No. _____

In The
Supreme Court of the United States

AKER BIOMARINE ANTARCTIC AS,
a Norwegian corporation, and AKER BIOMARINE
ANTARCTIC II AS, a Norwegian corporation,

Petitioners,

v.

NAM CHUONG HUYNH and LIN R. BUI, husband
and wife, and JO-HANNA READ, as guardian ad
litem for H.H. 1, H.H. 2, and H.H. 3, minors,

Respondents.

**On Petition For Writ Of Certiorari To
The Washington State Court Of Appeals**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Due Process Clause permits a state court to exercise specific jurisdiction over a defendant only when the plaintiff's claims "arise out of or relate to" the defendant's forum activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation omitted). Moreover, "the defendant's suit related conduct [must] create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). Finally, "restrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780-81 (2017) (internal quotes and citations omitted).

The question presented is:

Whether the "but for" causation test for personal jurisdiction, applied by Washington State and a minority of other jurisdictions, can survive this Court's recent personal jurisdiction case law, when the test sweeps a foreign defendant into Washington state court to answer claims based on conduct that occurred thousands of miles away in a foreign country, based solely on a contractual connection that is unrelated to the alleged tort or the defendant's suit related conduct giving rise to that claim.

PARTIES TO THE PROCEEDING

Petitioner, Aker BioMarine Antarctic AS is the successor to Aker BioMarine Antarctic II AS; both were named as defendants in the trial court and respondents/cross-appellants below.

Respondents, Nam Chuong Huynh and Lin R. Bui, husband and wife, Jo-Hanna Read as guardian ad litem for H.H. 1, H.H. 2, and H.H. 3, minors, were plaintiffs in the trial court, and were appellants/cross-respondents below.

Additionally, Marel Seattle, Inc. was a defendant before the trial court but was not a party before the court of appeals.

RULE 29.6 DISCLOSURE STATEMENT

Aker BioMarine Antarctic AS ("AKAS") is owned 60% by Antarctic Harvesting Holding AS and 40% by Aker BioMarine AS. No publicly traded company owns 10% or more of AKAS' stock, although Aker BioMarine AS is 100% owned by Aker ASA, a company that is publicly traded in Oslo, Norway.

Aker BioMarine Antarctic II AS was a wholly owned subsidiary of AKAS, and merged with AKAS on August 18, 2012.

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On Petition For Writ Of Certiorari To The Washington State Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

Aker BioMarine Antarctic AS, as corporate successor to Aker BioMarine Antarctic II AS, respectfully petitions for a writ of certiorari to review the judgment of the Washington State Court of Appeals.

OPINIONS BELOW

The opinion of the Washington State Court of Appeals (Pet. App. 1-34) is unpublished but is available at

2017 Wash. App. LEXIS 1219 or 2017 WL 2242299. The Washington State Supreme Court's Order denying petition for review (Pet. App. 65) is reported at 408 P.3d 1093 (Wash. 2017). Relevant findings, opinions and orders of the trial court (Pet. App. 35-40; 41-64, 66-87) are unreported.

JURISDICTION

The State Court of Appeals entered judgment on May 22, 2017, affirming the trial court's determination of personal jurisdiction over defendant Aker BioMarine Antarctic AS, as the corporate successor to Aker BioMarine Antarctic II AS. The Washington Supreme Court denied defendant's timely petition for review on December 7, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). *See*, *e.g.*, *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1779 (2017) (granting certiorari to determine whether a state court's exercise of jurisdiction comports with the Due Process Clause of the Fourteenth Amendment).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

Washington's statutory long arm provision provides, in relevant part:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any said acts:
>
> (a) The transaction of any business within this state;
>
> (b) The commission of a tortious act within this state;
>
> (c) The ownership, use, or possession of any property whether real or personal situated in this state;
>
> . . . . (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him or her is based upon this section.

Wash Rev. Code § 4.28.185.

INTRODUCTION

The instant appeal concerns the exercise of case specific jurisdiction by a Washington court over Aker BioMarine Antarctic AS, as the corporate successor to Aker BioMarine Antarctic II AS (referred to as "AKAS II" for sake of simplicity), a Norwegian company. The underlying complaint alleges harm to Mr. Huynh, a Washington resident, that occurred in Uruguay as a result of AKAS II's allegedly negligent acts or omissions, which all took place in Uruguay. The plaintiffs and the Washington state courts sought to link the plaintiffs' claims to AKAS II's forum-state activity solely by virtue of AKAS II's contract with Mr. Huynh's employer, Marel Seattle, Inc. ("Marel Seattle") to refurbish the factory on the Norwegian fishing vessel ANTARCTIC SEA while in Uruguay. The lower courts concluded that contract was the reason Marel Seattle sent Mr. Huynh to Uruguay, putting him in position to be injured while aboard the ANTARCTIC SEA, and finding that AKAS II's contract with Marel Seattle constituted a "but for" cause of his injuries, thereby satisfying Washington's "but for" standard for determining relatedness between a foreign defendant's in-state activities and a plaintiffs' claims, such that Washington State courts had case specific personal jurisdiction to adjudicate the plaintiffs' tort claims against AKAS II. The lower courts reached that conclusion despite the fact that the alleged tort, and the alleged tortious conduct that gave rise to it, all occurred in Uruguay, was not directed at Washington,

and did not create a substantial connection to that State.

