No. 18-311

In the Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

MAURA HEALEY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

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

BRIEF IN OPPOSITION

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts
ELIZABETH N. DEWAR
State Solicitor
SETH SCHOFIELD*
Senior Appellate Counsel
AMANDA I. MOREJON
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
seth.schofield@mass.gov
(617) 963-2436
**Counsel of Record*

QUESTION PRESENTED

Whether a state court may exercise specific jurisdiction over a nonresident corporation to enforce a state attorney general's civil investigative demand for documents that concern the nonresident's activities in the forum state and are sought to ascertain whether those activities give rise to a claim for liability.

TABLE OF CONTENTS

Table of Contents – Continued

TABLE OF AUTHORITIES

Cases *Page*

Table of Authorities – Continued

Cases – cont'd *Page*

Table of Authorities – Continued

Cases – cont'd *Page*

Table of Authorities – Continued

Cases – cont'd *Page*

Table of Authorities – Continued

Cases – cont'd *Page*

Table of Authorities – Continued

Cases – cont'd *Page*

Table of Authorities – Continued

Table of Authorities – Continued

Miscellaneous – cont'd *Page*

INTRODUCTION

Hundreds of "Exxon" and "Mobil" retail service stations operate in Massachusetts. Exxon Mobil Corporation (Exxon) has entered into franchise agreements that give it the right to control, and a share of the profits from, the marketing and sale of its products at these service stations. And Exxon admits it has itself advertised its products and sold securities in Massachusetts. The Massachusetts Attorney General is currently investigating whether Exxon has violated Massachusetts' consumer and investor protection law in the sale, and advertising and solicitation for sale, of its products and securities in Massachusetts. As part of this investigation, the Attorney General issued a civil investigative demand to Exxon, seeking documents relevant to the investigation. Exxon filed suit to quash the demand. The trial court allowed the Attorney General's cross-motion to compel compliance. In affirming that the trial court had specific personal jurisdiction to enforce the demand, the Supreme Judicial Court applied "settled principles" in deciding the fact-bound question at hand, *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1781 (2017): whether the Attorney General's investigation arises out of or relates to Exxon's Massachusetts contacts.

This Court should deny Exxon's petition seeking review of that decision, because it presents no question warranting this Court's intervention. The principal purported split of authority on the "relatedness" inquiry is not presented by the facts here, which concern an investigatory demand, rather than a plaintiff's legal claim. The few courts to have considered how to

analyze relatedness in the context of a pre-litigation investigative subpoena (just three, including the Supreme Judicial Court) have all applied a consistent standard, which Exxon itself endorsed below—thus waiving this issue. Exxon's alleged split is, moreover, illusory; the court below did not apply the "but for" test Exxon assails, and no court in the country has expressly adopted the "proximate cause" requirement Exxon now seeks. And the petition's second area of alleged doctrinal "confusion" regarding agency law is not fairly included in the question presented; concerns an unreviewable state-law question; was also waived below; and, in any case, presents no such confusion at all. The petition also is an exceedingly poor vehicle for review of any question: among other reasons, it arises from an ongoing investigation, the conclusion of which could at any time moot this dispute.

STATEMENT

1. A government agency can investigate potential violations of law "merely on suspicion that the law is being violated." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). Accordingly, Massachusetts law authorizes the Attorney General to investigate "whenever [s]he believes a person has engaged in or is engaging in" a violation of Massachusetts' Consumer Protection Act "to ascertain whether in fact [that] person" is violating the Act. Mass. Gen. Laws ch. 93A, § 6(1). The Act, Massachusetts' state analogue to the Federal Trade Commission Act, 15 U.S.C. 45, prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," Mass. Gen. Laws ch. 93A, § 2(a), including "the advertising, the offering for sale . . . [and] the sale

. . . or distribution of any services," "property," or "security," *id.* § 1(b).

Liability under the Act depends on the "circumstances" of each case and the "context" in which they occur, *Commonwealth v. Fremont Investment & Loan*, 897 N.E.2d 548, 556 (Mass. 2008), and can arise from fraudulent statements, half-truths, and omissions. A statement that is "true as a literal matter" can, for example, violate the Act if a "failure to disclose material information" creates "an over-all misleading impression" or "might have influenced [a] buyer to refrain from the purchase." *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 487 (Mass. 2004) (citation omitted). Because an "effective investigation requires broad access to sources of information," much of which is "within the control of the investigated party," civil investigative demands are frequently necessary and appropriate to uncover whether such violations have occurred, including demands intended to ascertain the full extent of the target's activities and their context. *In re Yankee Milk, Inc.*, 362 N.E.2d 207, 214 (Mass. 1977); *see also Morton Salt*, 338 U.S. at 642 ("The only power . . . involved here is the power to get information from those who best can give it and who are most interested in not doing so.").[1]

---

[1] *See also* National Association of State Attorneys General, *State Attorneys General Powers and Responsibilities* 232 (Emily Myers, ed., 3d ed. 2013) (describing civil investigative demands as "one of the most effective statutory tools" for conducting thorough investigations); *Mollison v. United States*, 481 F.3d 119, 123 (2d Cir. 2007) (administrative subpoena "is an important tool in the preliminary information-gathering process designed to determine whether a violation exists, not to actually prosecute the violation").

