No. 19-368

IN THE
Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, *et al.*,
Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

NEAL KUMAR KATYAL
SEAN MAROTTA
Counsel of Record
KIRTI DATLA
ERIN R. CHAPMAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5600
sean.marotta@hoganlovells.com

Counsel for Petitioner

RULE 29.6 DISCLOSURE STATEMENT

Ford Motor Company has no parent corporation and no publicly held company owns 10% or more of Ford Motor Company's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 19-368

FORD MOTOR COMPANY,
Petitioner,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, *et al*.,
Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

The stakes in this case for manufacturers are high. As the Alliance of Automobile Manufacturers explains (at 12), the Montana Supreme Court's expansive view of the arise-out-of-or-relate-to requirement means that manufacturers "can be haled into a forum in which they do not reside based on the unilateral decisions of" third parties. That, in turn, "mak[es] it impossible for corporations to structure their affairs to limit the number of jurisdictions in which they can be sued." U.S. Chamber of Commerce et al. Amicus Br. 16.

The Montana Supreme Court aligned itself with a growing minority of jurisdictions that hold that

specific personal jurisdiction is proper even if the defendant's forum contacts did not cause the plaintiff's claims. By contrast, the majority of federal and state courts require at least *some* causal connection between a plaintiff's claims and a defendant's forum contacts.

This petition is an ideal vehicle to resolve this conflict. Ford did not contest the other two prongs of the tripartite specific-jurisdiction test, and the motion-to-dismiss posture guarantees undisputed facts. Not only that, but courts across the country regularly confront the question presented on similar facts, highlighting the need for this Court's guidance.

The petition should be granted.

ARGUMENT

I. THE PETITION IMPLICATES A CLEAR SPLIT.

1. A plaintiff's "cause of action" must "arise out of or relate to the foreign corporation's activities in the forum State" before a court can exercise specific personal jurisdiction consistent with due process. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 (1984).

Federal courts of appeal and state supreme courts have settled on four different approaches to this requirement. A minority holds that a defendant's forum contacts need not have caused the plaintiff's claims, so long as the contacts relate in some unspecified sense to the subject of the plaintiff's claims. *See* Pet. 11–12. Six courts require that a defendant's forum contacts have been the but-for cause of a plaintiff's claims. *See id.* at 12–14. Eight require a stronger causal connection, akin to proximate cause. *See id.* at 14–16. And four more agree that *some*

causal connection is required, without adopting a clear standard. *See id.* at 16–17. And not only are courts in conflict, they *are asking* for clarification. *See, e.g.*, *Robinson* v. *Harley-Davidson Motor Co.*, 316 P.3d 287, 300 (Or. 2013) ("recogniz[ing]" that its strong causation requirement "is not definitive and may someday be further clarified by the Supreme Court"); *cf.* All. of Auto. Mfrs. Amicus Br. 4, 16 (asking Court to "provide much-needed guidance to state and federal courts").

2. Lucero does not deny the split. He instead tries to move 9 of the 24 pieces around the board. His quibbles are wrong and beside the point.

Lucero first suggests that the Tenth Circuit has declined to adopt a causal requirement because the Court supposedly punted on the question in *Kuenzle* v. *HTM Sport-Und Freizeitgeräte AG*, 102 F.3d 453, 457 & n.4 (10th Cir. 1996). *See* Opp. 11. But *Kuenzle* held that the arising-out-of-or-related-to requirement " 'is . . . not satisfied' when the plaintiff 'would have suffered the same injury even if none of the [defendant's forum] contacts had taken place.' " 102 F.3d at 456–457 (brackets in original). Lucero takes the Tenth Circuit's later statement that it has yet to "pick[] sides" between but-for and proximate cause to mean that the court rejects causation altogether; it requires some. Opp. 19 (discussing *Dudnikov* v. *Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1079 (10th Cir. 2008) (Gorsuch, J.)). But *Dudnikov* dismissed a non-causal test as "inappropriately blur[ring] the distinction between specific and general personal jurisdiction," and concluded instead that "either" a "but-for" or "proximate causa-

tion test[]" satisfies the "arises from" requirement. 514 F.3d at 1079.

