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 Texas Court Of Appeals, Fourteenth District

PETITIONER'S REPLY

PATRICK E. GAAS
EDWARD S. HUBBARD
DANIEL F. SHANK
KILPATRICK TOWNSEND & STOCKTON LLP
700 Louisiana St., Ste. 4300
Houston, TX 77002
(281) 809-4080

JASON P. STEED
Counsel of Record
ADAM H. CHARNES
KILPATRICK TOWNSEND & STOCKTON LLP
2001 Ross Ave., Ste. 4400
Dallas, TX 75201
(214) 922-7106
jsteed@kilpatricktownsend.com

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Does due process require a state court to determine whether *each* claim arises from or relates to the defendant's purposeful contacts with the forum?

2. Does due process require a court to determine whether an agent's contacts with the forum were authorized by the defendant before attributing those contacts to the defendant for jurisdictional purposes?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

ARGUMENT

1. This case presents a clean vehicle for resolving the questions presented.

Enterprise asserts that Amec seeks "fact-bound error correction." BIO 6. But as Enterprise acknowledges (*id.* 9), Amec seeks review of the Houston Court's *methodology—i.e.*, the questions presented ask what a state court must *do*, before it can exercise specific jurisdiction over a foreign defendant. These methodological questions are not "fact-bound," but arise in many cases involving specific jurisdiction. And here, a different methodology would've produced a different result. See Part 3, *infra*.

1.1. Question 1 is properly presented.

The Court has jurisdiction to review "[f]inal judgments . . . rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). When a State's supreme court denies discretionary review, the decision of the intermediate court becomes the judgment of "the highest court of a State in which a decision could be had." *Michigan-Wisconsin Pipe Line v. Calvert*, 347 U.S. 157, 159–160 (1954). Thus, the Court has jurisdiction to resolve an issue that was "properly presented to" a State's intermediate court, if that is "the state court that rendered the decision [this Court has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

Here, Enterprise admits Amec presented the claim-by-claim issue (Question 1) to the Houston Court

in Amec's motion for rehearing. BIO 9. Given the trial court's order (App. 31a), Amec presumed the trial court had conducted a claim-by-claim analysis. So Amec's appeal didn't challenge the absence of a claim-by-claim analysis; instead, it noted such analysis is necessary and argued—claim by claim—against the trial court's jurisdictional ruling. Amec's Br. 26–49; Amec's Reply 11–29. It wasn't until the Houston Court omitted a claim-by-claim analysis that Amec had cause to raise the issue on rehearing.

In Texas, parties can raise an issue on rehearing if the issue "aris[es] from the court of appeals' judgment." *Gilbert Tex. Const. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 125 (Tex. 2010). And this Court can exercise certiorari jurisdiction to review an issue that was raised on rehearing, when "the state-court decision itself is claimed to constitute a violation of federal law." *Stop the Beach Renourishment v. Fl. Dept. of Env. Prot.*, 560 U.S. 702, 712 n.4 (2010).

Because Amec's appeal sought a claim-by-claim analysis, and because the absence of a claim-by-claim analysis did not arise until the opinion was issued, Amec timely raised the issue on rehearing—and this Court has jurisdiction to resolve Question 1.

Enterprise asserts that this issue is waived because Amec didn't present it to the Texas Supreme Court. BIO 7–8. But the issue was properly presented to the Houston Court, which is all that is required when this Court is being asked to review the Houston Court's decision. See *Adams*, 520 U.S. at 86.

Moreover, as Enterprise admits (BIO 7–8), the Texas Supreme Court requires a claim-by-claim analysis, and Amec's petition noted that the Houston Court failed to conduct that analysis. And in seeking review of the scope-of-authority issue (BIO App. 2a), Amec sought a claim-by-claim analysis. Amec's Pet. for Rev. 16–25. So, under Texas law, the claim-by-claim issue was "fairly included within" Amec's presentation of the scope-of-authority issue. *Ditta v. Conte*, 298 S.W.3d 187, 190 (Tex. 2009); Tex. R. App. P. 53.2(f); *cf.* Sup. Ct. R. 14(1)(a).

