No. 18-311

In the Supreme Court of the United States

EXXON MOBIL CORPORATION, PETITIONER

v.

MAURA HEALEY,
ATTORNEY GENERAL OF MASSACHUSETTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF FOR THE PETITIONER

THEODORE V. WELLS, JR.
DANIEL J. TOAL
JAREN JANGHORBANI
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

JUSTIN ANDERSON
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006

KANNON K. SHANMUGAM
Counsel of Record
JOHN S. WILLIAMS
STACIE M. FAHSEL
MICHAEL J. MESTITZ
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

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In the proceedings below, respondent asked the Massachusetts Supreme Judicial Court to make something out of nothing by finding specific personal jurisdiction over petitioner even in the conceded absence of any record evidence that "indicates a specific advertisement to consumers" in Massachusetts concerning climate change, the subject of respondent's sprawling document request. Mass. S.J.C. Oral Arg. Tr. 55:23-25. Now, respondent asks this Court to make nothing out of something by denying review in the face of a recognized and entrenched conflict in the lower courts, which is implicated by the decision below and is cleanly presented here.

That conflict involves the fundamental question of when the Constitution will allow a nonresident defendant to be "expose[d] * * * to the State's coercive power,"

Goodyear Dunlop Tires Operations, S.A. v. *Brown*, 564 U.S. 915, 918 (2011), and it has bedeviled the lower courts for over thirty years. Respondent would have this Court ignore the conflict based on the threat that she could end her investigation at any time and thereby moot the question presented. That assertion signals desperation; it provides no basis for denying review. The Court should grant the petition for a writ of certiorari and reverse the Supreme Judicial Court's profoundly flawed decision.

A. The Decision Under Review Implicates A Conflict Among The Courts Of Appeals And State Courts of Last Resort

In her brief in opposition, respondent attempts to gloss over the conflicting standards courts have used when determining whether a nonresident defendant's contacts with a forum are sufficiently related to support the exercise of specific personal jurisdiction over that defendant. Respondent's efforts are unavailing, and that conflict warrants the Court's review in this case.

1. Respondent contends that there is no conflict among lower courts concerning the standard for relatedness in the specific context of investigative document requests. See Br. in Opp. 14-16. That is an exercise in diversion.

To be sure, it is true that courts considering personal-jurisdiction challenges to document requests have "applied the 'arise out of or relate to' standard" (or similar general standards) in evaluating the relationship between the subject matter of the investigation or requests and the party's forum contacts. Br. in Opp. 14; see, *e.g.*, *Gucci America, Inc.* v. *Weixing Li*, 768 F.3d 122, 141-142 (2d Cir. 2014); *SEC* v. *Knowles*, 87 F.3d 413, 418 (10th Cir. 1996); *SEC* v. *Lines Overseas Management, Ltd.*, Civ. No. 04-302, 2005 WL 3627141, at *3-*4 (D.D.C. Jan. 7, 2005).

But that signifies little: those courts have simply recognized that the general relatedness requirement this Court has articulated in cases such as *Helicopteros Nacionales de Columbia, S.A.* v. *Hall*, 466 U.S. 408 (1984), and *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), applies with full force in the context of investigative document requests. See Pet. 16.

It is the effort of lower courts to articulate a definitive test for relatedness, however, that has given rise to the dueling but-for and proximate-cause standards discussed in the petition and the supporting amicus briefs. See, *e.g.*, Pet. 12-16; DRI Br. 6-11. And it is the conflict between those standards that is implicated by the decision below and that warrants the Court's review.

2. Although respondent suggests that there is not a "split warranting review," she acknowledges (as she must) that the federal courts of appeals and state courts of last resort have articulated conflicting tests for relatedness. See Br. in Opp. 16-21. Indeed, respondent seemingly accepts petitioner's classification of courts within the conflict, save for the Massachusetts Supreme Judicial Court and the First Circuit. Respondent's caveat is curious, given that numerous courts have identified those courts as being on opposite sides of the conflict. See *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 318-319 & n.8 (3d Cir. 2007); see also *Dudnikov* v. *Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) (Gorsuch, then-J.) (placing the First Circuit in the group of courts applying a proximate-cause standard); *Shoppers Food Warehouse* v. *Moreno*, 746 A.2d 320, 334 (D.C.) (en banc) (placing the Supreme Judicial Court in the group applying a but-for standard), cert. denied, 530 U.S. 1270 (2000).

