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HANDLE WITH CARE: *FORD MOTOR CO. V. MONTANA EIGHTH JUDICIAL DISTRICT COURT* AND ITS EFFECT ON THE NINTH CIRCUIT'S BUT-FOR TEST

Dimitrios Tsolakidis*

I. Introduction

In *Ford Motor Co. v. Montana Eighth Judicial District Court*,[1] the Court gave special consideration to the second part of its disjunctive, "arise out of *or relate to*," test for the relatedness prong of specific jurisdiction.[2] By isolating the "relates to" disjunct, the Court held a corporation is subject to personal jurisdiction in any state where its product injures a consumer if the corporation has expansive contacts that systematically serve a market for the injury-causing product in the forum state.[3]

Ford Motor Co. poses a challenge for the Ninth Circuit: Did the Court's opinion abrogate the Ninth Circuit's but-for test for determining relatedness? Courts in but-for jurisdictions have so far answered this question inconsistently.[4] Until recently, district courts in the Ninth Circuit were

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1. 141 S. Ct. 1017 (2021).

2. *Id.* at 1026; *Id.* at 1033 (Alito, J., concurring); *Id.* at 1034 (Gorsuch, J., concurring). This Comment uses "relatedness" to refer to the second prong of the three-prong test for the constitutionality of specific jurisdiction as that test evolved from International Shoe Co. v. Washington, 326 U.S. 310 (1945), and was refined in Burger King v. Rudzewicz, 471 U.S. 462 (1985), and discussed in Section II(A), *infra*. This use of *relatedness* is not the same as the more technical "arises out of or *relates* to" phrase, which is analyzed in Section II(B)(3), *infra*. The reader should keep these two concepts separate.

3. *Ford Motor Co.*, 141 S. Ct. at 1028 (majority opinion).

4. For courts in but-for circuits that have answered the question affirmatively, *see* In re: Zantac (Ranitidine) Products Liability Litigation, No. 20-MD-2924, 2021 WL 2682602, at *7–8 (S.D. Fla. June 30, 2021); Israel v. Alfa Laval, Inc., No. 8:20-CV-2133-WFJ-AAS, 2021 WL 1662770, at *4 (M.D. Fla. Apr. 28, 2021); Nomad Glob. Commun. Sols., Inc. v. Hoseline, Inc., No. CV 20-138-M-DLC, 2021 WL 1400983, at *4 (D. Mont. Apr. 14, 2021); Clarke v. Dutton Harris & Co., PLLC, No. 220CV00160JADBNW, 2021 WL 1225881, at *4 (D. Nev. Mar. 31, 2021); Lewis v. Mercedes-Benz USA, LLC, No. 19-CIV-81220-RAR, 2021 WL 1216897, at *35 (S.D. Fla. Mar. 30, 2021). For courts in but-for jurisdictions that have suggested the but-for test is still good law, *see* Nationwide Agribusiness Inc. So. v. Yuma Cty. Water Users Ass'n, No. 21-CV-78-JLS, 2021 U.S. Dist. LEXIS 153986, *8 (S.D. Cal. Aug. 16, 2021); TransparentBusiness, Inc. v. Infobae, No. 3:20-cv-00582-MMD-WGC, 2021 WL 2670704, at *3 (D. Nev. June 29, 2021); McHugh v. Vertical Partners W., LLC, No. 2:20-CV-00581-DCN, 2021 WL 1554065, at *5 (D. Idaho Apr. 19, 2021); James Lee Constr., Inc. v. Government Employees Ins. Co., No. CV 20-68-M-DWM, 2021 WL 1139876, at *2 (D. Mont. Mar. 25, 2021).

also split.[5] The Ninth Circuit addressed this issue in passing in *Ayla, LLC v. Alya Skin Pty. Ltd.*[6] but has yet to fully flesh out its position.[7]

This Comment argues *Ford Motor Co.* did not abrogate the Ninth Circuit's but-for test for determining relatedness. A precise reading of the Court's opinion shows *Ford Motor Co.* added to, rather than invalidated, the but-for relatedness test. Federal court litigants in the Ninth Circuit should continue advocating for use of the but-for standard. But in an exceptional case, where the but-for test fails despite the defendant's expansive and systematic contacts with the forum state, courts can examine the nature of those contacts under the more forgiving *relates to* standard. If handled with care, *Ford Motor Co.* will not significantly change the Ninth Circuit's specific jurisdiction jurisprudence. The but-for test will still govern the analysis of a typical case. However, for a narrow set of cases, *Ford Motor Co.* expands the types of minimum contacts that can constitutionally subject an out-of-state corporation to a forum state's jurisdiction.

This Comment uses Ninth Circuit precedent to illustrate the effect *Ford Motor Co.* should have in this Circuit and proposes a framework that combines the old but-for test with the new *Ford Motor Co.* rule. Section II provides a necessary background on personal jurisdiction, with a special focus on the relatedness prong of the constitutionality of specific jurisdiction. Section III analyzes the Montana Supreme Court's and the United States Supreme Court's *Ford Motor Co.* opinions. Section IV develops the Comment's central thesis that *Ford Motor Co.* did not abrogate the Ninth Circuit's but-for test, and Section V concludes.

II. Personal Jurisdiction

Personal jurisdiction is the power of a court to enter judgments binding on the person or property of the defendant and to compel a defendant to appear in court.[8] The United States Constitution defines the outer bounds of personal jurisdiction.[9] The Fifth Amendment's Due Process Clause states, "[n]o person shall be deprived of life, liberty, or property, without due process of law."[10] The Fourteenth Amendment makes the Due Process Clause applicable to the states.[11] Every lawsuit triggers the Due Process Clause

5. *See supra* note 4. **R**

6. No. 20-16214, 2021 U.S. App. LEXIS 25921, *18 n.5 (9th Cir. Aug. 27, 2021).

7. *Ayla* suggested a departure from the Ninth Circuit's preferred but-for test for determining relatedness. *Id.* The impact of *Ayla* on the lower courts has yet to be seen. This Comment discusses *Ayla* more in Section IV *infra*.

8. Brooke D. Coleman, et al., Learning Civil Procedure 83 (3d ed. 2018).

9. Victoria Dettman, Milky Whey, Inc. v. Dairy Partners, LLC*: Transacting Business Under Montana's Long-Arm Statute to the Full Constitutional Limit*, 78 Mont. L. Rev. 339, 340 (2017).

10. U.S. Const. amend. V.

11. *Id.* amend. XIV; Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897).

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because it threatens to deprive defendants of either their liberty or property. "At a minimum, the Due Process Clause requires that a court . . . has proper personal jurisdiction over the defendant, has afforded the defendant appropriate notice of the action, and has given the defendant an opportunity to be heard."[12]

The analytical structure of personal jurisdiction arises directly from the language of the Due Process Clause.[13] The first question in the analysis asks whether a state or federal court is attempting to assert power over a person or their property.[14] If yes, the Clause is triggered.[15] This brings the analysis to a second question: whether that assertion of power is compatible with due process.[16] Therefore, a court may assert personal jurisdiction over a defendant only if two things are true: (1) the law of the forum grants the court the power to assert personal jurisdiction over the defendant; and (2) the application of that power complies with due process—i.e., is constitutional.[17] This Comment concerns the second prong—the "constitutionality" prong—of personal jurisdiction.

Historically, the Supreme Court relied on sovereignty concepts derived from international law to determine the extent of a court's personal jurisdiction.[18] "The states were treated like countries, each with exclusive sovereignty over its own persons or property within its territory."[19] Therefore, initially, courts had personal jurisdiction over defendants who consented to the power of the sovereign or whose person or property was physically present in the forum state.[20] The Court's 1878 decision, *Pennoyer v. Neff*,[21] solidified these two bases (consent or presence) for personal jurisdiction.[22] Eventually, "[a]s commerce, transportation, and communication advanced . . . courts expanded the bases of power beyond consent and presence."[23]

12. COLEMAN, *supra* note 8, at 85. **R**

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 83.

19. *Id.* at 84.

20. *Id.*; Dettman, *supra* note 9, at 340; *see also* Pennoyer v. Neff, 95 U.S. 714, 722, 733–34 (1878). **R**

21. 95 U.S. 714, 722, 733–34 (1878).

