

No. 23-874

IN THE
Supreme Court of the United States

IMPOSSIBLE X LLC,

Petitioner,

v.

IMPOSSIBLE FOODS INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF IN SUPPORT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states that it has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The decision below illustrates the need for this Court's intervention to clarify *Ford*. The panel held that California may determine Impossible X's trademark rights now because it was based there from 2014-2016. No matter that Impossible X left California in 2016, which should eliminate any risk of suit there under this Court's precedents. No matter that Impossible X had no presence in California when the dispute arose in 2020. No matter that there is no connection between Impossible Foods' alleged injury (the threat of enforcement) and Impossible X's California contacts. No matter that Impossible X began using its marks in Illinois in 2010 and obtained a federal trademark registration in 2012. No matter that Impossible Foods did not first use its mark until after Impossible X left California. Because Impossible X at one time "maintained a workspace in California" and "tri[ed] to grow business" there, the panel held, it had undertaken "brand-building" efforts relevant to its trademark rights and that gives California specific jurisdiction. That expansive theory of relatedness cannot be reconciled with *Ford* or numerous circuit-court decisions applying it.

Impossible Foods' opposition is unresponsive. Impossible Foods aims fire at an array of strawmen, various lower-court decisions on the other side of the split, and the entire legal academy. But Impossible Foods all but concedes that many lower courts have concluded with Justice Alito that post-*Ford* relatedness requires some form of rough causation, in direct conflict with the decision below. Impossible Foods

never disputes that this case presents an ideal vehicle. Impossible Foods offers no response at all to Impossible X's merits arguments on *Ford* or the Constitution's original understanding. And Impossible Foods does not explain how Impossible X's California contacts could relate to Impossible Foods' alleged injury of threatened enforcement.

This Court's review is warranted.

ARGUMENT

Impossible Foods misreads the petition and conflates the strict but-for causation standard *Ford* rejected with the rough-causation standard Justice Alito advanced in concurrence. Justice Alito agreed with the majority that the Constitution "does not require ... proof" of a "strict causal relationship." *Ford Motor v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 373 (2021) (Alito, J.). But that "is not to say that no causal link of any kind is needed." *Id.* Because the "whole point" of *Ford*'s "heavy presence" in the forum state was to "put more *Fords* (including those in question here) on [the forum state's] roads," the link between contacts and injury was "causal in a broad sense of the concept." *Id.* at 372, 374; *see also id.* at 365-67 (majority) (making similar points).

Impossible Foods' lead argument is that "Relatedness is a Standalone Means for Establishing Personal Jurisdiction," BIO.9-14, but everyone has always agreed that *Ford* holds as much. On the circuit split, similarly, Impossible Foods says Impossible X alleges that lower courts are "confused by the disjunctive nature of [*Ford*'s] holding," BIO.19, but Impossible X alleges no such thing. The first question presented concerns whether relatedness—the standalone prong—requires Justice Alito's rough causation or instead

there is a categorical rule that no form of causation is required regardless of factual context. And the lower courts adopting Justice Alito’s standard have it right—rejecting the rough-causation standard unmoors the relatedness requirement from any objective test, which in turn unmoors specific jurisdiction from the Constitution’s original understanding, which requires presence through the *International Shoe* minimum-contacts proxy.¹

I. THE QUESTIONS PRESENTED IMPLICATE CLEAR SPLITS

A. First Question Presented

Impossible Foods miscomprehends the nature of the split. The petition explains that some lower courts have held that *Ford*’s factual context is unimportant because rough causation is unnecessary no matter the facts, while others have held that rough causation of the kind present in *Ford* is at least sometimes required. Pet.12. Impossible Foods responds that there is no split because all courts recognize that a “strict causal relationship” is “not required.” BIO.20. No one

¹ Impossible Foods repeatedly makes bafflingly incorrect assertions about the petition. *E.g.*, compare BIO.23 (Impossible X “fail[ed] to advise the Court” that the Eleventh Circuit’s *Del Valle* case concluded that “direct causation is not required”), with Pet.14 (“The Eleventh Circuit has explained that ... ‘direct causation’ is not required.” (quoting *Del Valle*)); compare BIO.15 (accusing Impossible X of citing the dissent below as the majority), with Pet.2 (citing App.54a for the contested proposition and stating in the next sentence that App.54a is “the dissenting panelist”); compare BIO.11 (“the Petition is relatively devoid of citations to [*Ford*]”), with Pet.ix (petition cites *Ford* on 23 pages in a 29-page brief); compare BIO.31 (asserting Impossible X asks this Court to “hold[] the Declaratory Judgment Act unconstitutional”), with Pet.26 (“declaratory actions can raise constitutional concerns” (citing *MedImmune*)).

has ever said that a strict causal relationship is required after *Ford*. Yet Justice Alito, the dissent below, and numerous lower courts have all concluded that *rough* causation is at least sometimes required. *That* conclusion directly conflicts with the decision below’s categorical rule.

