.W.3d 58, 67 (Tex. 2016). If the relevant contacts occurred through individuals, those contacts can be attributed to the corporation for the purpose of exercising specific jurisdiction over that corporation—but only if the corporation authorized the individuals to perform the relevant acts on its behalf. See, *e.g.*, *id.* at 77–78.

Here, the court of appeals held that individuals' acts could be attributed to PLC for the purpose of exercising specific jurisdiction over PLC—but the court expressly refused to determine whether PLC ever authorized the individuals to perform the relevant acts on PLC's behalf. App. 54.

The following constitutional question is therefore presented:

1. Does it violate Due Process to exercise specific jurisdiction over a foreign holding company, based on an individual's contacts with Texas, without determining whether the holding company authorized the individual to perform the relevant acts on the company's behalf?

The trial court also implicitly applied Texas law to conclude that Foster and PLC are "alter egos," and that the trial court has "alter ego jurisdiction" over PLC App. 32, 35. The court of appeals did not address this issue. App. 54. If this Court reverses the court of appeals' opinion on Issue 1, the following compound

question—including a question of first impression—is presented:

2. Does English or Texas law govern the "alter ego" issue? And under the governing law, is there sufficient evidence to support the trial court's conclusion that Foster and PLC are "alter egos" for jurisdictional purposes?[3]

[3] An unbriefed **third issue** is whether, given the facts of this case, it violates "traditional notions of fair play and substantial justice" to rely on either an agency theory (Issue 1) or an alter-ego theory (Issue 2) to exercise jurisdiction over a British "great-grandparent" holding company. Cf. *Guardian Royal Exch. Assur., Ltd. v. English China Clays, PLC*, 815 S.W.2d 223, 230-233 (Tex. 1991); see also *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014) (quoting *Internat'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).