This Court has recently clarified that specific jurisdiction is only appropriate where "the defendant's suit related conduct create[s] a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). The fact that AKAS II entered into a contract with the plaintiffs' Washington-based employer was not "suit-related" in the sense required to satisfy due process and establish Washington State's specific personal jurisdiction over AKAS II, because the suit alleged no contractual breach, and focused solely on allegedly tortious conduct that occurred, if at all, entirely within Uruguay on a Norwegian vessel.

Washington's application of the "but for" test for specific personal jurisdiction effectuated a rote and mechanical assessment of relatedness, inconsistent with the recent pronouncements and jurisprudence from this Court starting with *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and continuing more recently with *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 137 S. Ct. 1773 (2017). Most courts have rejected the "but for" test, recognizing that its overbreadth is inconsistent with the requirements of due process. Washington courts' adherence to the "but for" test is emblematic of the minority of courts that still apply it. Today, a problematic split over relatedness endures, yielding diametrically opposed results under the same Due Process Clause, based on nothing more than the fortuity of where suit is filed. That is undoubtedly true here,

where an alleged "but for" cause was allowed to act as the jurisdictional hook to bring suit in Washington State, even though none of AKAS II's "challenged conduct" had anything to do with Washington. *See Walden*, 134 S. Ct. at 1121, 1125.

This Court should grant this writ, to clarify the import of its recent personal jurisdiction case law, and, specifically, to examine the viability of the "but for" test that persists in a minority of lower state and federal courts. How and whether the "but for" test survives *Goodyear*; *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Walden*; *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549 (2017); and *Bristol-Myers* is a ripe, current and significant consideration under the Due Process Clause.

STATEMENT

A. Facts

In January of 2012, Nam Chuong Huynh was employed as a welder by Marel Seattle, a wholly owned subsidiary of an Icelandic corporation. Pet. App. 2, 49, 67. Marel Seattle was hired via e-mail by Aker BioMarine Antarctic II AS ("AKAS II"), a Norwegian company, to refurbish its vessel, the ANTARCTIC SEA, a Norwegian-flagged fishing vessel located in Uruguay. Pet. App. 2, 4, 54, 71. The ANTARCTIC SEA, though owned by AKAS II, was operated by its parent

company, Aker BioMarine Antarctic AS ("AKAS").[1] Pet. App. 48, 50, 71. Marel Seattle's work aboard the ANTARCTIC SEA was to take place while the vessel was berthed in Montevideo, Uruguay. Pet. App. 3, 49.

Marel Seattle sent Mr. Huynh to Uruguay to work on the ANTARCTIC SEA project. Pet. App. 3. While he was working onboard the vessel in Uruguay, Mr. Huynh sustained an electrical shock, which he alleges resulted in severe injuries. Pet. App. 2.

B. Proceedings Below

Mr. Huynh, along with his spouse and minor children, filed suit against AKAS, AKAS II, and his employer in the King County Superior Court in the State of Washington. Pet. App. 1. In the Complaint, Mr. Huynh alleged that AKAS and AKAS II were negligent in that the vessel and its equipment were in an unsafe condition, the defendants caused the unsafe condition, that they failed to properly inspect the ship and its equipment, and that they failed to warn Mr. Huynh of the hazards. Pet. App. 3-4, 45-46.

AKAS and AKAS II moved to dismiss for lack of personal jurisdiction. Pet. App. 4. The trial court held an evidentiary hearing to resolve disputed jurisdictional facts. *Id.* The trial court subsequently found that it had specific personal jurisdiction over AKAS II

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[1] AKAS and AKAS II subsequently merged, leaving AKAS as the surviving entity. Pet. App. 3. The merger has no significance to the jurisdictional questions at issue in this matter.

because AKAS II had entered into a contract with Marel Seattle, Mr. Hyunh's employer, for the ANTARCTIC SEA project. Pet. App. 4-5. The trial court found there was no basis for the exercise of specific personal jurisdiction over AKAS[2] (Pet. App. 64, n.1) and further found that there was no basis for the exercise of general personal jurisdiction over either entity. Pet. App. 55.