Impossible Foods concedes that the First and Eleventh circuits have held that some form of causation is required. BIO.20, 23. Impossible Foods argues that these cases are wrong, BIO.20 (asserting that *Vapotherm* rests on abrogated authority), but cannot deny that they squarely conflict with the decision below, *compare, e.g., Vapotherm v. Santiago*, 38 F.4th 252, 260 (1st Cir. 2022) (courts still “must probe the causal nexus”), *with* App.36a (notion that “some causal nexus” is required “contradicts *Ford*”).

Impossible Foods also does not deny that, unlike the Ninth Circuit, the Third Circuit treats as decisive the fact that a defendant “does not enjoy [Ford’s] pervasive relationship with the forum state.” Pet.13 (quoting App.30); *see also Hepp v. Facebook*, 14 F.4th 204, 208 (3d Cir. 2021) (cited by Impossible Foods) (relatedness requirement unsatisfied “[b]ecause Hepp failed to establish the strong connection present in *Ford*,” where “[t]he contacts between [the forum] states and the company were legion”). When a defendant does not “systematically serve a market in [a Third Circuit forum state],” *Ford* is distinguished. *Martinez v. Union Officine Meccaniche*, 2023 WL 3336644, at *2 (3d Cir. 2023).

The other courts the petition cites are equally clear that they apply something like Justice Alito’s rough-causation standard. Impossible Foods observes that *Hood v. American Auto Care* does not use the term “rough causation,” BIO.22, but the Tenth Circuit

was very clear: it “understand[s] *Ford*” to hold that relatedness is satisfied when “(1) the defendant has purposefully directed activity to market a product or service at residents of the forum State and (2) the plaintiff’s claim arises from essentially the same type of activity.” 21 F.4th 1216, 1224 (10th Cir. 2021). Because the phrase “arises from” “asks about causation,” *Ford*, 592 U.S. at 362, the Tenth Circuit is saying that there must be a causal link between the claim and activity essentially the same as the forum contacts. That is Justice Alito’s rough causation.

Likewise, the “link” the Fifth Circuit required in *Johnson v. TheHuffingtonPost.com* is rough causation, *contra* BIO.21. *Ford*, the court observed, “sold the injurious models in [the forum states].” 21 F.4th 314, 324 (5th Cir. 2021); *see also id.* at 324 n.20 (*Ford* “systematically served a market in [the forum states] *for the very vehicles*” that injured the plaintiffs (emphasis added by Fifth Circuit)). “That link—between the products that injured the plaintiffs and *Ford*’s selling those products in the forum states—supported specific jurisdiction.” *Id.* at 324. That is rough causation.

Similarly, the Oregon Supreme Court and Tennessee Supreme Court understand *Ford* as requiring a link between “the type of claim at issue” and the defendant’s “ongoing connections” to the forum state. *Cox v. HP Inc.*, 492 P.3d 1245, 1257 (Ore. 2021); *Baskin v. Pierce & Allred Constr., Inc.*, 676 S.W.3d 554, 579 (Tenn. 2023). That is rough causation.

Impossible Foods, strangely, highlights Oregon Supreme Court language articulating Impossible X’s theory of relatedness. BIO.23-24. *Ford* says the Constitution does not “always require proof of causation”; the Oregon Supreme Court emphasized the “always”: the Constitution does not “*always* require proof of

causation” because “in some cases” a “but-for causal link” is unnecessary. *Cox*, 492 P.3d at 1255. But because there was no rough causation—that is, “unlike in *Ford*,” there was “no link that connects the product at issue in this case to sales or marketing of similar products in Oregon”—the relatedness requirement was unsatisfied. *Id.* at 1261. Impossible Foods omits *Cox*’s emphasis, BIO.23, perhaps recognizing that *Cox* plainly meant to reject the decision below’s categorical rule.

As the opposition reinforces, division is everywhere. Impossible Foods does not dispute that *Ford* has frequently divided three-judge panels. *See* Pet.15. Nor does it dispute that while the Ninth Circuit relied on 2014-2016 contacts, other courts have held that specific jurisdiction is lacking when the defendant has “ceased to reach” into the forum state. *Johnson*, 21 F.4th at 322; *Cox*, 492 P.3d at 1257 (“ongoing connections”). Impossible Foods does not deny that in one case the Seventh Circuit held opposite the Fifth Circuit on the same facts, claiming that the Fifth Circuit did not “come to grips with” *Ford*. Pet.15. And while Impossible Foods’ purported intra-circuit splits are dubious, *e.g.*, BIO.22, any intra-circuit conflict only highlights the pervasive division.