1.2. Question 2 is properly presented.

Enterprise asserts that—even if the Houston Court "went rogue from well-established law"—its decision cannot create a "scenario" that warrants certiorari because it cannot create a split in authority. BIO 27–28. But a split in authority is not the only basis for certiorari.

"The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law." *Caperton v. A.T. Massey Coal*, 556 U.S. 868, 902 (2009) (Scalia, J., dissenting) (citing Rule 10). Thus, even without a split in authority, the Court may grant certiorari when a state-court decision raises federal issues that need clarifying—or when a "rogue" state court acts in a way that is inconsistent with this Court's precedent. Sup. Ct. R. 10(c); *e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018) (granting certiorari because state-court decision raised important federal questions); *Pavan v.*

Smith, 137 S.Ct. 2075 (2017) (summarily reversing state-court decision that was "inconsistent" with Court's precedent); *Wearry v. Cain*, 577 U.S. 385 (2016) (summarily reversing state-court decision because due-process violation was "[b]eyond doubt").

Here, there is confusion over how "agency" applies in the jurisdictional context (Question 2)—and the Houston Court's opinion conflicts with this Court's precedent. See Parts 2.2 & 3, *infra*. So certiorari is warranted.

Enterprise asserts that, even if there is need to clarify *how* agency applies, Question 2 asks only *whether* it applies, so certiorari cannot be granted on the *how* question. BIO 27–30. But the *how* question is "subsidiary" to, and "fairly included" within, the *whether* question—because it would be unhelpful to say agency applies without also saying *how* it applies. Sup. Ct. R. 14(1)(a); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (noting questions necessary "to an intelligent resolution of the question presented" are "fairly included within the question presented" (cleaned up)).

Perhaps Question 2 could be better worded to ask: "Does due process require a state court to establish that an employee's 'words and actions' were authorized by the employer before attributing them to the employer for jurisdictional purposes?" See Parts 2.2 & 3, *infra*. But either way, the *how* question is fairly included.

2. Certiorari is warranted because these constitutional requirements need clarification.

Although the Court's precedent indicates that (1) a claim-by-claim analysis is necessary and (2) an individual's forum contacts cannot be attributed to the defendant unless they were authorized by the defendant, the Court has never explicitly stated these requirements. And because there is confusion among other courts, certiorari is warranted.

2.1. There is confusion over whether a claim-by-claim analysis is required.

Enterprise admits that the Ohio Supreme Court avoided a claim-by-claim analysis in *U.S. Sprint Commun. v. Mr. K's Foods*, 624 N.E.2d 1048 (Ohio 1994), in a way "that may not have survived this Court's subsequent development of specific jurisdiction law." BIO 17–18. But Enterprise asserts "there is no reason to believe Ohio would adhere to [this] outdated decision" because "no Ohio Supreme Court decision has relied on *U.S. Sprint* to determine how to analyze specific jurisdiction over multiple claims." *Id.* 18. According to Enterprise, this supposition erases any existing confusion.

But Ohio courts continue to rely on *U.S. Sprint*. For example, in *Baker v. Greenlee*, 2012-Ohio-3760, 2012 WL 3590769 (Ohio App. 2012), the trial court found jurisdiction for some claims but not for others—and the court of appeals remanded, instructing the trial court to consider whether, under *U.S. Sprint*, the

other claims could be "joined," even without standalone jurisdiction for those claims. *Id.* *3. Thus, confusion persists in Ohio, where *U.S. Sprint* remains authority for circumventing claim-specific jurisdiction.