22. Dettman, *supra* note 9, at 340. **R**

23. COLEMAN, *supra* note 8, at 84; *see also* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1146–47 (1966) ("The highly significant development in recent years of this form of specific jurisdiction reflects the growing mobility and complexity of modern life . . . ."). **R**

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Indeed, the emergence of *International Shoe Co. v. Washington*,[24] may be attributed, in part, to these advancements.[25]

A. International Shoe *and the Birth of Specific Jurisdiction*

International Shoe "established the framework for the current analysis of the constitutionality of the assertion of personal jurisdiction."[26] There, a Delaware corporation headquartered in Missouri was sued in Washington, where it was neither physically present nor had it consented to jurisdiction.[27] Under the traditional standards established by *Pennoyer*, the defendant would not be subject to personal jurisdiction.[28] Nonetheless, the Court upheld the Washington court's exercise of jurisdiction over the defendant.[29]

The Court in *International Shoe* applied the following rule:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[30]

Applying this standard, the Court found the defendant was subject to personal jurisdiction in Washington.[31] The out-of-state corporation had "systematic and continuous" activities within Washington (e.g., employing salespeople in Washington and doing a "large volume of interstate business"),[32] and the lawsuit "arose out of those very activities."[33] Therefore, the court's assertion of personal jurisdiction over the defendant corporation would be "reasonable and just according to our traditional conception of fair play and substantial justice."[34]

The *International Shoe* Court made an important and lasting distinction between general and specific jurisdiction.[35] General jurisdiction exists

24. 326 U.S. 310 (1945).
25. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1036 (2021) (Gorsuch, J., concurring). For a more complete history lesson on the development of personal jurisdiction jurisprudence, *see* Dettman, *supra* note 9, at 340–45.
26. COLEMAN, *supra* note 8, at 96. **R**
27. *International Shoe*, 326 U.S. at 311–12.
28. *Id.*
29. *Id.* at 322.
30. *Id.* at 316 (citing Milliken v. Meyer, 311 U.S. 457 (1940)).
31. *Id.* at 321.
32. *Id.* at 313, 320.
33. *Id.* at 320.
34. *Id.*
35. *Id.* at 316–18. *See also* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984). For subsequent circuit court opinions referring to the *International Shoe* distinction as "general" and "specific," *see* Data Disc, Inc. v. Systems Tech. Assocs., Inc., 557 F.2d 1280, 1286–87 (9th Cir. 1977); Donahue v. Far Eastern Air Transport Corp., 652 F.2d 1032, 1036–37 (D.C. Cir. 1981); Glater v. Eli Lilly & Co., 744 F.2d 213, 215–16 (1st Cir. 1984); Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481, 490 (3d Cir. 1985); Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 666 (7th Cir. 1986).

when a corporation's activities with a state are so "continuous" and "substantial" that jurisdiction may be appropriate even if the suit does not relate to those activities.[36] Recent cases hold that, absent some exceptional circumstance, corporations are subject to general jurisdiction only where they are incorporated or headquartered.[37]

The paradigm case of specific jurisdiction, according to *International Shoe*, is where an out-of-state defendant has continuous and systematic activities within a state and those activities give rise to a lawsuit in that state.[38] Conversely, such a corporation will not be subject to personal jurisdiction when its activities within the state are isolated and unrelated to the suit.[39] More difficult determinations of specific jurisdiction arise in cases where the defendant has isolated contacts related to the suit or substantial but unrelated contacts.[40] However, the Court did not foreclose the possibility of jurisdiction in these "difficult" cases.[41] Rather, it admitted the minimum contacts test is not "mechanical" or "quantitative," but dependent on "the quality and nature" of the out-of-state corporation's activities within the state.[42]

Since *International Shoe*, the constitutionality of specific jurisdiction demands three elements: (1) minimum contacts that show the defendant purposefully availed itself of the benefits and protections of the state's laws; (2) an affiliation between the defendant's activities within the forum state and the plaintiff's claim; and (3) fairness or reasonableness.[43] This test "derive[s] from and reflect[s] two sets of values—treating defendants fairly and protecting interstate federalism."[44] The central concern of *Ford Motor Co.* is the second, *arises out of or relates to* prong—often referred to as "relatedness."[45] The following Subsection discusses this prong in more detail.

36. *International Shoe*, 326 U.S. at 318; *Helicopteros*, 466 U.S. at 414 n.9.

37. Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S.F. Cty., 137 S. Ct. 1773, 1780 (2017); BNSF Ry. Co. v. Tyrell, 137 S. Ct. 1549, 1558 (2017); Daimler AG v. Bauman, 571 U.S. 117, 118 (2014).

38. *International Shoe*, 326 U.S. at 317.

39. *Id.* at 313, 320.

40. Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate about "Class Action Fairness,"* 58 SMU L. REV. 1313, 1338–39 (2005).

41. *International Shoe*, 326 U.S. at 320.

42. *Id.* at 319.

43. Burger King v. Rudzewicz, 471 U.S. 462, 472–73 (1985) (noting specific jurisdiction requires the defendant to "purposefully direct[ ]" activities at residents of the forum and for those activities to give rise, or relate, to the litigation); *Id.* at 476–77 (requiring also that the exercise of specific jurisdiction is "reasonable" or "fair," based on a five-factor test from World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980)). For a more in-depth analysis of this post-*International Shoe* development, *see* Matthew P. Demartini, *Stepping Back to Move Forward: Expanding Personal Jurisdiction by Reviving Old Practices*, 67 EMORY L.J. 809, 814–22 (2018); Dettman, *supra* note 9, at 342–44. **R**

44. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1025 (2021) (citing *World-Wide Volkswagen*, 444 U.S. at 293 (internal quotation marks omitted)).

45. Andrews, *supra* note 40, at 1334. **R**

B. The Relatedness Prong

As illustrated by *International Shoe*, the essential feature of specific jurisdiction is that the activities of the out-of-state defendant "give rise to the liabilities sued on[.]"[46] In the aftermath of this decision, the Court "repeatedly recognized a distinction between . . . claims that arise out of a defendant's activities in the forum state and . . . claims that do not concern the defendant's forum activities."[47] The remainder of this Subsection examines the evolution of the relatedness prong.

1. Early Development

Immediately following *International Shoe*, the Court habitually questioned whether an out-of-state corporation's contacts with the forum state are related to the cause of action for purposes of specific jurisdiction.[48] In the 1952 case, *Perkins v. Benguet Consolidated Mining Co.*,[49] the Court declined to apply specific jurisdiction, opting instead for a general jurisdiction analysis, because the out-of-state defendant's activities in the forum state were unrelated to the plaintiff's suit.[50]

Five years after *Perkins*, the Court decided *McGee v. International Life Insurance Co.*[51] There, the plaintiff, a California resident, purchased life insurance from Empire Mutual, an Arizona corporation, in 1944.[52] In 1948, International Life Insurance, a Texas company, assumed Empire Mutual's insurance obligations, including the plaintiff's life insurance policy.[53] The plaintiff died in 1950, and International Life Insurance refused to pay his beneficiary.[54] The beneficiary sued and obtained a judgment against International Life Insurance in California.[55] Although International Life Insurance had no offices or agents in California and never "solicited or [transacted] any insurance business in California apart from [the plaintiff's] pol-

46. International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).
47. Andrews, *supra* note 40, at 1333. R
48. *See* Travelers Health Ass'n v. Commonwealth of Va. ex rel. State Corp. Comm'n, 339 U.S. 643, 648 (1950) (upholding jurisdiction where out-of-state corporation "systematically and widely" conducted business in forum state and "caused claims for losses" there); Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 446 (1952) (declining to extend specific jurisdiction to case where "cause of action [did] not aris[e] out of the corporation's activities in the [forum state]"); Helicopteros Nacionales De Colombia v. Hall, 466 U.S. 408, 415–16 (1984) (applying general jurisdiction where claims did not arise out of defendant's activities in the forum state).
49. 342 U.S. 437 (1952).
50. *Id.* at 446.
51. 355 U.S. 220 (1957).
52. *Id.* at 221.
53. *Id.* at 221–22.
54. *Id.*
55. *Id.*

icy,"[56] the Court held California's exercise of jurisdiction was valid.[57] The Court reasoned, "It is sufficient for purposes of Due Process that the suit was based on a contract which had *substantial connection* with [the forum state]."[58]

Another important moment in early relatedness jurisprudence came in 1977 when *Shaffer v. Heitner*[59] overruled *Pennoyer* by invalidating in rem jurisdiction in cases where the property that "serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action."[60] The *Shaffer* Court emphasized the central concern of personal jurisdiction: "[T]he relationship among the defendant, the forum, and the litigation."[61]

2. *The Effect of* World-Wide Volkswagen

The development of relatedness jurisprudence continued with the 1980 case, *World-Wide Volkswagen Corp. v. Woodson*.[62] The dispute in *World-Wide Volkswagen* arose from a car accident in Oklahoma.[63] The plaintiffs' allegedly defective car was manufactured by Audi in Germany,[64] imported by Volkswagen of America, distributed by World-Wide Volkswagen, and sold to the plaintiffs by petitioner Seaway in New York.[65] The Court held Oklahoma, where the plaintiffs filed suit, could not exercise personal jurisdiction over Seaway and World-Wide Volkswagen because the plaintiff could not establish the first prong—minimum contacts—of specific jurisdiction.[66]

Although the *World-Wide Volkswagen* opinion never explicitly addressed the relatedness prong, Justice White's majority opinion created some influential dicta cited by later cases in this context.[67] The Court con-

56. *Id.* at 222.
57. *Id.* at 223.
58. *Id.* (emphasis added).
59. 433 U.S. 186 (1977).
60. *Id.* at 208–09.
61. *Id.* at 204.
62. 444 U.S. 286 (1980).
63. *Id.* at 288.
64. Brief for Petitioners at *3, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (No. 78-1078).
65. *World-Wide Volkswagen*, 444 U.S. at 288.
66. *Id.* at 295, 298–99.
67. *See id.* at 297. *See also* Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1027 (2021) ("Or said another way, if Audi and Volkswagen's business deliberately extended into Oklahoma . . . then Oklahoma's courts could hold the companies accountable for a car's [malfunctioning] there—even though the vehicle had been designed and made overseas and sold in New York"); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472–73 (1985) ("[T]he forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers

ceded that when the sale of a product to a consumer arises from the manufacturer's or distributor's efforts to "serve directly or indirectly[ ] the market for its product in other states, it is not unreasonable to subject it to suit in one of those states" if its product injures a consumer there.[68] The Court specifically noted that, as the manufacturer, Audi would be subject to specific jurisdiction in Oklahoma[69] if it served a market for its products there, even though the plaintiffs purchased the car from a retailer in New York with no ties to Oklahoma.[70]