B. Second Question Presented

The second question presented also implicates a clear split. *See* Pet.16-18. Because the nature of the claim “in a declaratory judgment action” is “to clear the air of infringement charges,” the Federal Circuit holds that in such actions only enforcement activities support specific jurisdiction. *Avocent Huntsville v. Aten Int’l*, 552 F.3d 1324, 1332 (Fed. Cir. 2008). Noting that *Avocent* was a patent case, Impossible Foods discusses differences between trademark and patent

law, but Impossible Foods never disputes that in a trademark declaratory action the nature of the claim likewise is to clear the air of infringement charges. BIO.25-29.

Instead, Impossible Foods misrepresents the Federal Circuit. The “policy considerations unique to the patent context,” BIO.30 (quoting *Avocent*), concerned a different holding, and that statement is abrogated, *Apple v. Zipit Wireless*, 30 F.4th 1368, 1377 (Fed. Cir. 2022) (while prior cases were “interpreted as resting on ‘policy considerations unique to the patent context,’” their considerations actually are “not ... patent-specific”). And the bright-line rule rejected by the Federal Circuit, *see* BIO.30-31, is that a “letter charging infringement can never provide specific jurisdiction,” BIO.31 (quoting 2018 Federal Circuit case), not that only enforcement activities support declaratory-action specific jurisdiction. The latter remains the Federal Circuit’s law.

II. THE PETITION OFFERS AN IDEAL VEHICLE

As the petition explains, this case presents an excellent vehicle. Pet.27-29. Impossible Foods does not dispute that proposition. *See generally* BIO (no vehicle argument).

In its Statement, Impossible Foods asserts that Impossible X founder Joel Runyon “maintained business-related contacts with California” after 2016, BIO.5, but those purported contacts have nothing to do with this suit, and because the Ninth Circuit did not rely on any of them, they are irrelevant. *See, e.g., Skinner v. Switzer*, 562 U.S. 521, 537 (2011) (granting certiorari and ultimately remanding for lower court to decide alternative arguments not addressed below). The decision below rests entirely on Runyon’s California contacts “[b]etween 2014 and 2016.” App.19a; *see*

also App.35a (“for approximately two years [*i.e.*, 2014-2016]” California was Impossible X’s “base point”), 37a (“what we have here” is Impossible X “us[ed] California as its ‘base point’”), 38a (Impossible X was “previously headquartered” in California). Because the decision below rests on the factual premise that Impossible X was based in California from 2014-2016 and undertook commercialization efforts there, and Impossible X stipulates those facts for this appeal, the petition presents pure legal questions.

III. THE DECISION BELOW IS GRIEVOUSLY WRONG

The petition explains that the decision below is grievously wrong under text, history, tradition, and precedent. Pet. 18-27. Impossible Foods offers no response. Instead, Impossible Foods repeatedly asserts that Impossible X “invok[es] *Ford* ... for the proposition that but-for causation is necessary.” BIO.11; BIO.12 (Impossible X “urge[s]” a “strict but-for causation requirement”). But the petition repeatedly—ten times—observes that there is no strict but-for causation requirement. *E.g.*, Pet.3. Impossible Foods spends pages, BIO.9-14, attacking a strawman.

What Impossible Foods calls *Ford*’s “actual holding,” BIO.12, shows the error in the Ninth Circuit’s categorical rule that there “need not be causal relationship” of any kind, App.29a. *Ford* states that specific jurisdiction does not “always requir[e] proof of causation.” BIO.12 (quoting *Ford*). Had the Court intended the Ninth Circuit’s categorical rule, it would have omitted “always” and “proof” and simply said that specific jurisdiction “does not require causation.” By including “always,” the Court implied that proof of causation might sometimes be necessary. And including “proof” reflects the concern that when the defendant has flooded the forum state with its product and

advertising, the plaintiff may not have “ability to present persuasive evidence” on but-for causation even if it exists. 592 U.S. at 367.

The Ninth Circuit disregarded these qualifiers in a case implicating none of *Ford*’s concerns. *Ford*’s holding most certainly was “linked to Ford’s overall size,” *contra* BIO.32—the Court carefully qualified its holding as applying to a defendant “like Ford” whose “business is everywhere” and whose “global” operations include “systematically serving” the forum state, 592 U.S. at 355, 365. A zero-employee LLC that is not systematically serving the forum state is nothing “like Ford.”

