

No. 20-1223

IN THE
Supreme Court of the United States

JOHNSON & JOHNSON AND
JOHNSON & JOHNSON CONSUMER INC.,
Petitioners,

v.

GAIL L. INGHAM, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to the
Missouri Court of Appeals
for the Eastern District**

**BRIEF OF THE INTERNATIONAL
ASSOCIATION OF DEFENSE COUNSEL
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST	1
INTRODUCTION.....	2
SUMMARY OF ARGUMENT	3
ARGUMENT.....	4
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Adden v. Middlebrooks</i> , 688 F.2d 1147 (7th Cir. 1982).....	7
<i>Beydoun v. Wataniya Rests. Holding, Q.S.C.</i> , 768 F.3d 499 (6th Cir. 2004).....	9, 12
<i>Bristol-Myers Squibb Co. v. Superior Court</i> , 137 S. Ct. 1773 (2017).....	6, 11
<i>Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.</i> , No. 19-368, 2021 WL 1132515 (decided Mar. 25, 2021)	3, 6, 12, 13
<i>Harlow v. Children’s Hosp.</i> , 432 F.3d 50 (1st Cir. 2005)	11, 12
<i>In re: KBR, Inc.</i> , 893 F.3d 241 (4th Cir. 2018).....	11
<i>Int’l Shoe Co. v. State of Washington, Off. of Unemployment</i> , 326 U.S. 310 (1945).....	3, 5
<i>King v. Wise Staffing Servs., Inc.</i> , No. 2:18-CV-01731-RDP, 2020 WL 5110758, (N.D. Ala. Aug. 31, 2020).....	6
<i>O’Connor v. Sandy Lane Hotel Co.</i> , 496 F.3d 312 (3d Cir. 2007)	7
<i>Raffaele v. Compagnie Generale Mar.</i> , 707 F.2d 395 (9th Cir. 1983).....	6
<i>Toys “R” Us, Inc. v. Step Two, S.A.</i> , 318 F.3d 446 (3d Cir. 2003)	8, 9, 12
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980).....	3, 5, 8

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV, § 1 3, 5, 6, 13

OTHER AUTHORITIES

Victor E. Schwartz, et al., *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 Duke J. of Con. L. & Pub. Policy 51 (2019)..... 10-11

STATEMENT OF INTEREST

The **International Association of Defense Counsel (IADC)** respectfully submits this brief as *amicus curiae*. It is filing due solely to its interest in the important issues raised by this case.¹

IADC is an invitation-only, peer-reviewed membership organization of about 2,500 in-house and outside defense attorneys and insurance executives. It is dedicated to the just and efficient administration of civil justice and improvement of the civil justice system. IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. *Amicus* regularly appears before the Court as *amicus curiae* in cases involving issues of importance to their members. *See, e.g., Janssen Pharm., et al. v A.Y., et al.*, No. 20-1069 (March 8, 2021) (brief in support of certiorari petitions) (cert pending); *Trans Union LLC, v. Ramirez*, No. 20-297, 2021 WL 533217 (Feb. 8, 2021) (brief in support of judgment reversal) (cert granted).

IADC's members represent distributors, packagers, and manufacturers across the country. The specific jurisdiction standard that the Missouri courts adopted in *Ingham* will improperly pull these entities into legal disputes with which they have no connection whatsoever,

¹ *Amicus* hereby affirms that no counsel for either party authored any part of this brief in whole or in part. No party, counsel for a party, or person other than *amicus*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. *Amicus* notified all parties of their intent to submit this brief at least 10 days before it was due and all parties provided written consent to the filing of this brief.

other than as a mechanism whereby a plaintiff seeks to create jurisdiction in a preferred forum. These tactical maneuvers do nothing to advance the interests of justice or the efficient resolution of controversies, and they impose significant costs on nonparties who are forced to respond to jurisdictional discovery and retain counsel to protect their interests.