This dictum suggests an out-of-state defendant could be subject to specific jurisdiction in any state where it "serve[s] directly or indirectly, the market for" a product that injures a consumer, even if the defendant did not directly sell that particular product to that particular consumer in the particular forum state.[71] When interpreted as the *Ford Motor Co.* decision interprets it, this excerpt from *World-Wide Volkswagen* expands the number of possible defendants whose minimum contacts could be deemed *related* to the dispute.[72]

3. The Disjunctive, Arises out of or Relates to, *Formulation*

The year 1984 marked a formulaic shift in the Court's articulation of the relatedness prong. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[73] the Court, for the first time, expressed the relatedness prong as "relate[s] to or arises out of."[74] Despite its effect on specific jurisdiction, *Helicopteros* was a general jurisdiction case.[75] The parties agreed that there was no affiliation between the defendant's forum-related activities and the claims.[76] However, the Court distinguished between specific and general jurisdiction, stating, "When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship

in the forum state and those products subsequently injure forum consumers."); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984) ("Where, as in this case, respondent Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.").

68. *World-Wide Volkswagen*, 444 U.S. at 297.

69. The Court did not have a chance to formally rule on the constitutionality of Oklahoma's assertion of personal jurisdiction over Audi, the manufacturer, because only two defendants' claims were before the Court. Audi's regional distributor and retail dealer petitioned the Court after their writ of prohibition was denied in the Supreme Court of Oklahoma. Audi's contacts with Oklahoma were therefore not at issue before the Court. *Id.* at 288–89.

70. *Id.* at 297–98.

71. *See id.* at 297.

72. *See Ford Motor Co.*, 141 S. Ct. at 1027–28.

73. 466 U.S. 408 (1984).

74. *Id.* at 414.

75. *Id.* at 415–16.

76. *Id.*

among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction."[77]

The precise source of this rule statement in *Helicopteros* is a bit of an enigma. The Court cites *Shaffer* for the final clause[78] of the sentence, but it offers no direct support for the *related to or arises out of* language.[79] In a footnote following the *Shaffer* citation, the Court states, "It has been said that when a state exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the state is exercising specific jurisdiction over the defendant."[80] At the end of this footnote, the Court cites to Arthur T. von Mehren's and Donald T. Trautman's law review article, *Jurisdiction to Adjudicate: A Suggested Analysis*, which contains similar language.[81]

Although von Mehren and Trautman offer no direct support for the rule statement, they support it indirectly through their discussion of *McGee*, which framed the rule in terms of a "substantial connection,"[82] and *Henry L. Doherty & Co v. Goodman*,[83] a pre-*International Shoe* case. The authors observed *Doherty* was a basis for *International Shoe*'s "new analytical approach [permitting] the assumption of jurisdiction over any matter that bears a reasonable and substantial connection to the forum."[84] It is also possible this language stems from the *International Shoe* decision itself—although the specific page was not cited by *Helicopteros* or von Mehren—which uses the phrase, "arise out of *or are connected with* the activities within the state."[85] Therefore, the disjunctive, *related to or arises out of*, formulation ostensibly resulted from a combination of *Doherty*, *International Shoe*, *McGee*, and *Shaffer*.

The Court continued the disjunctive formulation of the rule in the 1985 case *Burger King Corp. v. Rudzewicz*,[86] citing directly to *Helicopteros*.[87] It deviated from this language slightly in its 1990 case, *Burnham v. Superior*

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77. *Id.* at 414 (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

78. "[R]elationship among the defendant, the forum, and the litigation." *Id.* (citing *Shaffer*, 433 U.S. at 204).

79. *See generally id.* (citing *Shaffer*, 433 U.S. at 204). Although "arises out of" is in quotes, presumably pulled from *International Shoe*, which is cited in the preceding sentence, "related to" is not in quotes.

80. *Id.* at 414 n.8.

81. *Id.*; von Mehren & Trautman, *supra* note 23, at 1144–45 ("In the case of specific jurisdiction, the assertion of power to adjudicate is limited to matters arising out of—or intimately related to—the affiliating circumstances on which the jurisdictional claim is based."). **R**

82. von Mehren & Trautman, *supra* note 23, at 1149.

83. 249 U.S. 623 (1935); *see* von Mehren & Trautman, *supra* note 23, at 1147, 1149–50. **R**

84. von Mehren & Trautman, *supra* note 23, at 1147. **R**

85. International Shoe v. Washington, 326 U.S. 310, 319 (1945) (emphasis added).

86. 471 U.S. 462 (1985).

87. *Id.* at 472–73.

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Court of California,[88] where, citing again to *Helicopteros*, it seemingly dropped the *related to* disjunct but kept the *arising out of* phrase.[89] The Court returned to the disjunctive iteration in its two 2011 personal jurisdiction cases, *J. McIntyre Machinery, Ltd. v. Nicastro*[90] and *Goodyear Dunlop Tires Operations, S.A. v. Brown*.[91] In 2014, the Court decided *Walden v. Fiore*,[92] a specific jurisdiction case,[93] and *Daimler AG v. Bauman*,[94] a general jurisdiction case.[95] In *Walden*, the Court only referenced the *arises out of* language, citing to *Burger King Corp.*, which in turn was citing to *Helicopteros*.[96] But the Court framed the rule disjunctively again in *Daimler*.[97] In 2017, the Court decided *Bristol-Myers Squibb Co. v. Superior Court of California*,[98] where it again cited *Helicopteros* for the proposition that specific jurisdiction can only be exercised if the suit "arise[s] out of or relate[s] to" the defendant's forum-related contacts.[99] Of these seven cases, *Walden* and *Bristol-Myers Squibb* had the most profound effect on the relatedness prong. They are discussed in more detail below.

Walden exemplifies the level of proximity needed between the defendant's suit-related conduct and the forum state in order for the exercise of specific jurisdiction to be constitutional.[100] In *Walden*, Nevada plaintiffs sued a Georgia police officer for an allegedly unlawful search and seizure in a Georgia airport and for later falsifying a probable cause affidavit and conspiring with a United States Attorney in Georgia.[101] The officer had no contacts with Nevada, directed no activities toward Nevada, but knew the plaintiffs would suffer the effects of his actions in Nevada.[102] The Court held the officer did not have sufficient minimum contacts with Nevada to be subjected to Nevada's exercise of personal jurisdiction.[103] The mere fact that the officer "directed his conduct at plaintiffs whom he knew had Ne-

88. 495 U.S. 604 (1990).
89. *Id.* at 610, 618.
90. 564 U.S. 873, 881 (2011).
91. 564 U.S. 915, 923–24 (2011).
92. 571 U.S. 277 (2014).
93. *Id.* at 283.
94. 571 U.S. 117 (2014).
95. *Id.* at 121.
96. *Id.* at 284; Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472–73 (1985).
97. 571 U.S. at 118 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984)).
98. 137 S. Ct. 1773 (2017).
99. *Id.* at 1780.
100. 571 U.S. 277, 284 (2014); *see Bristol-Myers Squibb*, 137 S. Ct. at 1781 ("What is needed . . . is a connection between the forum and the specific claims at issue . . . Our decision in *Walden*, *supra*, illustrates this requirement.").
101. 571 U.S. at 277.
102. *Id.* at 278.
103. *Id.* at 288.

vada connections" was insufficient.[104] Rather, "it is the defendant, not the plaintiff or third parties, who must create contact within the forum state."[105]

Bristol-Myers Squibb further developed the necessary connection between the defendant, the plaintiff, the claims, and the forum state. It began as a class action filed in California by plaintiffs allegedly injured by the drug Plavix, which is manufactured by Bristol-Myers.[106] The class members consisted of 86 California residents and 592 nonresidents.[107] "[T]he nonresidents were not prescribed Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California."[108] Bristol-Myers moved to quash service of summons on the nonresidents' claims, contending California lacked personal jurisdiction over those claims.[109] The California Supreme Court affirmed the lower courts' finding of specific jurisdiction, and the United States Supreme Court granted certiorari and reversed.[110]

The nonresident plaintiffs in *Bristol-Myers Squibb* argued California's exercise of specific jurisdiction over their claims was proper; Bristol-Myers "marketed, promoted, and sold Plavix [in California] as part of a nationwide course of conduct," and the nonresidents' claims were related to that conduct.[111] They asserted that the Court's disjunctive, *arises out of or relates to*, formulation of the relatedness prong enlarges the scope of forum-related activities that can establish an affiliation between the defendant's conduct, the forum state, and the litigation.[112] The nonresident plaintiffs maintained that, although *arises out of* connotes a close causal link between the defendant's activities and the plaintiff's claims, the *relates to* disjunct does not—it is a more forgiving standard.[113] Therefore, they argued, the relatedness prong was satisfied, even though the nonresident plaintiffs obtained, used, and were allegedly injured by Plavix outside of California.[114]