Lucero contends (at 14–15) that the Eleventh Circuit belongs in the no-causation camp and not the but-for causation camp. Lucero describes its test as requiring only that a defendant "directly targeted its [products] toward" the forum. *Id.* at 15 (quoting *Vermeulen* v. *Renault U.S.A., Inc.*, 985 F.2d 1534, 1550 (11th Cir. 1993)). But the court held just last year that "a tort arises out of or relates to the defendant's activity in a state only if the activity is a *'but-for' cause* of the tort." *Waite* v. *All Acquisition Corp.*, 901 F.3d 1307, 1314 (11th Cir. 2018) (emphasis added and internal quotation marks and alterations omitted).

Lucero next suggests that the Ninth Circuit is a no-causation jurisdiction. Lucero relies on a decision that concluded that introducing products into the "flow of commerce" was sufficient for personal-jurisdiction purposes. Opp. 15 (quoting *Reyes* v. *Riggs*, 878 F.2d 386 (9th Cir. 1989)). The Ninth Circuit has explained, however, that its cases involving "goods sent into a forum" is entirely "consistent with" the "application of a 'but for' standard." *Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991).

Lucero would likewise place the First Circuit in the no-causation bucket. *See* Opp. 15–16. He describes its test as requiring only "knowledge and intent of the sale" of the products in the forum. *Id.* (quoting *Benitez-Allende* v. *Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 29 (1st Cir. 1988)). But in the thirty years since the opinion Lucero relies on, the First Circuit has explained that "[t]he relatedness prong

requires the plaintiff to show" that "the litigation itself" is "founded *directly* on those activities," which it evaluates "with reference to the contacts the defendant creates with the forum." *C.W. Downer & Co.* v. *Bioriginal Food & Sci. Corp.*, 771 F.3d 59, 66 (1st Cir. 2014) (emphasis added and citation omitted).

Lucero also resists (at 16 n.4) placing the Fifth Circuit in the unspecified-causation camp because it has applied a stream-of-commerce theory. But the Court has insisted that even when an object reaches the forum through the stream of commerce, the plaintiff must nevertheless show that the tortious conducted "stem[s] from" the defendant's actions in the forum. *Carmona* v. *Leo Ship Mgmt., Inc.*, 924 F.3d 190, 197–198 (5th Cir. 2019). That is a causation requirement. Indeed, the Fifth Circuit has held—like Ford argues here—that "a consumer's unilateral decision to take a product to a distant state, without more, is insufficient to confer personal jurisdiction over the manufacturer or distributor." *Seiferth* v. *Helicopteros Atuneros, Inc.*, 472 F.3d 266, 273 (5th Cir. 2006).

Lucero further argues that when the Sixth Circuit said that it requires proximate cause it did not really mean it—instead, the court was merely insisting that it be "reasonably foreseeable" that the defendant could be called on to litigate in the forum. Opp. 17 (quoting *Beydoun* v. *Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507–508 (6th Cir. 2014)). But the court concluded that specific jurisdiction was lacking because the plaintiffs had not shown that their injuries "w[ere] the result" of any of the de-

fendant's actions in Michigan. *Beydoun*, 768 F.3d at 508.

Finally, Lucero would likewise place all of the unspecified-causation jurisdictions in the no-causation camp, contending that they all take fact-based approaches. Opp. 19. But the Eighth Circuit case he relies on expressly found a causal connection. *See Myers* v. *Casino Queen, Inc.*, 689 F.3d 904, 913 (8th Cir. 2012) (exercising specific personal jurisdiction where plaintiff was "injured after responding to the solicitation" defendant directed at the state). And Alabama insists that a defendant's "in-state activity must '*give rise* to the episode-in-suit.'" *Hinrichs* v. *General Motors of Canada, Ltd.*, 222 So. 3d 1114, 1137 (Ala. 2016) (per curiam; plurality) (emphasis added and alteration omitted) (quoting *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 923 (2011)). The Second Circuit has similarly declined to exercise personal jurisdiction where "[m]issing from the complaint" was "any allegation" that the plaintiff "relied" on the defendant's "contacts" with groups that interacted with the forum when it made the investment that led to its injuries. *SPV Osus Ltd.* v. *UBS AG*, 882 F.3d 333, 344–345 (2d Cir. 2018). Those, too, are causation requirements.

With the split intact, Lucero tries (at 9–10 & n.2) to downplay it as involving mostly district court cases. If anything, those cases show that the issue is important and frequently recurring.