Enterprise next asserts that, in *Hammons v. Ethicon, Inc.*, 240 A.3d 537 (Pa. 2020), the Pennsylvania Supreme Court said it was "awaiting" clarification from *Ford*. BIO 18. And Enterprise asserts: "There is no reason to doubt Pennsylvania's expressed willingness to update its holding [in *Hammons*,] in light of *Ford*." *Id.* 19. Again: according to Enterprise, this supposition erases any existing confusion.

But Enterprise's assessment of Pennsylvania is puzzling when juxtaposed with its assessment of Ohio. In predicting Ohio will move away from its "outdated" position in *U.S. Sprint*, Enterprise cites *Bristol-Myers Squibb v. California*, 137 S.Ct. 1773 (2017), asserting *Bristol-Myers* clearly "requir[es] a 'connection between the forum and the specific claims at issue.'" BIO 18. But Enterprise fails to note that Pennsylvania reached the opposite conclusion, reading *Bristol-Myers* as requiring only a "broader" connection between the defendant's contacts and "the controversy," rather than a connection to "specific legal claims." *Hammons*, 240 A.3d at 559–560. And Pennsylvania did not say it was "awaiting" clarification from *Ford*; it said *Ford* was unlikely to provide clarification because "the question raised" in *Ford* was not "directly controlling" on *Hammons*. *Id.* 560 n.25. Pennsylvania indicated it would continue to eschew a claim-specific jurisdictional

analysis, "absent further clarification." *Id.* 560. Thus, confusion persists in Pennsylvania.

Despite all this, Enterprise insists that *Ford* provided that "clarification" because it "explain[ed] that the required connection to the forum must be tied to specific claims." BIO 18 (citing *Ford Motor Co. v. Montana*, 141 S.Ct. 1017, 1025 (2021)). But Enterprise fails to explain why Pennsylvania would read *Ford* differently from how it read *Bristol-Myers*. And a forthcoming law-review article appears to endorse Pennsylvania's position *against* a claim-specific analysis. See Bartholomew and Bernstein, *Ford*'s Underlying Controversy, 99 Wash. Univ. L.R. ___ (2022), http://ssrn.com/abstract=3920655. The article notes the confusion among state and federal courts over the meaning of the word "claim"—*i.e.*, whether it refers to a cause of action or to something broader like "the underlying controversy"—and, citing *Ford*, argues for the broader interpretation. *Ibid.*

The decisions in Ohio and Pennsylvania, the Bartholomew-Bernstein article—and the Houston Court's decision here—show that confusion persists over Question 1.

2.2. There is confusion over whether—or how—"agency" applies.

The Houston Court's opinion—and Enterprise's argument—demonstrates confusion over how "agency" applies when determining specific jurisdiction. Enterprise insists "no one" disputes that a court must

determine whether the defendant authorized an individual's forum contacts before attributing those contacts to the defendant for jurisdictional purposes. BIO 20. Yet the Houston Court refused to make this determination. App. 24a ("To reach this conclusion [that Texas has jurisdiction over Amec], we need not and do not address whether . . . Naylor [or] Reilly . . . had actual or apparent authority [to act on Amec's behalf]"). On its face, this indicates confusion over what is required.

Enterprise tries to excuse the Houston Court's refusal to address the scope-of-authority issue by distinguishing between "employees" and "agents"—asserting that, because the court found that Naylor and Reilly were "employees," there was no need to address the "alternate" question of whether they were "agents" with "actual or apparent authority." BIO 25. But this argument—and the Houston Court's opinion—presumes that *every word and action of an employee* can be attributed to the employer, without examining the scope of that employee's authority. See App. 23a–24a.