The Court rejected the nonresidents' arguments and held they could not establish the relatedness prong of specific jurisdiction.[115] Specific jurisdiction requires "an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the

104. *Id.* at 289.
105. *Id.* at 291.
106. Bristol-Myers Squibb Co. v. Sup. Ct. of Cal., 137 S. Ct. 1773, 1777–78 (2017).
107. *Id.* at 1778.
108. *Id.* at 1781.
109. *Id.* at 1778.
110. *Id.* at 1778–79, 1784.
111. Brief of Respondent at 47–48, 50–51, *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773 (2017) (No. 16-466).
112. *Id.* at 17–19.
113. *Id.* at 18–19.
114. *Id.* at 47–48.
115. *Bristol-Myers Squibb*, 137 S. Ct. at 1782.

forum state."[116] There was no such affiliation here, according to the Court, because "[w]hat is needed—and what is missing here—is a connection between the forum and the specific claims at issue."[117] Bristol-Myers only reaches the California market through third parties; the nonresident plaintiffs suffered no harm in California; and "all the conduct giving rise to [their] claims occurred elsewhere."[118] Therefore, the Court held, specific jurisdiction could not be established.[119]

With this legal background the United States Supreme Court set out in 2021 to answer whether Ford Motor Company could be subject to specific jurisdiction in Montana for a dispute that arose from a vehicle that was neither manufactured nor sold to the plaintiff in Montana.

III. THE *FORD MOTOR CO.* DECISIONS

The underlying facts of *Ford Motor Co.* are as straightforward as they are tragic. Ford assembled a 1996 Ford Explorer in Kentucky and sold the vehicle for the first time to a dealer in Washington.[120] Over ten years later, the owner of the vehicle sold it to another consumer.[121] On May 22, 2015, that consumer's daughter, Montana resident Markkaya Jean Gullett, crashed the vehicle in Montana and subsequently died when one of the Explorer's tires suffered a tread and belt separation.[122]

Charles Lucero, Gullett's personal representative, sued Ford in the Montana Eighth Judicial District Court alleging strict product liability, strict liability, and negligence.[123] Ford moved to dismiss for lack of personal jurisdiction; the district court denied its motion.[124] Ford subsequently petitioned the Montana Supreme Court for a writ of supervisory control.[125] The Montana Supreme Court accepted supervisory control and affirmed the district court's denial of Ford's motion.[126] Ford then petitioned the United States Supreme Court, which accepted certiorari on January 17, 2020.[127]

116. *Id.* at 1781 (citing Goodyear Dunlop Tires Opers. v. Brown, 564 U.S. 915, 919 (2011)).
117. *Id.*
118. *Id.* at 1781–82.
119. *Id.* at 1782.
120. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 443 P.3d 407, 411 (Mont. 2019).
121. *Id.*; Lauren Amongero & Kevin Ness, PREVIEW; Ford Motor Company v. Montana Eighth Judicial District Court: *Can Corporations "Have it Their Way" Under* Burger King Corp. v. Rudzewicz *and Specific Jurisdiction Jurisprudence?*, 81 MONT. L. REV. ONLINE 52 (2020), https://perma.cc/7MMU-N8BB.
122. *Ford Motor Co.*, 443 P.3d at 411; Dillon Kato, *Superior Woman Dies in Crash Near Alberton*, MISSOULIAN (May 23, 2015), https://perma.cc/VPA6-PNVF.
123. *Ford Motor Co.*, 443 P.3d at 411.
124. *Id.*
125. *Id.*
126. *Id.* at 418.
127. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 140 S. Ct. 917 (Jan. 17, 2020).

The Court combined *Ford Motor Co.* with *Ford Motor Co. v. Bandemer*,[128] on petition for a writ of certiorari from the Minnesota Supreme Court.[129] The United States Supreme Court affirmed the dismissal of Ford's motion and held Montana could exercise personal jurisdiction over Ford.[130]

A. Montana Supreme Court Decision

In a unanimous decision, the Montana Supreme Court held Ford was subject to personal jurisdiction in Montana.[131] The Court applied the two-part framework of personal jurisdiction, finding first that the Montana long-arm statute was satisfied under the tort accrual provision, and second, the exercise of specific jurisdiction was constitutional under a stream of commerce theory.[132] However, the most notable part of the opinion is the discussion of the relatedness prong of the constitutionality of specific jurisdiction.

The Court found the relatedness prong was satisfied because Lucero's claims against Ford *related to* Ford's activities in Montana, even though they did not directly *arise out of* those activities.[133] The Court distinguished *Bristol-Myers Squibb*, where the out-of-state plaintiffs were not prescribed, did not use, did not ingest, and were not injured by Plavix in California—the forum state.[134] Here, conversely, "Gullett was injured while driving the Explorer in Montana."[135] Similarly, the Court distinguished *Walden*.[136] In *Walden*, "the plaintiffs were the only connection between the defendant and the forum state, [but] here, Gullett is by no means the only connection between Ford and Montana. Rather . . . Ford markets, sells, and services vehicles in Montana, demonstrating a willingness to sell to and serve Montana customers[.]"[137] Thus, unlike *Walden* and *Bristol-Myers Squibb*, there was an affiliation between the defendant's minimum contacts, the forum state, and the litigation.

The Montana Supreme Court's treatment of the relatedness prong was the primary focus of the United States Supreme Court's opinion.

128. 140 S. Ct. 916 (Jan. 17, 2020).

129. Amongero & Ness, *supra* note 120, at 52. **R**

130. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1019 (2021).

131. *Ford Motor Co.*, 443 P.3d at 418.

132. *Id.* at 412–13. Under Montana's long-arm statute, personal jurisdiction is proper "as to any claim for relief arising from . . . the commission of any act resulting in accrual within Montana of a tort action." MONT. R. CIV. P. 4(b)(1)(B).

133. *Ford Motor Co.*, 443 P.3d at 416.

134. *Id.* at 417.

135. *Id.*

136. *Id.*

137. *Id.*

B. United States Supreme Court Decision

The United States Supreme Court affirmed the Montana Supreme Court's opinion and held Ford was subject to personal jurisdiction in Montana for Lucero's claims.[138] Justice Kagan wrote the opinion of the Court; Justices Alito and Gorsuch wrote separate concurring opinions.[139]

1. Petitioner Ford's Argument

Ford argued the relatedness prong of the constitutionality of specific jurisdiction could not be satisfied.[140] Specifically, Ford claimed the relatedness prong requires the defendant's forum-related contacts to give rise to the lawsuit.[141] Such was not the case here, according to Ford, because Ford did not manufacture or sell the vehicle that injured the plaintiff in Montana.[142]

On petition for certiorari, Ford argued there is a circuit split regarding the interpretation of the relatedness prong.[143] The lack of guidance from the Supreme Court on how much of a nexus is required between the defendant's forum-related contacts and the plaintiff's suit has led courts to adopt four different approaches.[144] Ford outlined these approaches in its petition: (1) no causal connection; (2) but-for causal connection; (3) stronger causal connection; and (4) unspecified causal connection.[145] As Ford noted in its petition, the Ninth Circuit belongs in the second camp, requiring but-for causation,[146] and Montana is in the first camp, the one with no causation standard.[147]

At oral argument, Ford's counsel, Sean Marotta, contended the Court should apply, at a minimum, but-for causation but perhaps even a proximate cause standard.[148] That Ford advertised in Montana might be a but-for cause of the injury, but it was not proximate enough, according to Marotta, to supply personal jurisdiction.[149] In response to Justice Sotomayor, Marotta clarified what he meant by proximate cause: "It's that the operative

138. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1032 (2021).
139. *Id.* at 1021, 1032, 1034 (Justice Barrett took no part in this decision).
140. *Id.* at 1026.
141. *Id.*
142. *Id.*
143. Petition for a Writ of Certiorari at 9–10, *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017 (2021) (No. 19-368).
144. *Id.* at 10–11.
145. *Id.* at 11–16.
146. *Id.* at 12–13.
147. *Id.* at 11.
148. Transcript of Oral Argument at 4–5, *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017 (2021) (No. 19-368), https://perma.cc/JMP9-EZU5 [hereinafter Transcript of Oral Argument].
149. *Id.* at 6–8 (Justice Roberts questioning Marotta about Ford's advertising).

facts of the controversy arise from the defendant's conducts—contacts with the state where the defendant's in-state conduct forms an important or at least material element of proof in the plaintiff's case."[150] However, in closing, Marotta simply asked the Court for some causation standard, not necessarily proximate cause.[151]

Justice Kagan's questioning exposed a fundamental weakness in Ford's causation-only approach: a plaintiff who purchases a product from a manufacturer in state A and drives it to state B, where they are injured and where the manufacturer is not subject to general jurisdiction, would only be able to sue in state A or the state where the product was manufactured, even if the manufacturer sells similar products in state B.[152] Justice Kagan further questioned Marotta on Ford's reliance on *Bristol-Myers Squibb* and *Walden*.[153] She attempted to distinguish the lack of forum-related contacts in *Walden* and the lack of suit-related contacts in *Bristol-Myers Squibb* from the present case, where Ford admits it purposefully availed itself in Montana and the injury occurred in Montana.[154]