3. Because the split is real, and because the split affects whether the Montana courts' exercise of personal jurisdiction comports with due process, Lucero pivots. He claims (at 9–10) that courts have

not split on a *different* question—whether a plaintiff's claims in a products liability case can arise out of or relate to a defendant's forum contacts if the product in question was first sold outside the forum, and the product was later re-sold, or brought into, the forum. This is, of course, not the question the petition presents. But these cases only confirm that the split is real.

a. The Alabama and West Virginia Supreme Courts' decisions demonstrate this most clearly. The Alabama Supreme Court recognized that this Court's precedents "require that, for specific jurisdiction to exist, [the defendant's] in-state activity must "g[i]ve rise to the episode-in-suit." *Hinrichs*, 222 So. 3d at 1137 (quoting *Goodyear*, 564 U.S. at 923 and citing *Walden* v. *Fiore*, 571 U.S. 277, 284 (2014)).[1] In *Hinrichs*, the plaintiff—a passenger injured in a car accident in Alabama—alleged design-defect claims, but the defendant had not designed, manufactured, or sold the vehicle in question in Alabama. *Id.* at 1116–17. The court found no specific jurisdiction because there was "no evidence of any suit-related contact between" the defendant and Alabama. *Id.* at 1138.

On rehearing, a majority of the Alabama Supreme Court considered, and expressly rejected, the West Virginia Supreme Court's contrary rule. The West Virginia court had considered a nearly identical suit brought by a passenger injured during an accident

[1] Later cases adopted this opinion as the view of the full Court. *Ex parte Int'l Creative Mgmt. Partners, LLC*, 258 So. 3d 1111, 1117–18 (Ala. 2018); *Ex parte Maint. Grp., Inc.*, 261 So. 3d 337, 346–349 (Ala. 2017).

involving a Ford vehicle not designed, made, or sold by Ford in the forum. *See State ex rel. Ford Motor Co.* v. *McGraw*, 788 S.E.2d 319, 324 (W. Va. 2016). *McGraw* found it sufficient for specific jurisdiction that the plaintiff was injured in West Virginia and that the vehicle was purchased second-hand there. *See id*. Yet *Hinrichs* concluded that *McGraw* was neither "on point or persuasive" because it did "not deal with" *Walden*'s suit-related-conduct requirement. *Hinrichs*, 222 So. 3d at 1157–58.

b. Lucero further contends that other product-liability cases did not explicitly adopt a causation requirement. *See* Opp. 11. But in each case, the court relied on the lack of causation to conclude that there was no specific jurisdiction. *See Montgomery* v. *Airbus Helicopters, Inc.*, 414 P.3d 824, 833–834 (Okla. 2018) (holding that a third party's "unilateral choice" to fly the product into the forum was insufficient, even where "[m]ost of the harm" occurred in the forum); *D'Jamoos ex rel. Estate of Weingeroff* v. *Pilatus Aircraft Ltd.*, 566 F.3d 94, 106 (3d Cir. 2009) ("[T]he fact that *other* Pilatus planes have followed a certain path to Pennsylvania and other states cannot provide the necessary connection between Pilatus and Pennsylvania to support specific jurisdiction in this case, because the aircraft involved here reached Pennsylvania by a series of fortuitous circumstances independent of any distribution channel Pilatus employed."); *Kuenzle*, 102 F.3d at 456–457 (finding no specific jurisdiction because plaintiff's accident "would have occurred" in the forum "even if [the defendant] had made none of the contacts").

II. THE PETITION OFFERS A CLEAN VEHICLE.

Lucero suggests two reasons to pass the case by. *See* Opp. 21. Neither has merit.

1. Lucero argues that instead of addressing the "sweeping" question presented, the Court should proceed on a "case-by-case" basis, and instead wait for a case that presents one "particular element" of the question. *Id.* But the *Nicastro* plurality Lucero cites stated that its purposeful-availment requirement applies *regardless* of the cause of action. *See J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 885 (2011) (plurality). And it rejected leaving personal jurisdiction to be governed by hazy generalities, viewing them as "inconsistent with the premises of lawful judicial power" and risking "significant expenses" being expended "just on the preliminary issue of jurisdiction." *Id.* at 883, 885. Like any legal test, the Due Process Clause's *application* will turn on a case's facts. But the Constitution's requirements do not.