Both parties sought and obtained discretionary review of the trial court's decision. Pet. App. 5. The Washington Court of Appeals (Div. I) affirmed the trial court's evidentiary and jurisdictional rulings. Pet. App. 34. AKAS II petitioned for review in the Washington Supreme Court, which was denied. Pet. App. 65.

REASONS FOR GRANTING THE PETITION

A state's authority to exercise personal jurisdiction over a nonresident defendant is constrained by the Due Process Clause of the Fourteenth Amendment. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). Due process requires "certain minimum contacts with [the forum state] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457 (1940)).

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[2] The trial court did, however, find that because AKAS II had merged with AKAS, AKAS could be subject to personal jurisdiction in its capacity as successor to the liability of AKAS II. Pet. App. 5.

International Shoe and its progeny set forth the criteria by which a defendant's contacts with the forum must be evaluated to determine whether an exercise of personal jurisdiction is valid, either as "general" (also known as "all-purpose") jurisdiction or "specific" (also known as "case-linked") jurisdiction. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

Where, as here, general jurisdiction over the foreign defendants is inapplicable and lacking, a court's adjudicatory authority will rest on whether it can exercise "case specific" jurisdiction. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014). "Adjudicatory authority . . . , in which the suit arises out of or relates to the defendant's contacts with the forum, is . . . called specific jurisdiction." *Id*. "Specific jurisdiction . . . depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919 (internal quotes and citations omitted). For there to be specific jurisdiction, "the defendant's suit-related conduct must create a substantial connection with the forum state." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

In the present case, AKAS II's alleged negligence – its activity that gave rise to the occurrence and complaint – occurred solely in Uruguay onboard a Norwegian vessel, was not directed at the State of Washington, and had no connection to the State of

Washington. Nonetheless, the Washington State Court of Appeals determined that it was appropriate to assert personal jurisdiction over AKAS II, based on AKAS II's contract with plaintiffs' employer, Marel Seattle, applying Washington's so called "but for" test. As the Washington Court stated, that "test is satisfied if the events giving rise to the claim would not have occurred but for the defendant's solicitation of business within the forum state." Pet. App. 24. The Washington Court therefore reasoned that the contract between AKAS II and Marel Seattle, though unrelated to the negligence alleged in the complaint, was a "but for" cause of plaintiffs' presence in Uruguay, and therefore of the injury he sustained there. *Id*. at 27.

I. There is a Clear and Longstanding Divide Among Lower Courts Regarding How to Assess the Relatedness or "Arising Out Of" Requirement When Determining Specific Personal Jurisdiction.

While this Court has established that specific jurisdiction can only exist when a controversy either "arises out of" or is related to the defendant's contacts with the forum state, it has also declined to conclusively resolve the question of precisely what "tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that [a relatedness or arising out of] connection exists." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 n.10 (1984). Absent a clear pronouncement

from this Court, lower courts have divided into different camps on this question.

A. "But For" Causation Approach

Washington's adherence to the "but for" approach is representative of the minority of courts that still apply that test. As the Washington Court of Appeals noted in this case, "Washington uses a 'but for' test to determine if a nexus exists between the cause of action and the defendant's activities in the forum." Pet. App. 24 (citing *Raymond v. Robinson*, 15 P.3d 697, 703 (Wash. Ct. App. 2001)). The other courts that apply a similar approach include the Fourth and Ninth Circuits, as well as the highest courts of Arizona and Massachusetts. *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007) (noting that "the Ninth Circuit follows the 'but for' test"); *see Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 278-79 (4th Cir. 2009) (requiring that defendant's contacts with the forum state must form the basis of the suit, to support specific jurisdiction); *Williams v. Lakeview Co.*, 13 P.3d 280, 284-85 (Ariz. 2000) (requiring a causal nexus between the defendant's activities and the plaintiff's claims); *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 553 (Mass. 1994) (determining that the "but for" test is more consistent with Massachusetts' long-arm statute, and adopting that test).

The "but for" causation test generally requires that the plaintiff simply would not have suffered an injury "but for" the defendant's forum-related conduct. *See Shute v. Carnival Cruise Lines*, 783 P.2d 78, 82

(Wash. 1989). That test, however, has come under considerable criticism. *See O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 322 (3d Cir. 2007) ("But-for causation cannot be the sole measure of relatedness because it is vastly over inclusive. . . ."); *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996) ("A 'but for' requirement, on the other hand, has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain."); Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 Temp. L. Rev. 627, 656 (2009) ("The but for test of personal jurisdiction swings the courthouse door open far too wide. . . ."). Recent authority shows that due process requires the defendant's suit-related conduct to create a connection between the defendant and the forum that is "substantial." *Walden*, 134 S. Ct. at 1122; *Pruczinski v. Ashby*, 374 P.3d 102, 106 (Wash. 2016) (quoting *Walden*).