2. *Respondent Lucero's Argument*

In his response brief, Lucero argued the Montana Supreme Court correctly analyzed the relatedness prong: the plaintiff's claims arose from Ford's efforts to serve indirectly the market for its product in Montana.[155] He was not required to prove, as Ford contended, a direct connection between the defendant's actions and his claims—i.e., that Ford designed, manufactured, or sold the vehicle in Montana.[156] Lucero maintained the Supreme Court had never required a strict causation test but rather has always framed the relatedness prong disjunctively: "arise out of or are connected with";[157] "arise out of or relate to";[158] and "deriving from or connected with."[159] Lucero further asserted that the Court already declined to adopt a causation requirement in *Bristol-Myers Squibb*.[160]

150. *Id.* at 21.
151. *Id.* at 34.
152. *Id.* at 24–26.
153. *Id.* at 26–27.
154. *Id.*
155. Respondent's Brief in Opposition at 23, *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017 (2021) (No. 19-368).
156. *Id.*
157. *Id.* at 24–25 (citing International Shoe v. Washington, 326 U.S. 310 (1945)).
158. *Id.* at 25 (citing Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773 (2017); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984)).
159. *Id.* at 25 (citing Goodyear Dunlop Tires Opers. v. Brown, 564 U.S. 915 (2011)).
160. *Id.*

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Lucero also argued that a causation requirement would undermine principles of personal jurisdiction.[161] Specifically, Ford should have "reasonably anticipate[d] being haled into court" in a state, such as Montana, where it actively advertises, sells, and services its vehicles.[162] Therefore, Lucero contended, "the 'traditional notions of fair play and substantial justice' that personal jurisdiction protects are served [here.]"[163] Additionally, Lucero claimed, Montana has a "compelling interest in protecting its residents from dangerous products that are marketed and sold there."[164] It would be "arbitrary and irrational" if Montana could not assert jurisdiction over a manufacturer who sold dangerous products in the State simply because the particular product was manufactured and first sold in a different state.[165]

3. Majority Opinion

Justice Kagan's majority opinion begins with "our most common formulation" of the relatedness prong, which is that "the suit must arise out of *or relate to* the defendant's contacts with the forum."[166] Although the first half of that standard "asks about causation," the other half contemplates some other relationship "without a causal showing."[167] However, "[t]hat does not mean anything goes"; there are, Justice Kagan maintains, "real limits."[168] Despite those limits, specific jurisdiction does not always require proof of causation, as Ford contends.[169]

Justice Kagan defines this "other relationship" implicitly in her discussion of *World-Wide Volkswagen*. Specifically, she points to Justice White's dicta discussed in Section II(B)(2) *supra* of this Comment.[170] Cited in full, the excerpt from *World-Wide Volkswagen* states:

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in [several or all] other States, it is not unreasonable to sub-

161. *Id.* at 26.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1026 (2021) (emphasis in original).
167. *Ford Motor Co.*, 141 S. Ct. at 1026.
168. *Id.*
169. *Id.* For further support that relatedness does not always require strict causation, Justice Kagan cites to Goodyear Dunlop Tires Opers. v. Brown, 564 U.S. 915 (2011), for the proposition that "an affiliation between the forum and the underlying controversy" is all that is needed, "without demanding that the inquiry focus on cause." *Ford Motor Co.*, 141 S. Ct. at 1026.
170. *Ford Motor Co.*, 141 S. Ct. at 1027.

https://scholarworks.umt.edu/mlr/vol83/iss1/4

> ject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.[171]

For Justice Kagan, this paragraph squarely addresses Ford's situation in this case. In *World-Wide Volkswagen*, the Court held Oklahoma could not assert personal jurisdiction over the New York car dealer, but it could exercise jurisdiction over Audi, the car's manufacturer, and Volkswagen, the nationwide importer.[172] The example of Audi and Volkswagen was later used as a "paradigm" of specific jurisdiction in *Daimler*.[173] There, the Court stated, "[a] California court would exercise specific jurisdiction 'if a California plaintiff, injured in a California accident involving a Daimler-manufactured vehicle, sued Daimler [in that court] alleging that the vehicle was defectively designed.' "[174] "Substitute Ford for Daimler," Justice Kagan observed, "and the Court's illustrative case becomes the . . . case[ ] before us."[175]

Having clarified the legal framework of the relatedness prong, Justice Kagan applied it to the facts before her. First, she considered "the business that [Ford] regularly conducts in Montana[.]"[176] Ford advertised through billboards, television, radio, direct mail, and print; sold used and new cars—including the Ford Explorer model—throughout the state of Montana; and "work[ed] hard to foster ongoing connections to its cars' owners" by regularly maintaining and repairing cars through Montana dealerships, including cars whose warranties had long expired, and distributed replacement parts to its own dealers and independent auto shops around the State.[177] All of these activities, Justice Kagan observed, "encourage Montanans . . . to become lifelong Ford drivers."[178]

Second, Justice Kagan examined Ford's suit-related contacts in Montana. Ford advertised, sold, and serviced Ford Explorers, like the one that injured the plaintiff, in Montana.[179] "In other words, Ford had systematically served a market in Montana . . . for the very vehicle[ ] that [the plaintiff alleges] malfunctioned and injured them[.]"[180] Therefore, "there is a strong 'relationship among the defendant, the forum, and the litigation.' "[181]

171. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).
172. *Ford Motor Co.*, 141 S. Ct. at 1027.
173. *Id.* at 1027–28.
174. *Id.* at 1028 (citing Daimler AG v. Bauman, 571 U.S. 117, 127 (2014)).
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984)).

These facts, according to Justice Kagan, provided a "paradigm" case of how specific jurisdiction works.[182]

Though Ford's contacts clearly *relate to* the dispute, Justice Kagan was reluctant to concede that causation exists here. But she did not foreclose the possibility either. It is possible that "the owners of these cars might never have bought them, and so these suits might never have arisen, except for Ford's contacts with their home states."[183] For instance, they may have made those purchases because they saw Ford advertisements, or because Ford's in-state activities make it convenient for them to drive a Ford there. "The plaintiffs here did not in fact establish, or even allege, such causal links."[184]

Next, Justice Kagan continued where her colloquy with Marotta left off and distinguished *Bristol-Myers Squibb* and *Walden* from the case before the Court. In *Bristol-Myers Squibb*, there was no affiliation between the forum and the controversy.[185] In *Walden*, there was no affiliation between the defendant and the forum state.[186] Both were inapplicable here, according to Justice Kagan.[187] Unlike *Bristol-Myers Squibb*, there was an affiliation between the forum and the controversy because the plaintiff resided, purchased and used the vehicle, and was allegedly injured by the vehicle, in Montana.[188] And unlike *Walden*, there was an affiliation between the defendant and the forum because "Ford has a veritable truckload of contacts with Montana . . . as it admits."[189] Therefore, both precedents are inapposite.[190]

4. Justice Alito's Concurrence

Justice Alito concurred solely to express his concerns with Justice Kagan's disjunctive parsing of the phrase *arises out of or relates to*.[191] According to him, the Court should not have altered its personal jurisdiction jurisprudence because this case is easily decided under *World-Wide Volkswagen*:

> If a car manufacturer makes substantial efforts to sell vehicles in States A and B (and other States), and a defect in a vehicle first sold in State A

182. *Ford Motor Co.*, 141 S. Ct. at 1028.
183. *Id.* at 1029.
184. *Id.*
185. *Id.* at 1031.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 1033 (Alito, J., concurring).

> causes injuries in an accident in State B, the manufacturer can be sued in State B. That rule decides these cases.[192]

Although Justice Alito agreed with the holding, he took issue with the way the majority handled Ford's causation argument.[193] Justice Alito thought the majority went too far when it recognized "a new category of cases in which personal jurisdiction is permitted," namely, "those in which the claims do not 'arise out of' (i.e., are not caused by) the defendant's contacts but nevertheless sufficiently 'relate to' those contacts in some undefined way."[194]

Justice Alito thought it unwise to say a causal link is not needed—and here, he claims, there is a sufficient causal link.[195] It is reasonable to infer, he contended, that the Ford Explorer would not have been on the road but for Ford's activities (i.e., advertising, selling, and servicing) in Montana.[196] Therefore, Lucero's claim *arises out of* Ford's contacts with the forum state, and it is unnecessary to ask whether Ford's contacts with Montana *relate to* the dispute.[197]

Additionally, Justice Alito was concerned about the ramifications of recognizing *relate to* as an independent basis for jurisdiction.[198] He considered the phrase overly broad and likely to confuse the lower courts.[199] Although the majority recognized the need for "real limits," it did not indicate "what those limits might be."[200] Therefore, Justice Alito would have decided this case on the *arising out of* language and *World-Wide Volkswagen*, without altering the relatedness prong.