In any event, respondent's characterization of the positions of those courts is incorrect. As to the Massachusetts Supreme Judicial Court: respondent contends that, in *Tatro* v. *Manor Care, Inc.*, 625 N.E.2d 549 (1994), that court applied a but-for approach when construing Massachusetts' long-arm statute, but did not do so in the context of the Due Process Clause's relatedness requirement. See Br. in Opp. 17. As respondent acknowledges, however, that was not the position she took in this case before the court below—the Supreme Judicial Court. See *id.* at 18 n.10.

Respondent had it right the first time. To be sure, in *Tatro*, the Supreme Judicial Court was interpreting the provision of Massachusetts' long-arm statute granting jurisdiction over a person as to a cause of action "arising from" the person's transacting business in the State. See 625 N.E.2d at 551 (quoting Mass. Gen. Laws ch. 223A, § 3(a)). But that statute functioned as "an assertion of jurisdiction * * * to the limits allowed by the Constitution of the United States." *Id.* at 553. The court concluded there was "no reason" to take a different approach "with respect to the 'arising from' language" in the statute, which closely resembled this Court's "arise out of or related to" constitutional standard. *Ibid.* (internal quotation marks and citation omitted). Accordingly, when the court announced a but-for standard, it was necessarily taking a position on the relatedness standard for purposes of the Due Process Clause. See *id.* at 554 (citing *Burger King* for the proposition that the claim must "arise out of, or relate to, the defendant's forum contacts").[1]

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[1] Lower courts in Massachusetts have repeatedly applied *Tatro*'s but-for test for determining relatedness in the constitutional context. See, *e.g.*, *Diamond Group, Inc.* v. *Selective Distribution International, Inc.*, 998 N.E.2d 1018, 1023, 1025 (Mass. App. Ct. 2013); *C&M*

As to the First Circuit: respondent is mistaken when she suggests that it does not apply a proximate-cause standard. See Br. in Opp. 18. Respondent seemingly relies on the First Circuit's conclusion in *Nowak* v. *Tak How Investments, Ltd.*, 94 F.3d 708 (1996), cert. denied, 520 U.S. 1155 (1997), that it was constitutionally permissible to exercise personal jurisdiction on facts similar to those in *Tatro*. See *id.* at 712-714. That two courts reached the same result on similar facts, however, hardly indicates that the courts applied the same legal standard.

In *Nowak*, the First Circuit directly addressed the conflict presented here and concluded that "the proximate cause standard better comports" with due process, while acknowledging that "strict adherence" might not be necessary in all circumstances. See 94 F.3d at 714-716. Since that decision, the First Circuit has consistently applied proximate-cause concepts, requiring a "demonstrable nexus" such that "the litigation itself is founded directly on" the forum contacts, *C.W. Downer & Co.* v. *Bioriginal Food & Science Corp.*, 771 F.3d 59, 66 (1st Cir. 2014) (citation omitted), or that the forum contacts "form an important, or at least material" element of the subject matter of the dispute, *Harlow* v. *Children's Hospital*, 432 F.3d 50, 60-61 (1st Cir. 2005) (alteration, internal quotation marks, and citation omitted).

The most that can be said about the First Circuit, then, is that it eschews any "rigid proximate cause formulation." Br. in Opp. 19. By respondent's own recognition, however, that merely places the First Circuit with at least

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Management, Inc. v. *Cunningham-Warren Properties, LLC*, 3 N.E.3d 1119 (table), 2014 WL 738043, at *4 (Mass. App. Ct. 2014); *Gleason* v. *Jansen*, 925 N.E.2d 573 (table), 2010 WL 1708746, at *2 & n.4 (Mass. App. Ct. 2010); *Donaldson* v. *Shapemix Music, LLC*, 31 Mass. L. Rptr. 580, 2013 WL 7121289, at *3-*4 (Mass. Super. Ct. 2013).

four other courts of appeals that reject but-for causation as "insufficient." See *id.* at 18-19. The conflict among the lower courts concerning the standard for relatedness has persisted since this Court's decision in *Helicopteros*, *supra*, and it has survived the Court's recent decision in *Bristol-Myers Squibb Co.* v. *Superior Court of California*, 137 S. Ct. 1773 (2017). See Pet. 15-16; Chamber Br. 6, 10. That conflict is crying out for the Court's review.