The problem with the "but for" test is the danger that it will result in a state reaching beyond its borders to adjudicate a foreign defendant's suit-related conduct that occurred elsewhere, because of a mere "but for" connection to other activities of the defendant in the forum. Here, the contract between AKAS II and Marel Seattle was deemed to be a "but for" cause of the alleged injury. But, it is plain that the contract was not a *legal cause* of the injury, nor did it form the "substantial" connection *Walden* requires. The contract did not in any way cause the alleged negligence, which is the suit-related conduct. The causes of that alleged negligence all reside far outside of Washington. And it is only those causes that could be "substantial" and form

a valid basis for exerting specific jurisdiction over the plaintiffs' claims under this Court's recent precedents. Instead, by asserting specific jurisdiction based on "but for" causation, but in the absence of a substantial connection between defendant and forum, the Washington courts' approach begins to resemble a "loose and spurious form of general jurisdiction." *Bristol-Myers*, 137 S. Ct. at 1776.

The criticism of the "but for" test is exemplified by the Sixth Circuit's decision, after *Walden*, to abandon the "but for" test.[3] The Eastern District of Michigan described *Walden* as "clarifying the more exacting requirements for case-specific jurisdiction. . . ." *Gutman v. Allegro Resorts Mktg. Corp*., 2015 U.S. Dist. LEXIS 166647 at *16 (E.D. Mich. Dec. 14, 2015). The same court wrote: "[W]here *Conley* [a case from another district] implies that a mere 'but-for' relationship between contacts and claims will suffice to support an exercise of specific personal jurisdiction, it collides with later published decisions of our supervising appellate court . . . as well as the Supreme Court's recent clear pronouncement in *Walden*, that any exercise of limited personal jurisdiction must be premised on a *substantial* connection between the alleged in-forum activities

[3] "[M]ore than mere but-for causation is required to support a finding of personal jurisdiction. To the contrary, the plaintiff's cause of action must be proximately caused by the defendant's contacts with the forum state. Indeed, the Supreme Court has emphasized that only consequences that *proximately* result from a party's contacts with a forum state will give rise to jurisdiction." *Beydoun v. Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 507-08 (6th Cir. 2014) (citation omitted).

and the injuries for which a plaintiff seeks to recover." *Id*. at *16-17. For this reason, the Sixth Circuit has held that "more than mere but-for causation is required to support a finding of personal jurisdiction . . . [and] plaintiff's cause of action must be proximately caused by the defendant's contacts with the forum state." *Beydoun v. Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 507-08 (6th Cir. 2014) (citation omitted). Regardless, a persistent (though shrinking) minority of other courts have continued to apply the "but for" test, including Washington.

B. Proximate Cause or Foreseeability Approach

A second group of courts has applied a more stringent test for the exercise of specific personal jurisdiction, noting that the relatedness requirement mandates something more than mere "but for" causation. This requirement has been described as a requirement that plaintiff's injuries be "proximately caused" by the defendant's contacts with the forum state. *See, e.g.*, *Beydoun, supra* (6th Cir. 2014); *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) (noting the requirement of a proximate cause nexus, which "correlates to foreseeability, a significant component of the jurisdictional inquiry") (quoting *Nowak v. Tak How Invs., Ltd.*, *supra*).

The First, Third, Sixth, Seventh, and Eleventh Circuits have all found the "but for" test to be insufficient, and require a more direct causal connection than

that provided by the "but for" test. *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 323 (3d Cir. 2007) (finding that specific jurisdiction requires "a closer and more direct causal connection than that provided by the but-for test"); *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 430 (7th Cir. 2010) (citing and agreeing with *O'Connor* and the Third Circuit's approach, and further noting that "[b]ut-for causation would be 'vastly overinclusive,' haling defendants into court in the forum state even if they gained nothing from those contacts"); *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222-23 (11th Cir. 2009) (describing "but for" causation as a necessary, but not sufficient basis for the exercise of personal jurisdiction – a "causal nexus between the tortious conduct and the purposeful contact" must also be present, to satisfy Due Process concerns) (citing *Burger King*, 471 U.S. at 472; *O'Connor*, 496 F.3d at 322-23). In addition to the foregoing federal circuits, the Supreme Court of Oregon has reached a similar conclusion, requiring not only "but for" causation, but also that "the nature and quality of the [defendant's forum-state] activity must also be such that the litigation is reasonably foreseeable by the defendant." *Robinson v. Harley-Davidson Motor Co.*, 316 P.3d 287, 300 (Or. 2013) (en banc).