5. Justice Gorsuch's Concurrence

Justice Gorsuch concurred in the decision separately, joined by Justice Thomas.[201] Most of Justice Gorsuch's opinion took up the same issue as Justice Alito's: the concern that Justice Kagan's disjunctive parsing of the relatedness prong needlessly altered the Court's relatedness jurisprudence.[202] Justice Gorsuch was similarly troubled by the absence of guidelines, and particularly limitations, in the majority opinion.[203] However, he

192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 1033–34.
200. *Id.*
201. *Id.* at 1034.
202. *Id.* (Gorsuch, J., concurring) ("[T]he majority asks us to parse those words as though we were dealing with language of a statute.").
203. *Id.* at 1034–35.

went further than Justice Alito by providing some concrete examples of how this new, stand-alone *related* category might stray from the fundamental notions of fairness and due process that underpin our personal jurisdiction doctrine.[204] "In some cases," he contented, "the new test may prove more forgiving than the old causation rule . . . [but] it may also sometimes turn out to be more demanding."[205]

The first example Justice Gorsuch invited us to grapple with is one where he considered the new test to be more demanding: whether Washington, the State where the vehicle was first sold, could exercise personal jurisdiction over Ford in this case.[206] Justice Kagan implicitly foreclosed that possibility in her majority opinion, stating, "[f]or [Washington], the suit involves all out-of-state parties, an out-of-state accident, and out-of-state injuries; the suit's only connection with the State is that a former owner once . . . bought the car there."[207] Justice Kagan used this example to show that Ford's causation argument, which would render Washington an appropriate forum state as the state of first-sale, would in fact "undermine, rather than promote," due process because Washington bears even less of a relationship to the defendant and the litigation.[208] Justice Gorsuch questioned this outcome: It would seem, he claims, that Washington has "a strong interest in ensuring [it does not] become [a] marketplace[ ] for unreasonably dangerous products."[209] A proper causation standard would allow courts to examine whether the dispute *arises out of* that first sale of the vehicle in Washington—arguably, he maintains, it did.[210]

The next example came from a hypothetical in a footnote of the majority opinion.[211] The hypothetical contemplates the situation in which a retiree in Maine carves and sells wooden duck decoys over the Internet, when one of his decoys injures a consumer in another state.[212] "The majority says this hypothetical supplies a useful study in contrast with our cases."[213] Although Ford's continuous contacts with Montana are sufficient to establish an "affiliation" with the State, the decoy seller's contacts may be too isolated and sporadic.[214] Justice Gorsuch viewed this as a problematic example because "between the poles of 'continuous' and 'isolated' . . . lie a virtually

204. *Id.* at 1035.
205. *Id.*
206. *Id.*
207. *Id.* at 1030 (majority opinion).
208. *Id.*
209. *Id.* at 1035 (Gorsuch, J., concurring).
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*

infinite number of 'affiliations' waiting to be explored."[215] By not providing some causation standard, Justice Gorsuch questioned whether the majority opinion provided any standard by which to evaluate the cases that fall somewhere between the two extremes.[216]

The remainder of Justice Gorsuch's opinion embarks on a journey through the history of specific jurisdiction jurisprudence.[217] In doing so, he identified a central tension motivating the majority's holding: "When a company 'purposefully availed' itself of the benefits of another state's market in the 1940s, it often involved sending in agents, advertising in local media, or developing a network of on-the-ground dealers . . . ."[218] However, today, "even an individual retiree carving wooden decoys in Maine can 'purposefully avail' himself" of doing business in other states, "thanks to internet advertising with global reach."[219] Perhaps, he wrote, that is the intuition underlying the majority's introduction of a new rule.[220]

In a somewhat dramatic conclusion, Justice Gorsuch reiterated his consent to the Court's judgment and admitted he had no real solutions to offer:

> None of this is to cast doubt on the outcome of these cases . . . The real struggle here isn't with settling on the right outcome in these cases, but with making sense of our personal jurisdiction jurisprudence and *International Shoe*'s increasingly doubtful dichotomy. On those scores, I readily admit that I finish these cases with even more questions than I had at the start. Hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history.[221]

For how narrow the focus of *Ford Motor Co.* purportedly is, Justice Gorsuch seems to foreshadow the Court's almost inevitable dismantling of specific jurisdiction doctrine. But that will need to wait for another day and perhaps a more appropriate case.

IV. ANALYSIS

Several jurisdictions, including the Ninth Circuit,[222] use a but-for test to determine whether the relatedness prong is satisfied.[223] Recent district court decisions from these jurisdictions interpreted *Ford Motor Co.* as an

215. *Id.*
216. *Id.*
217. *Id.* at 1036–39.
218. *Id.* at 1038.
219. *Id.*
220. *Id.*
221. *Id.* at 1039.
222. Bullard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995).
223. *Id.*; Waite v. All Acquisition Corp., 901 F.3d 1307, 1314 (11th Cir. 2018); Consulting Eng'rs Corp. v. Geometric Ltd., 561 F.3d 273, 278–79 (4th Cir. 2009); Williams v. Lakeview Co., 13 P.3d 280,

abrogation of that approach,[224] while other decisions suggested the but-for test is still in play.[225] This Section argues the latter approach is the correct reading of *Ford Motor Co.* Justice Kagan did not completely overrule a causation standard in her opinion. Rather, she distinguished between the first part of the disjunctive relatedness rule—*arises out of*—which does indeed "ask[ ] about causation,"[226] and the second half of the rule—*relates to*—which, as she noted, "contemplates some other relationship."[227] Therefore, courts in but-for jurisdictions are free to continue using the but-for test unless presented with this "other relationship" to which Justice Kagan alludes; namely, the *World-Wide Volkswagen-Daimler* paradigm that "[became] . . . the case[ ] before us."[228]

To illustrate what that situation will look like, this Section uses Ninth Circuit precedent decided on a but-for standard. Specifically, Subsection IV.A discusses the but-for standard used in the Ninth Circuit, and Subsection IV.B uses Ninth Circuit cases to illustrate how *Ford Motor Co.* works in conjunction and in harmony with the but-for test. Finally, Section IV.C discusses the shortcomings of *Ayla*, which, to date, is the Ninth Circuit's only interpretation of *Ford Motor Co.*'s effect on the relatedness prong of specific jurisdiction.

A. The Ninth Circuit's But-For Test

The Ninth Circuit "explicitly adopted" the but-for test for determining the relatedness prong of specific jurisdiction in *Shute v. Carnival Cruise Lines*.[229] Later cases continued this trend.[230] *Shute* arose from an injury sustained by a Washington State resident on-board a cruise ship in interna-

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284–85 (Ariz. 2000); Tatro v. Manor Care, Inc., 625 N.E.2d 549, 553 (Mass. 1994); Shute v. Carnival Cruise Lines, 783 P.2d 78, 81–82 (Wash. 1989).

224. In re: Zantac (Ranitidine) Products Liability Litigation, No. 20-MD-2924, 2021 WL 2682602, at *7–8 (S.D. Fla. June 30, 2021); Israel v. Alfa Laval, Inc., No. 8:20-CV-2133-WFJ-AAS, 2021 WL 1662770, at *4 (M.D. Fla. Apr. 28, 2021); Nomad Glob. Commun. Sols., Inc. v. Hoseline, Inc., No. CV 20-138-M-DLC, 2021 WL 1400983, at *4 (D. Mont. Apr. 14, 2021); Clarke v. Dutton Harris & Co., PLLC, No. 220CV00160JADBNW, 2021 WL 1225881, at *4 (D. Nev. Mar. 31, 2021); Lewis v. Mercedes-Benz USA, LLC, No. 19-CIV-81220-RAR, 2021 WL 1216897, at *35 (S.D. Fla. Mar. 30, 2021).

225. TransparentBusiness, Inc. v. Infobae, No. 3:20-cv-00582-MMD-WGC, 2021 WL 2670704, at *3 (D. Nev. June 29, 2021); McHugh v. Vertical Partners W., LLC, 2:20-CV-00581-DCN, 2021 WL 1554065, at *5 (D. Idaho Apr. 19, 2021); James Lee Constr., Inc. v. Government Employees Ins. Co., No. CV 20-68-M-DWM, 2021 WL 1139876, at *2 (D. Mont. Mar. 25, 2021).

226. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1026 (2021).

227. *Id.*

228. *Id.* at 1028; *see also supra* Section II(B)(2).

229. 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991).