INTRODUCTION

The lower court's adoption of a "but-for" approach to specific jurisdiction incentivizes forum shopping, enabling plaintiffs to litigate in jurisdictions with which they have no connection and obtain jurisdiction only by imposing significant costs on nonparties. This is exactly what occurred in this case: Lacking any relationship to the forum state of their choice, Plaintiffs sought side-door entry into Missouri through extensive discovery of Defendant's forum-state contractor, a nonparty with no connection to the operative facts of the lawsuit. Plaintiffs did not reside in Missouri, purchase Johnson & Johnson Consumer Inc.'s (JJCI) talc in Missouri, nor suffer injury in Missouri. Defendant JJCI likewise was not a citizen of Missouri. Thus, in order to create a jurisdictional hook to Missouri, Plaintiffs focused on a bottler of one of JJCI's products that happened to be located in Missouri, requiring that bottler to identify and process 6.5 million documents at the expense of over half a million dollars. Ultimately, the lower courts justified jurisdiction in Plaintiffs' preferred forum based solely upon this bottling activity, concluding it was a "but-for" cause of their injury as it was a necessary step in the production of a product that allegedly harmed them.

This approach distorts the constitutional principle of specific jurisdiction. Rather than the parties' forum ties determining specific jurisdiction, in this case the

Plaintiffs’ desire to bring suit in a different forum determined that a nonparty entity would be pulled into the litigation. By increasing costs on nonparties, this “but-for” approach also distorts the “interstate judicial system’s interest in obtaining the *most efficient* resolution of controversies.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (emphasis added). This Court’s specific jurisdiction rulings have sought to limit these distortions. It has understandably looked askance at cases in which a plaintiff lacks any connection with the chosen forum but engages in tactical machinations aimed at obfuscating that fact. This issue merits review.

SUMMARY OF ARGUMENT

This case offers the Court the opportunity to review whether specific jurisdiction can exist in a forum with which plaintiffs have no connection and the defendant’s only relevant ties are premised upon a nonparty with no connection to the legal dispute. The lower court’s approach in finding jurisdiction on this ground promotes forum shopping and imposes burdens on nonparties that prevent the most efficient resolution of controversies.

The Court’s specific jurisdiction decisions—from *International Shoe* to *Ford Motor Co.*—hail Due Process as the “instrument of interstate federalism” that prevents self-interested state acquisition of jurisdiction that would undermine the “orderly administration” of the interstate judicial system. These decisions identify the “*most efficient* resolution of controversies” as one goal of the system. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 294 (1980) (emphasis added). To pursue efficient dispute resolution, courts have rejected specific jurisdiction where it would promote forum shopping,

increase discovery costs, multiply judicial proceedings, or complicate the legal questions that require decision. By sharp contrast, the lower court's approach to jurisdiction in this case would turn these important goals on their head.

The "but-for" approach to jurisdiction adopted below imposes significant costs on nonparties, most particularly in having to answer (and often litigate) extensive jurisdictional discovery. Missouri's expansive view of specific jurisdiction turns almost any relationship between a forum-state contractor and an out-of-state defendant into fertile ground for jurisdictional discovery and ultimately a massive enlargement of the specific jurisdiction doctrine this Court has enunciated over the past decade. In the specific case below, the "but-for" approach resulted in a *nonparty* having to process 6.5 million documents at significant cost. Increased exposure to jurisdictional discovery threatens every forum-state nonparty that contracts with an out-of-state defendant, requiring both sides to such a contract to weigh the added risks and costs due to this jurisdictional argument.

To deter forum shopping and ensure order and efficiency in the interstate judiciary, this Court should grant certiorari and consider whether the "arise out of or relate to" test is satisfied when a defendant's forum-state activity is a "but-for" cause of plaintiffs' injuries *but* plaintiffs themselves lack any connection to the forum state.

ARGUMENT

Over more than eight decades, the Court has placed restrictions on the scope of jurisdiction to, among other things, limit the ability of plaintiffs to engage in forum shopping and to ensure an efficient judicial system.

The Missouri court’s holding upsets both of these goals, allowing plaintiffs to search across the nation for a friendly jurisdiction and then to look for nonparties within that forum with any connection to defendants to swing open the jurisdictional gate. This perverse system—in which a plaintiff’s forum shopping determines the entities that will incur the costs of litigation rather than the parties to the dispute determining jurisdiction—creates inefficiencies and imposes substantial costs on nonparties, who are often subjected to extensive and costly discovery obligations. The consequences of the Missouri court’s “but-for” jurisdictional approach and its impact on the federal system and on nonparties warrant review by this Court.