C. Sliding Scale or No Causal Connection Approach

Another group of courts has applied a third test, holding that personal jurisdiction does not necessarily require a causal connection between the defendant's

suit-related contacts and the injury, but instead that jurisdiction may lie based on an even more general relationship or connection between the two. *See*, *e.g.*, *Bristol-Myers*, 137 S. Ct. at 1781 (discussed at greater length, *infra*). That test, adopted by California courts, was recently rejected by this Court, upon a finding that in order to satisfy specific personal jurisdiction, "[w]hat is needed – and what is missing here – is a connection between the forum and the specific claims at issue." *Id*.

A version of that test was adopted by the Federal Circuit, and by the highest courts of Texas and the District of Columbia. *Avocent Hunsville Corp. v. Aten Int'l Co*., 552 F.3d 1324, 1336-37 (Fed. Cir. 2008) (interpreting the "arise out of or related to" language as "far more permissive than either the 'proximate cause' or the 'but for' analyses," and requiring only that defendant's contacts with the forum "relate in some material way" to the suit); *TV Azteca v. Ruiz*, 490 S.W.3d 29, 52-53 (Tex. 2016); *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 336 (D.C. 2000).

These cases and the test applied in those jurisdictions requires relatively less consideration, given this Court's recent decision in *Bristol-Myers*.

II. The Split Yields Different Results on the Same Facts, Based Solely on the Location of the Forum in Which Suit is Filed – a Result that Should be Unacceptable Under the Due Process Clause.

The split among lower state and federal courts has created a situation in which the demands of our Constitution's due process requirements vary from place to place, yielding different results under similar facts depending only upon the forum in which a foreign defendant is haled into. "A State may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the Federal Constitution which are applicable to State authority." *Crowell v. Benson*, 285 U.S. 22, 57 (1932). Far from uniform, the current landscape is fraught with anomalies, where due process can be offended or satisfied depending solely on the forum deciding the issue.

A majority of state and federal jurisdictions would rule that the Due Process Clause prevents courts therein from exercising jurisdiction over a defendant like AKAS II to consider allegations that its conduct in Uruguay injured somebody there. For instance, there can be little doubt that, were this exact same case brought in the neighboring State of Oregon (which requires not only "but for" causation, but also reasonable foreseeability by the defendant), the facts would plainly not support the exercise of specific personal jurisdiction. *See Robinson v. Harley-Davidson Motor Co.*, 316 P.3d at 300 ("[T]he activity may not be only a but-for

cause of the litigation; rather, the nature and quality of the activity must also be such that the litigation is reasonably foreseeable by the defendant.").

The same would be true if the case was brought in a federal district court within the First, Third, Sixth, Seventh, or Eleventh Circuits, all of which find the "but for" test to be an insufficient basis for the exercise of specific jurisdiction. For example, in *B2 Opportunity Fund, LLC v. Trabelsi*, a Massachusetts district court considered the exercise of specific jurisdiction over a defendant alleged to have committed various torts including fraud, breach of fiduciary duty, and gross negligence. 2017 U.S. Dist. LEXIS 172371, at *6 (D. Mass. Oct. 18, 2017). The court's analysis began with the first prong for determining specific jurisdiction: "whether the claim 'directly arise[s] out of, or relate[s] to, the defendant's forum state activities[.]'" *Id*. at *16-17. Although the defendant had various contractual ties and contacts with the forum state, those contractual ties were deemed to be "an essential mismatch" with the unrelated tort claims. *Id*. at 18. Applying the First Circuit's approach, that Court noted that "but for" causation alone would not suffice – legal causation was also required. *Id.* In that case, as in the present one, the contractual ties that plaintiff had identified, while likely sufficient to satisfy a "but for" inquiry, did *not* suffice to establish legal or proximate causation. *Id*. (citations omitted). Accordingly, there was not adequate "relatedness" to support the exercise of jurisdiction, and the Court granted the defendant's motion to dismiss. *Id*. at *18-19.

In the present case, the jurisdictional question would be resolved differently if Washington did not apply the "but for" test. There is no basis for AKAS II to have expected or reasonably foreseen being haled into court in Washington for allegedly tortious conduct that occurred in Uruguay and was not directed toward Washington, or that Washington courts would have the authority to adjudicate responsibility for conduct occurring on a Norwegian vessel situated in Uruguay.