230. *See* Harrison v. Butler, 131 F.3d 146 (9th Cir. 1997); Hashiro v. General Elec. Co., 56 F.3d 71 (9th Cir. 1995); Ballard v. Savage, 65 F.3d 1495 (9th Cir. 1995); Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 272 (9th Cir. 1995).

tional waters off the coast of Mexico.[231] The defendant, Carnival Cruise Lines, was a Panamanian corporation headquartered in Florida.[232] The plaintiff sued in Washington.[233] The Court summarized Carnival's minimum contacts with Washington:

> Carnival does, however, advertise its cruises in local Washington newspapers. It also provides brochures to travel agents in Washington, which in turn are distributed to potential customers. Carnival also periodically holds seminars for travel agents in the State of Washington to inform them about, and encourage them to sell, Carnival cruises. Carnival pays travel agencies a 10% commission on proceeds from tickets sold for Carnival cruises.[234]

The Court held these contacts satisfied the minimum contacts prong because Carnival purposefully availed itself of the laws of Washington.[235]

Turning to the relatedness prong, the Ninth Circuit held the plaintiff's cause of action arose out of Carnival's contacts with Washington.[236] The Court reached this conclusion by applying a but-for test: but for "Carnival's activity [in Washington], the Shutes would not have taken the cruise, and Mrs. Shute's injury would not have occurred."[237] The Court adopted the but-for test used at that time by the Fifth and Sixth Circuits and "implicitly adopted" by an earlier Ninth Circuit case.[238] In doing so, the Court explicitly rejected the defendant's argument that a more stringent, proximate cause standard should govern.[239] This was the same argument Ford's counsel made at oral argument in *Ford Motor Co.*,[240] which the Supreme Court ultimately rejected.[241]

Shute was reversed on appeal to the United States Supreme Court,[242] but the but-for test remained good law in the Ninth Circuit and was applied consistently until the recent confusion created by *Ford Motor Co.*[243] Ironi-

231. 897 F.2d at 379.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at 382.
236. *Id.* at 386.
237. *Id.*
238. *Id.* at 385.
239. *Id.* at 383, 385.
240. *See supra* Section III(B)(1).
241. *See supra* Section III(B)(3).
242. *See generally* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 585 (1991).
243. *See* Nat'l Cas. Co. v. Burns & Wilcox Ltd., CV-19-04854-PHX-DWL, 2020 WL 4039119, at *7 (D. Ariz. July 17, 2020); Haines v. Get Air LLC, CV1500002TUCRMEJM, 2017 WL 1067777, at *9 (D. Ariz. Feb. 24, 2017); Supplier's City SA de CV v. EFTEC N.A., LLC, CV-06-2503-PHX-PGR, 2007 WL 1655989, at *3–4 (D. Ariz. June 7, 2007); Fisk v. Sikorsky Aircraft Corp., CV 04-45-M-DWM, 2006 WL 8435896, at *5 (D. Mont. Mar. 29, 2006); nMotion, Inc. v. Environmental Tectonics Corp., 196 F. Supp. 2d 1051, 1059 (D. Or. 2001); Nissan Motor Co., Ltd. v. Nissan Computer Corp., 89 F. Supp. 2d 1154, 1160 (C.D. Cal. 2000).

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cally, courts in the Ninth Circuit were already accommodating situations like the one presented in *Ford Motor Co.* using the but-for test.

Consider *National Casualty Co. v. Burns & Wilcox Ltd.*,[244] a breach of contract case out of the District of Arizona that held the but-for test was satisfied.[245] There, the defendant argued the plaintiff's claim did not "arise from its forum related contacts because none of the alleged breaches of their agreement . . . occurred in Arizona."[246] Therefore, the "specific acts triggering [the plaintiff's] claim" were not forum-related activities on the part of the defendant.[247] Nonetheless, the court upheld the relatedness prong, stating, "The claims in this lawsuit can easily be said to 'relate to' these forum related [activities]."[248] The court clarified the but-for test is not limited to the specific act giving rise to the lawsuit, but rather requires an examination of the totality of the defendant's contacts with the forum state.[249] The Ninth Circuit applied similar reasoning in *Alexander v. Circus Circus Enterprises, Inc.*[250] and *Haisten v. Grass Valley Medical Reimbursement Fund*.[251] The logic used in these cases shows that courts in the Ninth Circuit already used the but-for test rather liberally.

The following Subsection uses two Ninth Circuit cases to illustrate how the but-for test can be used consistently with *Ford Motor Co.* In one case, the relatedness prong would not ordinarily be met under the but-for standard but would be met under the expansion of the relatedness test created by *Ford Motor Co.* In the second case, the relatedness prong would not be met under either the but-for test or under *Ford Motor Co.*

B. Ford Motor Co. *Can (and Should) be Used Consistently with the But-For Test in the Ninth Circuit*

This Subsection illustrates how *Ford Motor Co.* can operate in conjunction with the Ninth Circuit's but-for test and argues this approach is preferable. As argued in Section IV *supra*, Justice Kagan left undisturbed the first half of the relatedness rule, which does ask about causation, and expanded the second part of the rule, which "contemplates some other relationship." Synthesized, the relatedness prong becomes a two-part inquiry.

244. CV-19-04854-PHX-DWL, 2020 WL 4039119 (D. Ariz. July 17, 2020).

245. *National Cas. Co.*, CV-19-04854-PHX-DWL, 2020 WL 4039119, at *7.

246. *Id.* (ellipses in original).

247. *Id.*

248. *Id.*

249. *Id.* ("Although these arguments have surface appeal, they focus on the wrong question. The but-for test doesn't focus on the specific acts triggering a claim, but on whether that claim 'arises out of or relates to' the defendant's forum-related contacts."). The court went on to list the defendant's forum related contacts and their relation to the contract at issue.

250. 939 F.2d 847, 853 (9th Cir. 1991).

251. 784 F.2d 1392, 1400 (9th Cir. 1986).

https://scholarworks.umt.edu/mlr/vol83/iss1/4

First, did the claim arise out of the defendant's forum-related activities, under the jurisdiction's preferred causation approach (here, but-for)? If the answer to this first question is yes, the inquiry ends. If the answer is no, the analysis turns to a second question: are the defendant's contacts with the forum state so expansive that they warrant application of *Ford Motor Co.*? Stated differently, is the defendant corporation "systematically serv[ing] a market" for its products or services in the forum state, or does it have equivalent contacts with the state? If the answer to that question is yes, then the only remaining inquiry is whether those activities *relate to* the plaintiff's claims.

The following two cases illustrate how this rule will work practically, and why it is preferable to replacing the but-for test altogether. The first case shows how some circumstances will not satisfy the relatedness prong under the but-for test but will under *Ford Motor Co.*'s expansion of the test. The second case illustrates how other situations will fail both the but-for test and *Ford Motor Co.* In this second situation, courts should use *Ford Motor Co.* conservatively to avoid the pitfalls discussed in Justices Alito's and Gorsuch's concurrences. However, if courts abandon the but-for test altogether, the "real limits" discussed by Justice Kagan will slowly start to fade.

1. Fisk v. Sikorsky Aircraft Corp.[252]

Fisk is a pre-*Ford Motor Co.* products liability case from the District of Montana that arose from the death of a pilot in a helicopter crash in Tennessee.[253] The helicopter was owned by the pilot's employer, Carson Helicopters, which was based in Pennsylvania.[254] The plaintiffs suing on his behalf alleged design and manufacture defects caused by defendants Sikorsky and Rotair.[255] Sikorsky is a Delaware corporation headquartered in Connecticut, and Rotair is a Connecticut corporation.[256] However, as the two leading manufacturers of helicopter parts in the United States, Sikorsky and Rotair did business in, and thus had minimum contacts with, Montana: they advertised through brochures, prominent trade publications, and the internet; and they supplied parts to Montana businesses and organizations, including the Montana National Guard.[257] But that was the extent of their

252. CV 04-45-M-DWM, 2006 WL 8435896 (D. Mont. Mar. 29, 2006).
253. *Id.* at *1.
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*

Montana contacts. The only other connection to Montana was the pilot, who was a Montana resident.[258]

The court held that both Rotair and Sikorsky were subject to specific jurisdiction in Montana.[259] With respect to the relatedness prong, the court stated, "[T]he [d]efendants marketed their products as widely as possible. Thus, Fisk's claim arises out of [their] efforts to market their products in forums such as Montana."[260] This conclusion is technically incorrect under the Ninth Circuit's but-for test, but the court seems to have avoided the consequences of the but-for test by relying on its own precedent.[261] If decided on a true but-for test, it would have failed the relatedness prong.

Fisk is, nonetheless, a paradigmatic case because the facts align neatly with *Ford Motor Co.* The defendants never transacted with the plaintiff in Montana, just as Ford never dealt directly with Gullett. Similarly, regardless of whether Sikorsky and Rotair (or Ford in *Ford Motor Co.*) did any business in Montana, the plaintiffs would have sustained the same injuries. Therefore, their forum-related contacts are not but-for causes of the plaintiffs' claims, even under the liberal but-for standard used in cases such as *National Casualty*.[262]

Because the plaintiff's claims did not arise out of Rotair's and Sikorsky's forum-related activities, it is necessary to consider the second part of the inquiry: do the defendants' forum-related activities warrant application of *Ford Motor Co.*? Here, it appears they do. Rotair and Sikorsky made a "systematic" effort to "serve the market for" their products in Montana, as Ford did in *Ford Motor Co.* Additionally, the claims *relate to* the defendants' minimum contacts with Montana because, as in *Ford Motor Co.*, the products for which they serve a market in Montana subsequently injured Montana residents. Therefore, the claims *relate to* those contacts.

Fisk is the type of case that compels courts to move to the second half of the relatedness test to avoid an unacceptable result. Deciding a case such as *Fisk* solely under the *arises out of*, but-for test would disturb the balance between "treating defendants fairly and protecting interstate federalism," the two sets of values guiding specific jurisdiction jurisprudence.[263] The following case illustrates a situation where the but-for test fails to supply

258. *Id.*

259. *Id.* at *3.

260. *Id.* at *5.