This conflicts with both Texas and federal law. Texas treats an "employee" as a type of "agent." *E.g.*, *Cappuccitti v. Gulf Indus. Products*, 222 S.W.3d 468, 485 (Tex. App. 2007) (noting "individual employee . . . who acts for the corporation is that corporation's agent"). And the Texas Supreme Court has held that whether an employee represents the employer depends on "the extent of that employee's power to act for the corporation." *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 382 (Tex. 1998). Similarly, this

Court has recognized that an "employee" is a "special type of agent." *United States v. New Mexico*, 455 U.S. 720, 740 (1982). And federal courts have long recognized that employees have limited authority. *E.g.*, *United States v. Smith*, 810 F.2d 996, 997–998 (10th Cir. 1987) ("An employee is not acting as his employer's agent when he acts outside the scope of the employment."). As this Court put it: "One may be an agent for some business purposes and not others." *Daimler AG v. Bauman*, 571 U.S. 117, 135 (2014).

On the other hand, propositions to the contrary can be found. *E.g.*, *Bielicki v. Terminix Internat'l Co.*, 225 F.3d 1159, 1166 n.5 (10th Cir. 2000) ("An employee's conduct is deemed to be that of the employer in 'every case.' "). And no on-point case resolves whether *all* of an employee's "words and actions" can be attributed to the employer for jurisdictional purposes.

The Houston Court cited no authority for attributing *all* of Naylor's and Reilly's Texas contacts to Amec without considering the scope of their authority. App. 23a–24a. And Enterprise insists this was the "correct" analysis (BIO 24–27)—even though it conflicts with state and federal law.

This demonstrates confusion over Question 2.

3. Summary reversal is warranted if constitutional error is obvious.

The Court's precedent indicates that (1) a claim-by-claim analysis is necessary and (2) an individual's forum contacts cannot be attributed to the defendant unless the defendant authorized them. And Enterprise insists that "no one" disputes these constitutional requirements. BIO 16, 20. If this is true—and if the Houston Court failed to satisfy these *undisputed* constitutional requirements—then Enterprise should not be able to sue Amec in Texas for over $700,000,000 in damages. If the Houston Court failed to satisfy *undisputed* constitutional requirements, then this Court should consider summary reversal. *Cf. Wearry*, 577 U.S. 385 (summarily reversing because due-process violation was "[b]eyond doubt").

Enterprise insists the Houston Court (1) properly conducted a claim-by-claim analysis and (2) properly determined that Amec had authorized all of Naylor's and Reilly's Texas contacts. BIO 11–15, 21–25. But even a casual reading of the opinion reveals that the Houston Court did no such thing.

To satisfy due process, courts must determine whether alleged forum contacts constitute the "minimum contacts" required for jurisdiction. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945). This means courts must determine whether alleged contacts show the defendant "purposefully" acted in the forum. *Ford*, 141 S.Ct. at 1024. Courts must determine whether the contacts were "the defendant's own choice

and not 'random, isolated, or fortuitous.' " *Id.* 1025. And when alleged contacts were made by an agent, courts must determine whether the defendant authorized those contacts before attributing them to the defendant for jurisdictional purposes. Pet. 24–28 (citing cases); BIO 20 (insisting "no one" disputes this requirement).

Here, the Houston Court recited the alleged contacts in its statement of facts. App. 3a–7a. But it conducted no further analysis—no analysis of the scope of Naylor's or Reilly's authority to act on Amec's behalf; no analysis of *which* contacts could be attributed to Amec; and no analysis of whether any contact showed Amec had "purposefully" acted in Texas. Enterprise tries to transform the court's recitation of alleged contacts into a careful analysis. BIO 11–12 (citing App. 3a–7a). But even a casual reading reveals that, aside from merely reciting the alleged contacts (App. 3a–7a) and reciting the constitutional standard of review (*id.* 12a–13a), the Houston Court made no effort to *apply* the constitutional standard to the alleged contacts. Instead, the court simply established that Naylor and Reilly were Amec's "employees" (*id.* 15a–22a), then attributed *all* of their "words and actions" to Amec based on their "employee" status (*id.* 23a–24a).