In *Goodyear*, the relatedness test required a causal link between the defendant's in-state activities and the plaintiff's specific claims. 564 U.S. at 923. Exercise of specific jurisdiction further requires an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulations. *Id*. at 919. In other words, not just *any* activity in the forum state will suffice – instead, specific jurisdiction requires that the actual activity in question "gave rise to the episode-in-suit." *Id*. at 923. This notion was articulated as early as 1945 in *International Shoe*, which made clear: "[t]he obligation which [was] here sued upon arose out of th[e] [defendant's] very activities" in the State. 326 U.S. at 320. *Walden* appears to have gone even further than *International Shoe* and *Goodyear*, articulating the requirement that "the defendant's suit-related conduct must create a substantial connection with the forum State[,]" 134 S. Ct. at 1121, and equating "suit-related conduct" with the defendant's "challenged conduct[.]" *Id.* at 1125 (discussed at greater length, *infra*).

Here, AKAS II hired via e-mail a Washington company, Marel Seattle, to refurbish the factory aboard its vessel the ANTARCTIC SEA while it was in Montevideo, Uruguay. Marel Seattle decided to send a welder, the plaintiff, Mr. Huynh, to Uruguay to work on the ship, rather than send some other welder, or hire a local worker. Entering into a contract with Marel Seattle was not, and cannot reasonably be construed as, AKAS II's "suit-related conduct" – instead, the negligence claims against AKAS II arise out of AKAS II's acts or omissions on the vessel in Uruguay. That is the only conduct of AKAS II that the plaintiffs have challenged in their lawsuit.

The conflict between federal circuits, and even between neighboring states, yields unpredictable results for litigants, insuring disparate outcomes based on nothing more than geographical boundaries. Non-uniform application of the Due Process Clause tears at the fabric of our Constitutional Federalism. This case provides the Court with an opportunity to address itself to this area of inconsistency at a time when the Court has placed considerable focus on refinement of the tests for general and specific jurisdiction.

III. Washington and Other Adherents to the "But For" Causation Test are Out of Step With this Court's More Recent Pronouncements and Case Law, Which has Clarified the Requirement that Jurisdiction is Only Proper Where a Defendant's Suit-Related Conduct Creates the Substantial Connection With the Forum State.

The Washington Court of Appeals' application of the "but for" test in this context perfectly illuminates the limitations and the problems with that test. It is a more mechanical analysis than this Court has favored, and as other courts have recognized, it is ultimately over inclusive. *See O'Connor*, 496 F.3d at 322 ("But-for causation cannot be the sole measure of relatedness because it is vastly over inclusive. . . ."); *Nowak*, 94 F.3d at 715 ("A 'but for' requirement, on the other hand, has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain."); Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 Temp. L. Rev. 627, 656 (2009) ("The but for test of personal jurisdiction swings the courthouse door open far too wide. . . ."). And the continued application of the "but for" test ultimately disregards the direction and the significance of this Court's recent personal jurisdiction cases.

Over the past seven years, in a series of decisions starting with *Goodyear*, this Court has been steadily reshaping and refining personal jurisdiction jurisprudence. *See Goodyear*, 564 U.S. at 919; *Daimler*, 134

S. Ct. 746; *Walden*, 134 S. Ct. 1115; *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549 (2017); and *Bristol-Myers*, 137 S. Ct. 1773. These decisions are widely recognized as tightening rather than expanding the power of state and federal courts to exercise jurisdiction over foreign defendants. *See, e.g.,* William V. Dorsaneo, III, *Pennoyer Strikes Back: Personal Jurisdiction in A Global Age*, 3 Tex. A&M L. Rev. 1, 17 (2015); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207, 211 (2014); *see also Bristol-Myers*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting).

Goodyear, albeit a general jurisdiction case, is instructive. There, two 13-year-old North Carolina boys were killed in a bus accident in France as a result of a defective tire that had been manufactured by Goodyear in the plant of a foreign subsidiary. 564 U.S. at 918. The Court addressed specific jurisdiction summarily: "Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy." *Id.* at 919.

In *Daimler* and *Goodyear* alike, the Court clarified its earlier holdings on general jurisdiction by concluding that, except in an "exceptional case," a foreign corporation will only be subject to general jurisdiction at "its formal place of incorporation or principal place of business. . . ." *Daimler*, 134 S. Ct. at 761 n.19; *Goodyear,* 564 U.S. at 924. "Specific jurisdiction [by contrast,] depends on an affiliation between the forum and

the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919 (internal quotes and citations omitted). In *BNSF*, this Court concluded that a Montana court could not exercise specific jurisdiction over the defendant railroad "[b]ecause neither [plaintiff] alleges any injury from work in or related to Montana. . . ." 137 S. Ct. 1549. The other three U.S. Supreme Court opinions since 2011 have been concerned more directly with specific jurisdiction.[4]