This Court’s specific jurisdiction holdings promote the “interstate judicial system’s interest in obtaining the most efficient resolution of controversies.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Promoting efficient and orderly dispute resolution is not simply judicial pragmatism—the Due Process Clause demands it. As early as *International Shoe*, this Court acknowledged that satisfaction of Due Process in the jurisdictional inquiry requires consideration of both fairness to the parties and the “orderly administration of the laws.” *Int’l Shoe Co. v. State of Washington, Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 319 (1945). And the Court has reiterated that constitutional dictates limit jurisdiction:

[E]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the 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.

Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780–81 (2017).

This Court’s most recent ruling on this subject reiterates how the Due Process Clause restricts the ability of plaintiffs to abuse our federal system by engaging in forum shopping. *See Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, No. 19-368, 2021 WL 1132515 (decided Mar. 25, 2021). In finding specific jurisdiction to exist, the Court stressed the fact that the victims were residents of the states where the suits were brought and that the accidents at issue occurred in those jurisdictions. *E.g., id.* at *3. In contrast, the Court explained, the plaintiffs in *Bristol-Myers* (like the plaintiffs at issue in *Ingham*) had no such connections to the forum. *Id.* at *8. Instead, “the [*Bristol-Myers*] plaintiffs were engaged in forum shopping—suing in [the forum state] because it was thought plaintiff-friendly, even though their cases had no tie to the State.” *Id.* Accordingly, jurisdiction existed in *Ford* but not *Bristol-Myers*. *Id.*

Beyond forum shopping, federal courts have identified a number of other situations that detract from the “efficient resolution of controversies.” For example, courts have rejected jurisdictional claims that would increase discovery costs. *See, e.g., Raffaele v. Compagnie Generale Mar.*, 707 F.2d 395, 399 (9th Cir. 1983) (increasing discovery costs reduces “the most efficient resolution of the controversy”); *King v. Wise Staffing Servs., Inc.*, No. 2:18-CV-01731-RDP, 2020 WL 5110758, at *8 (N.D. Ala. Aug. 31, 2020) (easing the discovery burden on witnesses and document production makes resolution of the claims more efficient for the

interstate judicial system). Likewise, courts have looked askance at jurisdictional claims that increase the number of issues in dispute or otherwise complicate the correct determination of the law. *See, e.g., Adden v. Middlebrooks*, 688 F.2d 1147, 1156 (7th Cir. 1982) (rejecting specific jurisdiction in a forum that would require resolution of legal issues not present in other jurisdictions while failing to promote “the most efficient resolution” of the controversy).

The Missouri court’s adoption of the “but-for” approach undermines both of these goals by promoting forum shopping and threatening a forum-state nonparty with significant costs whenever its out-of-state contractual partner is sued. Given today’s interconnected economy, any step in the production chain can be targeted as a “but-for” cause of an injury, allowing plaintiffs to scour the nation for a favorable forum and an unwitting forum-friendly company for a possible jurisdictional hook. As the Third Circuit explained in rejecting this “but-for” approach, it “is vastly overinclusive . . . it has no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain.” *O’Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 322 (3d Cir. 2007) (quotation marks omitted).

If virtually any conduct by a forum-state nonparty is sufficient to establish jurisdiction over an out-of-state defendant, the procedural rules of many states would authorize jurisdictional discovery against the nonparty simply because there is a contract for services between these two entities.² Under the standard

² Even under the federal standard for jurisdictional discovery—if the “requisite contacts” for jurisdiction require only “but-for” causation—then such discovery is warranted whenever plaintiffs can allege with “reasonable particularity” that some connection between the forum-state nonparty and the out-of-state defendant

elucidated by the courts below, small and mid-size distributors, packagers, and manufacturers will become targets of discovery not because of any relevant connection to legal disputes but because of the happenstance of their location in a perceived plaintiff-friendly forum. These unlucky companies will be forced to incur significant expenses to comply with (or defend against) burdensome discovery requests from forum-shopping plaintiffs, expenses that they can avoid only by moving to another jurisdiction. In the modern chain of commerce, a final product might require labor and component parts from ten or more states. Granting jurisdiction based on the service or part supplied in *any* state, even when a service or part is merely a “but-for” cause of the alleged injury, would severely chill interstate economic activity and undermine the interstate marketplace the Constitution seeks to protect. *See, e.g., World-Wide Volkswagen Corp.*, 444 U.S. at 293 (“In the Commerce Clause, [the Founders] provided that the Nation was to be a common market, a free trade unit in which the States are debarred from acting as separable economic entities.”).