B. The Decision Under Review Deepens Confusion Among The Courts Of Appeals And State Courts of Last Resort

Review is also warranted to resolve confusion in the lower courts regarding whether personal jurisdiction can be based on the mere existence of a contractual right regarding a third party's in-forum behavior—here, petitioner's apparently unexercised right to review and approve advertising by its Massachusetts licensees. On that issue, too, respondent's arguments are unavailing.

To begin with, respondent asserts that the issue was not fairly included in the question presented. See Br. in Opp. 21-22. That is a singularly odd assertion where, as here, an *entire section* of the petition for certiorari was devoted to the issue. See Pet. 19-23. Not surprisingly, the question presented was specifically drafted to cover that issue as well as the relatedness issue. It asks "[w]hether a court may exercise personal jurisdiction over a nonresident corporation to compel its compliance with an investigatory document request where jurisdiction is based principally *on third-party contacts* that are unrelated to the subject matter being investigated." Pet. i (emphasis added). The question presented thus specifically adverts to, and unambiguously incorporates, the subsidiary issue of whether the Supreme Judicial Court properly relied in its personal-jurisdiction analysis on the contacts of third parties—here, petitioner's Massachusetts licensees—

based on petitioner's contractual relationship (and unexercised contractual right) vis-à-vis those parties.

Respondent correctly notes that courts that have considered the issue have often looked to state agency law to determine whether there is a basis to impute the third party's contacts to the nonresident defendant. See Br. in Opp. 22-24. But that does not mean the issue is somehow rendered an unreviewable one of state law. Indeed, where state courts have relied on state law to assert personal jurisdiction over a party, this Court nonetheless reviews such decisions to ensure that "the [state] courts' exercise of personal jurisdiction under [state] law comports with the Due Process Clause of the Fourteenth Amendment." *BNSF Railway Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1558 (2017).

When it comes to the confusion in the lower courts as to whether the actual exercise of control over a third party is required, respondent has conspicuously little to say. Respondent does not dispute that the lower courts have articulated different standards; instead, she merely questions whether those standards have resulted in irreconcilable outcomes. See Br. in Opp. 24-26. At a minimum, however, the confusion concerning the correct standard—a confusion that the decision below significantly exacerbates, see Pet. 22-23—provides an additional justification for review in this case.[2]

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[2] In a footnote, respondent suggests that petitioner has forfeited its argument on the issue. See Br. in Opp. 24 n.17. Before the Supreme Judicial Court, however, petitioner unambiguously argued that "[t]he level of control extended to [petitioner] under the [license agreements] is entirely consistent with that found time and again not to create an agency relationship between the brand owner and the [licensees]," because licensees "control their own marketing" and respondent "failed to offer evidence demonstrating control beyond the [license agreement] itself." Pet. Mass. S.J.C. Br. 20-22.

C. This Case Is An Ideal Vehicle To Address The Question Presented

Respondent contends that the case is a poor vehicle to consider and resolve the question presented. See Br. in Opp. 27-35. None of the identified vehicle problems has merit.

1. Respondent contends that petitioner "waived the question presented." Br. in Opp. 27. That is simply incorrect. The Supreme Judicial Court applied a but-for standard to determine whether it could exercise personal jurisdiction over petitioner—thus unambiguously passing on the question presented. See Pet. 10-11, 16-18.[3] But beyond that, petitioner specifically urged the court to apply one of the First Circuit's articulations of a proximate-cause standard: specifically, that "'in-state conduct must * * * form an important, or at least material, element' of the legal claim." Pet. Mass. S.J.C. Br. 16 (alteration in original) (quoting *United Electrical, Radio & Machine Workers* v. *163 Pleasant Street Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992)). Petitioner explained that "[n]othing in the record establishe[d] an important or material relationship, *much less a 'but for' relationship*, between the [licensees'] service stations and either the documents requested by the [civil investigative demand] or the Attorney General's investigation of possible consumer fraud." *Id.* at 28 (emphasis added).