In a unanimous opinion, this Court concluded in *Walden* that "[f]or a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum state." 134 S. Ct. at 1121. In *Walden*, this Court examined the out-of-state defendant's "challenged conduct," concluding that because no part of that conduct had occurred within the forum State of Nevada, and had not been directed there by the defendant, Nevada did not have specific jurisdiction. *Id.* at 1125. The mere fact that the plaintiffs happened to reside in Nevada was considered by this Court to be irrelevant to the jurisdictional inquiry, because "the plaintiff cannot be the only link between the defendant and the forum." *Id.* at 1122. Although *Walden* involved intentional torts, its principles apply to all tort claims. *See id.* at

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[4] *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), was also a personal jurisdiction case that arose in the product liability setting; it failed to garner a majority.

1123 ("The same principles apply when intentional torts are involved").

The "but for" test applied in this case essentially effectuated the same approach that this Court rejected in *Walden*: it "impermissibly allow[ed] a plaintiff's [or a third-party's] contacts with the defendant and forum to drive the jurisdictional analysis. . . . It also obscures the reality that none of [defendant's] *challenged conduct* had anything to do with [the forum State] itself." *Id*. at 1125 (emphasis added). *Walden* was clear that "mere injury to a forum resident is not a sufficient connection to the forum." *Id*. (citing *Calder v. Jones*, 465 U.S. 783 (1984)).

Most recently, the Court decided *Bristol-Myers,* 137 S. Ct. 1773.[5] That case concerned a suit in California by 678 plaintiffs, some from California but most from other states, against Bristol-Myers, alleging injuries caused by the drug Plavix. *Id*. at 1778. Although Bristol-Myers had considerable operations, facilities, and employees in California, it was not subject to general jurisdiction there inasmuch as it was incorporated in Delaware and had its principle place of business in New York. *Id.* Consequently, the decision focused on whether the California state courts could exercise specific jurisdiction over Bristol-Myers for the claims of the nonresident plaintiffs. *Id.*

Bristol-Myers sold Plavix in California, but none of the non-resident plaintiffs purchased, used, or were

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[5] *Bristol-Myers* was decided after the Washington Court of Appeals issued its decision in this instant case.

injured by Plavix there. *Id.* at 1781. The California Supreme Court applied a "sliding scale" approach in determining that *California* courts had specific jurisdiction over *Bristol-Myers*. Under this approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Id.* at 1778 (citations omitted).

By a vote of 8-1 this Court reversed, stating: "In order for a state court to exercise specific jurisdiction, 'the *suit*' must 'aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'" *Id.* at 1780 (emphasis in original, quoting *Daimler*, 134 S. Ct. at 746). The opinion continued:

> In other words, there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. For this reason, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.

Id. (internal quotes and citations omitted). Although the Court acknowledged that personal jurisdiction is primarily concerned with the burden of forcing a foreign defendant to litigate far from home, the majority opinion emphasized that

> it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it,

> restrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.

Id. at 1780. Re-emphasizing the focus of specific jurisdiction, the Court repeated that "there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Id.* at 1781 (internal quotes and citation omitted).

This Court found the approach adopted by the California court to specific jurisdiction to be dangerous because it "found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims." *Id.* After noting that the nonresident plaintiffs were not prescribed, did not ingest, and were not injured by Plavix in California, the Court concluded: "What is needed – and what is missing here – is a connection between the forum and the specific claims at issue." *Id*.

Goodyear, *Daimler*, *BNSF*, *Walden* and *Bristol-Myers* teach that there must be a connection between the "specific claims at issue" and the forum. *Id.* "[T]he defendant's suit-related conduct must create a substantial connection with the forum State." *Walden*, 134 S. Ct. at 1121. The suit-related conduct is the conduct challenged in the complaint. *See id.* at 1125.[6]

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[6] Indeed, this Court has recently enforced the limitations articulated by recent personal jurisdiction cases, via summary

Here, however, in the absence of a connection between Washington and AKAS II's allegedly tortious conduct, the Court of Appeals focused instead on the contract between AKAS II and a third party, Marel Seattle. Professing to apply Washington's "but for" test for relatedness, the Court of Appeals reasoned that "but for" AKAS II's contract with Marel Seattle, Mr. Huynh would never have been sent by Marel Seattle to Uruguay and, hence, would not have been in a position to be injured by AKAS II's alleged negligence there. Such reasoning ignores both the rule for specific jurisdiction, and the rationale underlying the rule.