By doing so, the Houston Court short-circuited any analysis of whether Amec acted "purposefully" in Texas. By attributing *all* of Naylor's and Reilly's contacts to Amec—without analyzing the scope of their authority to act on Amec's behalf—the court failed to show that Naylor's or Reilly's alleged contacts were

anything more than "[t]he unilateral activity of those who claim some relationship with a nonresident defendant." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). This approach subjects Amec to Texas's jurisdiction based on the alleged remarks of an employee—even if that employee never had authority to make those remarks on Amec's behalf.

This is where the scope-of-authority issue (Question 2) and the claim-by-claim issue (Question 1) overlap. Had the Houston Court addressed the scope-of-authority issue, it would've concluded that some of Naylor's and Reilly's alleged contacts cannot be attributed to Amec. And with a claim-by-claim analysis, the court would've concluded that Texas lacks jurisdiction for any claim that arises from contacts that cannot be attributed to Amec.

For example: Enterprise's breach-of-contract claim arises from Naylor's and Reilly's alleged "words and actions . . . in Texas," whereby they allegedly "inserted" Amec into "the contractual relationship between Enterprise and Foster"—allegedly representing that Amec was "assum[ing]" Foster's contractual "obligations," and assuming "management of daily operations [on the PDH Project]." App. 4a. But *none* of these Texas contacts can be attributed to Amec because neither Naylor nor Reilly had authority to say or do any such thing on Amec's behalf.

Enterprise agrees that Naylor and Reilly derived their authority from the "Delegated Authorities"

document. BIO 2, 24. The first paragraph of this document is reproduced at R. 1a.

As the Houston Court noted, this document gave Naylor and Reilly authority to manage Amec's day-to-day operations as a British holding company with 439 subsidiaries. Pet. 4–7; App. 16a–18a. But the document never authorized Naylor or Reilly to take control of a particular construction project being managed by one of Amec's sub-sub-subsidiaries. And it never authorized Naylor or Reilly to "assume" the contract between Enterprise and Foster—because it limited their contracting authority to contracts worth less than $350,000,000, and the Enterprise contract was worth at least $884,000,000.

Enterprise repeatedly represents that the document "'mandated' that Naylor and Reilly 'direct and manage the day-to-day business operations' of the [PDH] Project in Texas"—and that it "expressly" authorized all "the very same contacts that underlie jurisdiction." BIO 4–5, 14, 26. But Enterprise misrepresents the text of the document. See R. 1a. And Enterprise insists that the Houston Court "thoroughly" analyzed the scope-of-authority issue. *Id.* 4. But no such analysis exists.

Given the actual scope of Naylor's and Reilly's authority, the Houston Court should've concluded that many of their alleged "words and actions" cannot be attributed to Amec. And the court should've subsequently concluded that Texas lacks jurisdiction over Enterprise's breach-of-contract claim—at least—

because it arises from contacts that cannot be attributed to Amec. But the court didn't reach these conclusions because it didn't conduct the proper analyses.[1]

If—as Enterprise insists—the constitutional requirements for specific jurisdiction are *undisputed*, then the Court should consider summarily reversing the Houston Court's decision and remanding with instructions to do what is constitutionally required.

CONCLUSION

For these reasons, the Court should grant the petition.

Respectfully submitted,

PATRICK E. GAAS
EDWARD S. HUBBARD
DANIEL F. SHANK
KILPATRICK TOWNSEND & STOCKTON LLP
700 Louisiana St., Ste. 4300
Houston, TX 77002
(281) 809-4080

JASON P. STEED
Counsel of Record
ADAM H. CHARNES
KILPATRICK TOWNSEND & STOCKTON LLP
2001 Ross Ave., Ste. 4400
Dallas, TX 75201
(214) 922-7106
jsteed@kilpatricktownsend.com

Attorneys for Petitioner

[1] Enterprise suggests a claim-by-claim analysis isn't necessary if Enterprise's claims all "arise from the same jurisdictional facts." BIO 15–16. But Enterprise admits that its breach-of-contract claim arises from different contacts than its "misrepresentation" claims—and admits the trial court addressed these claims as arising from separate contacts. *Id.* 11–12, 13.