2. Lucero next suggests that this Court should not grant certiorari in a personal jurisdiction case because in this area of the law there are no "black and white" answers to be given. Opp. 21 (quoting *Kulko* v. *Superior Court of Cal.*, 436 U.S. 84, 92 (1978)). Not so. When it comes to the arise-out-of-or-relate-to requirement, the process is in fact black and white: A court must take a defendant's forum contacts, compare them to the plaintiff's claims, and ensure that the connection between the two is sufficient. This Court need only explain what connection is sufficient. And Lucero offers no reason, and none exists, why the connection due process requires should change with context.

III. THE DECISION BELOW WAS WRONG.

Lucero defends the Montana Supreme Court's holding that the arise-out-of-or-relate-to requirement can be satisfied so long as a defendant has enough in-forum contacts that look enough like the kinds of contacts that could give rise to a similar enough claim by another plaintiff. *See* Opp. 22–23. That is not how specific—that is, "case-linked," *Bristol-Myers Squibb Co.* v. *Superior Court of Cal.*, 137 S. Ct. 1773, 1780, 1785 (2017)—personal jurisdiction works.

1. To argue that the arise-out-of-or-relate-to prong does not require a causal connection, Lucero relies on *purposeful availment* precedent. Opp. 21–22. This Court has explained that "[w]hen a corporation purposefully avails itself" of a forum, it "has clear notice" it may be sued there. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980) (internal quotation marks and citation omitted). "*Hence*," the next sentence says, "it is not unreasonable to subject" a defendant to suit where "the sale of a product * * * arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market." *Id.* (emphasis added). Lucero's invocation of *World-Wide Volkswagen* thus shows the problem with his no-causation rule: It muddles the purposeful-availment requirement and the arising-out-of requirement, and blurs general and specific personal jurisdiction. That is because mere relatedness relies not on the "activity g[iving] rise to the episode-in-suit," *Goodyear*, 564 U.S. at 923, but on "unconnected activities in the [forum]." *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

2. Lucero next invokes (at 24–25) the disjunctive phrasing of "arise out of or relate to." But *Helicopte-*

ros itself refused to answer "whether the terms 'arising out of' and 'related to' describe different connections between a cause of action and a defendant's [forum] contacts." 466 U.S. at 415 n.10. And this Court has never found specific personal jurisdiction where causation was lacking. Pet. 21–22.

Lucero also suggests (at 25–26) that so long as an accident occurs in the forum, and a plaintiff is injured in the forum, *Bristol-Myers* held that specific jurisdiction is proper. *Bristol-Myers* holds that the fact a plaintiff "suffered foreseeable harm" in the forum is *not* enough for specific jurisdiction. 137 S. Ct. at 1781 (quoting *Walden*, 571 U.S. at 289). "[C]ontacts between [Lucero's decedent] and the forum State" cannot establish a link between Ford's forum contacts and his claims. *Walden*, 571 U.S. at 284.

Though Lucero sees (at 26–28) no value in a causation requirement, its role is clear. It ensures that states will not "reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system" in exercising jurisdiction. *World-Wide Volkswagen Corp.*, 444 U.S. at 292; *accord Bristol-Myers*, 137 S. Ct. at 1781 ("[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." (citation omitted)); *see also* U.S. Chamber of Commerce et al. Amicus Br. 18–19. Otherwise, a suit could regulate a defendant's *out-of-forum* conduct that caused a plaintiff's claims. *See Goodyear*, 564 U.S. at 918 (explaining that the "assertion of jurisdiction exposes defendants to the State's coercive power").

3. Finally, Lucero claims that a causal rule may lead to "irrational" results because it may mean that some injured plaintiffs will be able to have their claims heard in their home states while others will not. Opp. 26. But the Due Process Clause "principally protect[s] the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties," *Walden*, 571 U.S. at 284, and personal jurisdiction must be proved "as to each defendant." *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980). The result is that sometimes a plaintiff will not be able to establish personal jurisdiction over every defendant he would like to sue in a single forum. There is nothing irrational about enforcing the Due Process Clause's clear commands.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NEAL KUMAR KATYAL
SEAN MAROTTA
Counsel of Record
KIRTI DATLA
ERIN R. CHAPMAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5600
sean.marotta@hoganlovells.com

Counsel for Petitioner

DECEMBER 2019