First, the rule instructs that specific jurisdiction requires that the foreign defendant's suit-related conduct must create a "substantial" relationship between the defendant and the forum. *Walden,* 134 S. Ct. at 1121. In examining suit-related conduct, this Court has required lower courts to focus on the defendant's "challenged conduct," *id.* at 1125; the "episode in suit," *Goodyear*, 564 U.S. at 919; and "the specific claims at issue." *Bristol-Myers*, 137 S. Ct. at 1781. In the instant case, if the Washington Court of Appeals had followed this Court's specific guidance, it would have had to focus instead on the plaintiffs' allegations of AKAS II's negligence and the link, if any, between that alleged

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disposition. *See Murco Wall Prods. v. Galier*, 200 L. Ed. 2d 243 (2018). In that case, as in this one, an intermediate appellate court applied a test for specific personal jurisdiction that was inconsistent with this Court's precedents, and the state supreme court denied review. This Court summarily vacated the judgment, and remanded the case to the Court of Civil Appeals of Oklahoma, for further consideration in light of *Bristol-Meyers*. *Id.*

negligence and Washington. Had it done so, it would have been forced to conclude that AKAS II's alleged negligence occurred, if at all, in Uruguay, far from Washington, and was not directed towards Washington. There is undoubtedly a connection between Mr. Huynh and Washington – he resides here – but "the plaintiff cannot be the only link between the defendant and the forum." *Walden*, 134 S. Ct. at 1122. There was no contract between AKAS II and Mr. Huynh. There are no contract claims in this case; the plaintiffs' claims are all aimed entirely at allegedly tortious conduct in Uruguay on board a Norwegian vessel. No part of the specific claims at issue involves a contract, and no part of AKAS II's challenged conduct occurred in or was directed towards Washington. Thus, the rule, as announced by this Court's recent opinions in different settings, has been violated here because Washington State adheres to the "but for" test when assessing relatedness.

Second, an equally significant reason for rules limiting the jurisdiction of state courts under the Fourteenth Amendment is "the more abstract matter of submitting [a foreign defendant] to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers*, 137 S. Ct. at 1780. Restrictions on personal jurisdiction are also "a consequence of territorial limitations on the power of the respective States." *Id*. Yet, here, the lower courts have decided to take jurisdiction over claims allegedly arising out of the conduct of a foreign company onboard a foreign vessel while docked thousands of

miles away in foreign waters. In doing so, those courts have reached well beyond the reasonable territorial limitations of Washington State.[7] The jurisdictional "hook" in this case is a contract with Marel Seattle, a third party,[8] who decided to send Mr. Huynh to Uruguay, rather than send someone else or hire local labor. But, that contractual hook is not itself in any way part of the claims or the conduct at issue, nor does it supply a basis for Washington to reach so far beyond its borders in order to address the allegedly negligent conduct that *is* at issue, i.e., the safety of the conditions on board the vessel at the time of the plaintiffs' injury in Uruguay.

This, of course, raises the important question of "relatedness" and whether the "but for" test[9] is consistent with the "substantial relationship" required by recent Supreme Court decisions.[10] As addressed above,

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[7] Nobody would suggest that it would be a legitimate exercise of state power for Washington to establish rules for workplace safety on board Norwegian ships, or in a Uruguayan shipyard.

[8] "[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." *Bristol-Myers*, 137 S. Ct. at 1781 (quoting *Walden*, 134 S. Ct. at 1123).

[9] "From the standpoint of fairness it should make no difference where the cause of action matured, so long as it could not have arisen *but for the activities of the nonresident firm in the forum where it is ultimately sued.*" *Shute v. Carnival Cruise Lines*, 783 P.2d at 81 (italics in original; citation omitted).

[10] *See, e.g.*, *Walden*, 134 S. Ct. at 1122 (requiring a "substantial relationship" between the forum and the defendant to be created by the defendant's suit-related conduct); *Bristol-Myers*, 137 S. Ct. at 1780 ("specific jurisdiction is confined to adjudication of issues deriving from, or connected with the very controversy that establishes jurisdiction[;]" "there must be an affiliation between

the Sixth Circuit and other courts have explained the rationale for how this Court's recent case law, including *Walden*, supports their rejection of the "but for" test and reliance, instead, on a proximate cause test. *See Beydoun*, 768 F.3d at 507-08.

This Court should take the opportunity provided by this case to consider whether the "but for" test applied by a minority of federal and state jurisdictions is overly broad, a "loose and spurious form of general jurisdiction." *Bristol-Myers*, 137 S. Ct. at 1781. Whether the "but for" test survives *Goodyear, Daimler, BNSF, Walden* and *Bristol-Myers* is a ripe, current and significant consideration under the Due Process Clause, and a matter of considerable public interest to plaintiffs and defendants alike.

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the forum and the underlying controversy, principally an activity or an occurrence that takes place in the forum State").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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