Petitioner thus argued that due process requires an "important" or "material" relationship between the contacts and the subject matter of the civil investigative demand—*i.e.*, proximate-cause relatedness—as well as but-

[3] Respondent briefly argues to the contrary, see Br. in Opp. 29-30, but her argument rests on the invalid premise that, in *Tatro*, the Supreme Judicial Court did not apply a but-for standard to the due-process inquiry. See pp. 3-4, *supra*.

for relatedness. That certainly does not constitute a forfeiture of the argument that proximate cause is the appropriate standard—an argument that was both pressed and passed upon below. See, *e.g.*, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

2. Respondent next threatens that she could unilaterally render the case moot. See Br. in Opp. 28-29. As a preliminary matter, it is odd for respondent to claim that she could file a complaint or would otherwise end the underlying investigation when no documents have yet been produced in response to the civil investigative demand. See *id.* at 29. But more broadly, respondent provides no affirmative reason to believe that the end of the investigation is imminent (and that mootness might be likely). This Court should not be menaced by respondent's empty threat. After all, *any* case involving a challenge to the exercise of personal jurisdiction could potentially be mooted by the dismissal of the lawsuit at issue, since the plaintiff is the master of the complaint. That is surely not a sufficient basis for the Court to decline to grant review.

3. Finally, respondent advances various merits arguments in support of the decision below. See Br. in Opp. 30-35. Tellingly, most of those arguments were not embraced by the Supreme Judicial Court, and all of them lack merit.

Respondent seeks to justify the civil investigative demand on the ground that it sought advertisements used by petitioner and its licensees. See Br. in Opp. 32. But that proves too much, because, as respondent acknowledges, the licensees' ads did not "expressly 'address' the environmental topic at issue." *Ibid.* (citation omitted).[4]

[4] As respondent notes, it is possible that the Supreme Judicial Court also meant to consider petitioner's advertisements for engine-

On respondent's theory, a civil investigative demand could ask for *any* advertisements, no matter how unrelated to the actual subject matter of the investigation, and then use that request as a bootstrap to seek *all* of the documents related to the subject matter of the investigation. It is hard to imagine a rule less capable of "ensur[ing] that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Burger King*, 471 U.S. at 475 (internal quotation marks and citations omitted); see Chamber Br. 17-19.

As to the argument that petitioner may have somehow misled its licensees, respondent cannot dispute that the civil investigative demand does not seek any communications between petitioner and its licensees on which to base a theory that they were misled. See Br. in Opp. 32. Instead, respondent simply points the Court back to the sole request in the demand for the licensees' ads. See *ibid.*

Respondent next turns to a variety of other alleged contacts between petitioner and Massachusetts on which the Supreme Judicial Court did not rely—and with good reason. See Br. in Opp. 33. Respondent cites petitioner's operation of a website accessible in Massachusetts, which the court did not mention in its relatedness inquiry. See *ibid.* That is no doubt because, like a national advertisement, a website that does not specifically target Massachusetts residents is insufficient to confer specific personal jurisdiction. See, *e.g.*, *NexLearn, LLC* v. *Allen Interactions, Inc.*, 859 F.3d 1371, 1379 (Fed. Cir. 2017).

Respondent also relies on a set of contacts involving petitioner's securities, which, she recognizes, the Supreme Judicial Court did not consider. See Br. in Opp. 33-

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lubrication products, which are derived from fossil fuels. See Br. in Opp. 32-33. As with the licensees' ads, however, respondent does not argue that petitioner's small set of Massachusetts-specific ads were misleading. See *ibid.*

34. As the court acknowledged, "very few of the [civil investigative demand's] requests even mention investors or securities." Pet. App. 17a n.9. Respondent specifically cites petitioner's sale of securities to Massachusetts investors. But she forgets that those sales were only of short-term notes (no longer than 270 days) with fixed-rate returns, see S.J.C. App. 65, which renders it highly unlikely that the purchasers of those notes will "suffer significantly" from any as-of-yet-unidentified misrepresentations about the long-term impact of climate change on the company's prospects. Br. in Opp. 33.

Respondent cannot dispute that the existence of personal jurisdiction in this case is outcome-determinative. And as discussed above, the Supreme Judicial Court's decision squarely implicates a conflict regarding the standard for relatedness for purposes of specific personal jurisdiction. The decision under review presents this Court with an ideal opportunity to resolve that conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE V. WELLS, JR.
DANIEL J. TOAL
JAREN JANGHORBANI
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

JUSTIN ANDERSON
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006

KANNON K. SHANMUGAM
JOHN S. WILLIAMS
STACIE FAHSEL
MICHAEL J. MESTITZ
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

DECEMBER 2018