Ingham itself exemplifies these problems. Plaintiffs did not allege that they themselves had any connection to Missouri. Third Am. Pet. ¶¶ 7-84, *Ingham v. Johnson & Johnson, et al.*, No. 1522-CC10417-01 (Mo. Cir. Ct. St. Louis City Oct 2, 2017). They did not live in Missouri, purchase JJCI’s talc in Missouri, nor

might supply a link in the causal chain. *See, e.g., Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (“If a plaintiff presents factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts between [the party] and the forum state, the plaintiff’s right to conduct jurisdictional discovery should be sustained”) (quotation marks omitted).

experience injury in Missouri. *Id.* They did not allege that JJCI was at home in Missouri. But Missouri was their chosen forum, so they searched out nonparties with a business relationship with JJCI and identified Pharma Tech, a bottler that contracted with JJCI.

But for Plaintiffs' desire to bring suit in Missouri, there was no reason for Pharma Tech to be involved in this lawsuit. Plaintiffs never asserted—nor could they—that Pharma Tech's packaging of JJCI's product caused the alleged defect that led to their injuries. Their complaint claims that the alleged defect, an asbestos impurity, originated during a co-defendant's mining of talc, Third. Am. Pet. ¶ 102, an activity that Pharma Tech did not participate in (and that had no connection to Missouri). Plaintiffs did not allege that Pharma Tech mined or tested the allegedly defective talc or that Pharma Tech designed the allegedly inadequate label. *Id.* And in seeking jurisdictional discovery, Plaintiffs never alleged with "reasonable particularity" facts showing that their subpoenas might lead to evidence relevant to personal jurisdiction under the "proximate cause" standard, i.e., that Pharma Tech's packaging activities in Missouri were the "operative facts" that caused Plaintiffs' injuries. *See, e.g., Toys "R" Us, Inc.*, 318 F.3d at 456 (jurisdictional discovery requires facts alleged with "reasonable particularity"); *Beydoun v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507-508 (6th Cir. 2004) (applying proximate cause standard and rejecting specific jurisdiction because plaintiff-CEO's recruitment by defendant-employer in forum state and subsequent business trips to forum state as defendant's agent were not "**operative fact[s]**" that caused defendant's alleged wrongful detainment of the plaintiff in Qatar when defendant's business suffered (emphasis added)).

But applying the “but-for” approach to jurisdiction, the trial court granted Plaintiffs’ request for extensive jurisdictional discovery of Pharma Tech, based solely on the existence of JJCI’s packaging contract with Pharma Tech. See Pharma Tech’s Mot. for Protective Order and Costs, ¶¶ 4, 9, *Ingham v. Johnson & Johnson, et al.*, No. 1522-CC10417-01 (Mo. Cir. Ct. St. Louis City Mar. 12, 2018). This discovery sought 45 years of records, requiring Pharma Tech to identify and process 6.5 million documents, and cost Pharma Tech over half a million dollars to satisfy. *Id.* ¶¶ 11–12, 15. In addition, Pharma Tech incurred significant expenses in litigating (unsuccessfully) these discovery demands, resulting in 11 briefs, 4 hearings, 4 orders and several “meet-and-confers.” See Dkt., *Ingham v. Johnson & Johnson, et al.*, No. 1522-CC10417-01 (Mo. Cir. Ct. St. Louis City); see also Pharma Tech’s Mot. for Protective Order and Costs, at 1–5. Thus, not only was the nonparty required to expend significant resources but so too were the parties and the court, which had to address a range of issues, including notice, the subpoena power, privilege, and Missouri procedural law. See, e.g., Pltfs.’ Mot. to Compel Disc., ¶ 7, *Ingham v. Johnson & Johnson et al.*, No. 1522-CC10417-01 (Mo. Cir. Ct. St. Louis City Aug. 22, 2017); Pharma Tech’s Objections to Special Master’s Order to Compel Disc., at 4, 7–8, 10, *Ingham v. Johnson & Johnson et al.*, No. 1522-CC10417-01 (Mo. Cir. Ct. St. Louis City Oct. 25, 2017).