Impossible Foods’ attempt to articulate a limiting principle in the decision below reinforces the dissent’s conclusion that none exists. *See* Pet.23. The Ninth Circuit’s limiting principle, according to Impossible Foods, is that the plaintiff must “show that the defendant’s conduct in the forum *relates to* the plaintiff’s claims.” BIO.14. Exactly. Because “everything is related to everything,” *Maracich v. Spears*, 570 U.S. 48, 60 (2013), merely saying that contacts must relate to claims does nothing to ensure that the relatedness requirement “incorporates real limits” and not “anything goes,” *Ford*, 592 U.S. at 362.

Adrift with only the words “related to” untethered from rough causation, the Ninth Circuit pushed the minimum-contacts test past its breaking point.

- Even though specific jurisdiction requires a link between contacts and injury, and the injury in a declaratory action is the threat of enforcement, *see* Pet.26, the Ninth Circuit relied on contacts unrelated to enforcement. Impossible Foods asserts that “Runyon’s [purported] brand-building activities in California are

necessary to the existence of his asserted rights,” BIO.21, but relatedness concerns the relationship between forum contacts and the plaintiff’s injury, not the defendant’s defenses, *see* Pet.26.

- Even though analyzing a declaratory suit “as if it were simply an infringement action” “overlooks the genuine purpose of declaratory judgment actions,” Pet.16 (quoting Federal Circuit), the Ninth Circuit treated this suit no differently than if it were an infringement action.
- The Ninth Circuit disregarded that this suit would not exist had Impossible X ceased using its trademarks in 2017. It is Impossible X’s continuing ownership and protection of its trademark rights—all while under Texas’s sovereign authority—that purportedly makes this suit live. *See* BIO.26-27 (trademark rights exist “only to the extent that marks are used”).
- Under its holding, the Ninth Circuit acknowledged, even if a trademark defendant has been absent from a state for decades, its decades-ago business-development activities will satisfy relatedness and it must hope that a judge deems jurisdiction unreasonable. App.38a-39a.
- Because trademark rights “are determined by the date of the mark’s first use in commerce,” BIO.26 (quoting this Court), and Impossible X did not first use its marks in California, the decision below logically allows any state Impossible X has ever been based in to exercise general jurisdiction over its trademarks. *See* App.34a (this dispute “puts at issue the full extent of Impossible X’s use of the IMPOSSIBLE mark”).

- The contacts the Ninth Circuit relied on are Impossible X’s general business activities from 2014-2016. Under the decision below, any forum-state business development, “past or present,” BIO.32, permanently “exposes [a company] to the State’s coercive power,” *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 918 (2011).

Impossible Foods responds to only the last bullet, asserting that the Ninth Circuit actually relied on “Impossible X’s *brand-building activities*.” BIO.16. But the dissent and district court were right—the contacts the panel relied on are in fact Impossible X’s “general business activities.” App.54, App.86. When explaining Impossible X’s relevant contacts, the panel stated: “Between 2014 and 2016, Runyon—and by extension, Impossible X—was based in California.” App.19; *see also* App.55 (majority “repeatedly references that Impossible X and its owner used to be ‘based in California’”). Runyon, the panel continued, “maintained ... [a] workspace in California” and “conducted his business activities” there. App.19. The panel emphasized that Runyon “tri[ed] to grow business” while in California, the workspace was “festooned with company logos,” and Runyon did “calls and meetings” and “videos and writing” there. App.6-7, 19. These contacts are “general business operations” “more akin to those that would be used in a general jurisdiction ‘nerve center’ analysis.” App.86-87.

Impossible Foods’ opposition gives up the game. Echoing the Ninth Circuit, Impossible Foods purports to invoke “brand-building activities” but then asserts that “*all of Impossible X’s activities in California*, past or present, have occurred in connection with that company’s versions of the IMPOSSIBLE mark.” BIO.32

(emphasis added). An approach that invokes “trying to grow business” and “calls and meetings,” App.7, 19—or, more simply, “all” of a company’s activities, BIO.32—is fairly described as invoking general business activities.

The decision below will make it “nigh impossible” for trademark holders and other companies to foresee where they may have litigation risk. App.55a (citing this Court). Impossible Foods cites several recent cases in the Ninth Circuit holding that relatedness was lacking, BIO.14-19, but Impossible X never asserted that no court will ever again dismiss for lack of relatedness. The problem, rather, is that the decision below leaves relatedness to a rudderless judicial eyeball test. Specific-jurisdiction standards must have “predictability” that gives defendants “assurance as to where [their] conduct will and will not render them liable to suit.” *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980). The decision below fails in that regard.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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April 26, 2024