261. *Id.* (citing Hanson v. United Instruments, Inc., 9:00-cv-00065-DWM (D. Mont. Feb. 8, 2001)). This outcome corroborates the argument in Section IV(A) *supra* that courts in the Ninth Circuit were already accommodating cases such as *Ford Motor Co.* using the but-for test.

262. *See supra* Section IV(A).

263. *See* Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1025 (2021). *See also* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

specific jurisdiction, and the expansion of *Ford Motor Co.* is rightfully inapplicable.

2. Harrison v. Butler[264]

Harrison was a medical malpractice action filed in the District of Arizona.[265] The plaintiff, Harrison, was the surviving spouse of a patient who was allegedly misdiagnosed in Nevada and later died in Arizona.[266] The defendant, Dr. Butler, was a Nevada-based physician. Dr. Butler examined, diagnosed, and referred the patient in Nevada to a surgical consultant in Arizona.[267] The allegedly negligent act was that Dr. Butler should have referred the patient to a hospital for immediate surgery instead of a consultation.[268] The Court assumed, *arguendo*, the plaintiff could establish minimum contacts and then proceeded to discuss the relatedness prong.[269] Applying the but-for test, the Court noted, "Mrs. Harrison's claims against these appellees would have arisen regardless of Dr. Butler's contacts with Arizona because the allegedly negligent acts occurred entirely in Nevada."[270] Therefore, the plaintiff could not satisfy the but-for test of the relatedness prong.[271]

Harrison illustrates a case where it is appropriate to stop at the but-for test. Here, *Ford Motor Co.* would be inapplicable because the defendant physician did not have the kind of expansive contacts with Arizona, equivalent to Ford's "serving a market for its products" in the forum state. Assuming the physician worked for a hypothetical company, "Doctors, Inc.," which was a leading medical provider in the United States and had the types of contacts that systematically served a market for those services in Arizona, then perhaps it would be reasonable to move to the second part of the test and inquire whether those contacts *relate to* the plaintiff's claim. Otherwise, the balance between the defendant's fairness and interstate federalism is undisturbed by the outcome of *Harrison*.

C. Ayla *Is Suggestive of the Ninth Circuit's Hasty and Incorrect Departure from the But-For Test*

Though *Ayla* did not address the question head-on, it suggested that the Ninth Circuit is moving away from its but-for test in the wake of *Ford*

264. 131 F.3d 146 (Table), No. 96-17086, 1997 WL 730259 (9th Cir. 1997).
265. *Id.* at *1.
266. *Harrison*, 131 F.3d at *1–2.
267. *Id.* at *1.
268. *Id.*
269. *Id.* at *3.
270. *Id.*
271. *Id.*

Motor Co.[272] *Ayla* originated in the Northern District of California.[273] Ayla, a San Francisco-based beauty and wellness company, sued Alya Skin, an Australian skincare company, for trademark infringement.[274] Alya Skin moved to dismiss for lack of personal jurisdiction.[275] It argued it has "no retail stores, offices or branches, officers, directors, or employees, bank accounts, or real property in the United States."[276] It stated that "it does not sell products in any retail stores in the United States . . . [or] direct any advertising toward California through online, television, and radio marketing[,] . . . [and] less than 10% of its sales have been to the United States."[277] On these facts, the district court granted Alya Skin's motion.[278]

The Ninth Circuit reversed, finding that the action "both arises out of and relates to" Alya Skin's contacts with the United States.[279] In a footnote, the Court hastily dismissed Alya Skin's argument that its purported sales to the United States are not the but-for cause of Ayla's alleged harm: "We clarify that our precedents permit but do not require a showing of but-for causation to satisfy the nexus requirement . . . A narrower test is foreclosed by the Supreme Court's recent decision in [*Ford Motor Co.*]."[280] The Court cited *Core-Vent Corp. v. Nobel Industries AB*[281] for its assertion that the Ninth Circuit has never required a showing of but-for causation.[282] But in *Core-Vent Corp.*, the relatedness prong was not at issue. The Court's comments on relatedness were confined to one sentence: "The libel claims clearly arose out of the publication of the articles; we thus need consider only the first and third elements of the minimum contacts test."[283] The Court did not write the words "but-for" in its opinion because it was obvious to everyone involved that the publication of the allegedly libelous articles were the but-for cause of the plaintiff's alleged harm. The omission of the words "but-for" from the Court's opinion does not suggest, as *Ayla* seems to hastily imply, that *Core-Vent Corp.* was *not* decided on a but-for standard.

The Court in *Ayla* ignored and misstated its own precedent. The Ninth Circuit has required a showing of but-for causation when determining relat-

272. No. 20-16214, 2021 U.S. App. LEXIS 25921, *18 n.5 (9th Cir. Aug. 27, 2021).
273. *Id.* at *4.
274. *Id.* at *3–4.
275. *Id.* at *5.
276. *Id.*
277. *Id.*
278. *Id.* at *1.
279. *Id.* at *18.
280. *Id.* at *18 n.5.
281. 11 F.3d 1482 (9th Cir. 1993).
282. *Ayla*, No. 20-16214, 2021 U.S. App. LEXIS 25921, *18 n.5.
283. *Core-Vent Corp.*, 11 F.3d at 1485.

edness for specific jurisdiction since *Shute*,[284] and, until recently, district courts in the Ninth Circuit followed this approach.[285] Nothing about the but-for test was, as the Court erroneously suggests, permissive. What is permissive, conversely, is Justice Kagan's *Ford Motor Co.* opinion, which does not preclude courts from applying some causation standard for determining relatedness, but rather adds to those tests by recognizing *relates to* as a second, distinct category on which to base a relatedness determination when a corporation's systematic and expansive contacts with the forum state parallel Ford's contacts with Montana.

Ayla got it wrong by, first, dismissing valid Ninth Circuit precedent and, second, hastily interpreting and applying *Ford Motor Co.* when such application was unnecessary. Federal court litigants in the Ninth Circuit should press the court of appeals to clarify its shifting relatedness jurisprudence in a way that respects precedent and gives *Ford Motor Co.* the attention it deserves.

V. Conclusion

The cases discussed exemplify how *Ford Motor Co.* can be applied harmoniously with the Ninth Circuit's but-for test, if handled with care. They also illustrate that using one test at the expense of the other defies the underlying principles of personal jurisdiction.[286] Indeed, these are the results Justice Gorsuch warned against in his concurrence. To concretize Justice Kagan's "real limits," litigants in the Ninth Circuit should continue advocating for the but-for test. But when presented with "some other relationship"—i.e., a *Ford Motor Co.* situation—courts are free to examine the affiliation between the plaintiff's claims and the defendant's forum-related activities using the more forgiving *relates to* standard.

284. *See, e.g.*, Learjet, Inc. v. Oneok, Inc., 715 F.3d 716, 742 (9th Cir. 2013); Fireman's Fund Ins. Co. v. National Bank of Coops., 103 F.3d 888, 894 (9th Cir. 1996).

285. *See, e.g.*, Jackson v. Euphoria Wellness, LLC, No. 3:20-CV-03297-CRB, 2020 U.S. Dist. LEXIS 163567, *17 (N.D. Cal. Sep. 8, 2020); Miller v. Weinmann, No. 2:19-CV-2213-JCM, 2020 U.S. Dist. LEXIS 253007, *9 (D. Nev. Aug. 24, 2020); Yamashita v. LG Chem, Ltd., No. 20-CV-00129-DKW-RT, 2020 U.S. Dist. LEXIS 4431666, *28 (D. Haw. July 31, 2020); Krypt, Inc. v. Ropaar, LLC, No. 19-CV-03226-BLF, 2020 U.S. Dist. LEXIS 118207, *8-9 (N.D. Cal. July 6, 2020); Palumbo Design, LLC v. 1169 Hillcrest, LLC, No. 19-CV-06664-DSF, 2019 U.S. Dist. LEXIS 234198, *14 (C.D. Cal. Dec. 3, 2019); Birdwell & Janke, LLP v. Farkas, No. 3:18-CV-00910-YY, *23 (D. Or. Oct. 19, 2018); Deveroux v. TT Mktg., No. 1:18-CV-487-AWI-SAB, 2018 U.S. Dist. LEXIS 139244, *5-6 (E.D. Cal. Aug. 16, 2018); Sia v. Berhad, No. C16-1692-TSZ, 2017 U.S. Dist. LEXIS 60569, *9 (W.D. Wash. April 20, 2017) ("Plaintiffs' allegations fail to establish any causal connection[.]"); Haines v. Get Air, LLC, No. CV-15-00002-TUC-RM (EJM), 2017 U.S. Dist. LEXIS 27140, *26-27 (D. Ariz. Feb. 23, 2017); Saipan Air, Inc. v. Stukes, No. 1:12-CV-00015, 2013 U.S. Dist. LEXIS 26977, *18-19 (D. N. Mar. I. Feb. 25, 2013); C.S. v. Corp. of the Catholic Bishop of Yakima, No. 13-CV-3051-TOR, 2013 U.S. Dist. LEXIS 138862, *14-15 (E.D. Wash. Sept. 25, 2013).

286. Results Lucero terms "arbitrary and irrational." *See* Respondent's Brief in Opposition, *supra* note 155, at 26. R