The increased burdens imposed by this “but-for” approach to jurisdiction threaten *any* forum-state nonparty that has contracted with an out-of-state defendant. As seen in this case, the costs to the nonparty in responding to jurisdictional discovery can be substantial. See, e.g., Victor E. Schwartz, *The U.S. Supreme Court’s Personal Jurisdiction Paradigm*

Shift to End Litigation Tourism, 14 Duke J. of Con. L. & Pub. Policy 51, 74–75 (2019) (“[a]llowing broad discovery on purely jurisdictional matters, before the merits of any alleged claim are considered, could create an undue burden.”). The burden of jurisdictional discovery is already high. In one case, “[j]urisdictional discovery yielded over 5.8 million pages of documents . . . and 34 witness depositions,” *In re: KBR, Inc.*, 893 F.3d 241, 254 (4th Cir. 2018), but that discovery at least was directed to *a party* to the lawsuit. Further expanding the basis for jurisdictional discovery to *nonparties* not only imposes such costs on entities that otherwise would play no role in a legal dispute, it distorts business relationships and interstate commerce. Distributors, packagers and other entities that serve as necessary links in national product distribution chains will incur added costs having nothing to do with their business conduct but solely where they are headquartered. States and local jurisdictions perceived as plaintiff friendly will be placed at an economic disadvantage in attracting businesses, not because of any risk from wrongdoing that the company might commit but because of the jurisdictional “rules of the game,” that place targets on companies that can open jurisdictional doors. Both of these concerns undermine the federal marketplace.

The Missouri court applied the “but-for” approach even though the Plaintiffs lacked their own independent ties to the forum state, such as residence or location of injury. This interpretation of *Bristol-Myers* promotes forum shopping and imposes a much greater burden on nonparties than does the “proximate cause” approach adopted by numerous federal appellate courts. *See, e.g., Harlow v. Children’s Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) (adopting proximate cause standard and noting “the proximate cause standard

better comports with the relatedness inquiry because it so easily correlates to foreseeability, a significant component of the jurisdictional inquiry”); *Beydoun*, 768 F.3d at 507–08 (adopting proximate cause standard and holding “only consequences that proximately result from a party’s contacts with a forum state will give rise to jurisdiction”). The “proximate cause” rule holds that the nonparty’s activity in the forum state must constitute an “important, or [at least] material, element of proof in the plaintiff’s case.” *Harlow*, 432 F.3d at 61 (quotations omitted). Under the “proximate cause” rule, a forum-state nonparty would not face jurisdictional discovery merely because it contracts with an out-of-state defendant. Unless the service performed by a nonparty under a contract supplies the plaintiff with an “important” or “material” element of their claim, specific jurisdiction would not exist. The mere existence of a contract between a forum-state nonparty and out-of-state defendant does not “present factual allegations” suggesting “with reasonable particularity” that further investigation of the nonparty would establish that the service the nonparty performed actually caused the plaintiff’s injury. Accordingly, discovery would not be warranted. *See, e.g., Toys “R” Us, Inc.*, 318 F.3d at 456.

The facts in this case are mirror opposite to those of *Ford*, providing the Court with an opportunity to explicate the limits of *Ford*’s interpretation of “relate to” jurisdiction. *See Ford Motor Co.*, No. 19-368, 2021 WL 1132515, at *12 (Gorsuch, J. concurring) (“Loosed from any causation standard, we are left to guess. The majority promises that its new test ‘does not mean anything goes,’ but that hardly tells us what does.”). Here, Pharma Tech’s bottling of the allegedly defective product unquestionably occurred in the forum state and that bottling was a “but-for” cause of Plaintiffs’

injuries. But unlike the plaintiffs in *Ford*, the *Ingham* Plaintiffs did not purchase or use the product in the forum state, nor did they allege that they were injured by the product in the forum state, or that the events that occurred in Missouri play a role in causing the alleged harm. Where plaintiffs lack their own ties to a forum state, the “but-for” approach permits, if not encourages, virtually unlimited forum shopping. This case presents the Court the chance to elucidate whether application of the “but-for” approach—*when plaintiff-specific forum ties are absent*—distorts Due Process by increasing forum shopping and subverting the interstate judicial system’s “most efficient resolution of controversies.” It should take this opportunity.

CONCLUSION

Due Process is the “instrument of interstate federalism” that protects the whole judicial system against the parts’ self-interested acquisition of jurisdiction. For the foregoing reasons, *Amicus* respectfully asks the Court to grant certiorari to address the serious consequences of the “but-for” approach to jurisdiction on this fundamental constitutional protection.

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