2. The Attorney General is investigating whether Exxon has violated the Act. In aid of that investigation, on April 19, 2016, the Attorney General served Exxon's Massachusetts registered agent for service of process with the civil investigative demand at issue here. Pet. App. 27a.

As the civil investigative demand states, the Attorney General issued it as "part of a pending investigation concerning potential [state law] violations . . . arising both from (1) the marketing and/or sale of energy and other fossil fuel derived products to consumers in . . . [Massachusetts] . . . and (2) the marketing and/or sale of securities . . . to investors in . . . [Massachusetts]." Pet. App. 27a-28a. Among other document requests trained on Exxon's relevant connections to and conduct in Massachusetts, the demand requests "all advertisements . . . used by" Exxon and its "franchisees" to "solicit or market Exxon Products and Services in Massachusetts." S.J.C. App. 109. It also seeks documents "concerning Exxon's consideration of public relations and marketing decisions . . . in connection with Exxon's offering and selling of Securities in Massachusetts." *Id*. at 108. And the demand seeks further documents to inform the Attorney General's consideration of Exxon's in-state conduct, including documents about a draft communications plan that aimed to influence public perception of the harmful impacts associated with Exxon's fossil-fuel products. *See id*. at 104; *see also id*. at 703-10 (draft plan).

Exxon has yet to produce a single document in response to the Attorney General's civil investigative demand, despite producing more than a million pages of documents in response to a similar request from the New York Attorney General. *See* Pet. App. 20a-21a &

n.12. Notwithstanding Exxon's refusal to cooperate with Massachusetts, the Attorney General's investigation of Exxon's conduct remains active; in addition to the presence in Massachusetts of hundreds of Exxon-branded service stations, Massachusetts-based institutional investors hold billions of dollars in Exxon stock. *See* S.J.C. App. 801-02, 804. And Exxon is already facing several lawsuits, including one brought by the New York Attorney General following her own investigation, which alleges that Exxon defrauded investors about the value of the company's assets by stating publicly that it had fully accounted for environmental risks while privately minimizing or even ignoring those risks.[2]

3. The record reflects numerous and multifaceted Exxon contacts with Massachusetts, forming part of the basis of the Attorney General's belief that Exxon may have violated Massachusetts' Consumer Protection Act. Exxon has contractual ties to, and relevant control over, more than three hundred Exxon-branded service stations in Massachusetts—"[o]ur stations," in Exxon's parlance. S.J.C. App. 778, 780-83, 793. The operation of these stations is governed by a franchise contract, "a primary purpose of [which] . . . is to optimize effective and efficient distribution and representation of [Exxon's] Products through planned market and image development." *Id.* at 1524 (§ 13(a)); *see* Pet.

---

[2] Summons and Complaint, *New York v. Exxon Mobil Corp.*, Index No. 452044/2018, at ¶¶ 1-21 (N.Y. Sup. Ct. Oct. 24, 2018), https://tinyurl.com/y76mep98; *see also, e.g.*, *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-3111-K, 2018 WL 3862083, at *1, 6-16 (N.D. Tex. Aug. 14, 2018) (denying motion to dismiss where plaintiffs' securities fraud complaint satisfied heightened scienter pleading standard).

App. 11a. Franchisees agree "that the operation of" Exxon-branded stations "impacts customers' perceptions and acceptances of" Exxon's products, S.J.C. App. 1510 (§ 2(d)(2)), and to "diligently promote the sale of [Exxon- or Mobil-branded fuel], including through advertisements," Pet. App. 9a.[3] Exxon holds "'the authority to review and approve, in its sole discretion, all forms of advertising and sales promotions' . . . that . . . 'relate[] to any Business operated at a'" branded station. Pet. App. 9a. Exxon profits from its Massachusetts franchisees by collecting fees from them based on their use of its name and their sale of Exxon-branded fuel in Massachusetts. *Id.* at 8a, 15a.

Exxon has itself directly advertised and marketed its fossil-fuel products in Massachusetts through radio, television, and print and online media. S.J.C. App. 329 (¶ 47). Exxon admitted to advertising its engine-oil products—products covered by the civil investigative demand—on the radio and in print in Massachusetts. Pet. App. 14a, 28a. Exxon has touted its 2012 contract to supply its engine oil to 2,500 Massachusetts state police vehicles, stating in a press release that the product will cause a "positive environmental impact," including improved vehicle "fuel economy," and allow "the everyday driver" to save "over $400 on gasoline over the life of their vehicles." S.J.C. App. 795-96.[4] And Exxon also uses its website and

---

[3] Exxon promises to provide its franchisees with "best-in-class marketing and advertising support," "dedicated sales expertise," and "[e]asy access to advertising materials." S.J.C. App. 791.

[4] Exxon also sells its engine oil products in Massachusetts through national retailers, with the expectation and intent that the products will be sold at the retailers' Massachusetts-based

mobile telephone "Fuel Finder" and "Speedpass" payment-processing applications to market and sell its gasoline and engine-oil products at its Massachusetts Exxon-branded service stations. *See id.* at 760-76, 778-83, 791. Exxon intends that those payment platforms will "attract more customers" and "reward . . . loyal" ones. *Id.* at 793.

Exxon also interacts with Massachusetts investors and securities advisors. Exxon admitted below that it recently sold securities in the form of short-term fixed rate notes directly to Massachusetts investors. S.J.C. App. 65. The Massachusetts Pension Reserves Investment Trust and Massachusetts-based institutional investors also hold billions of dollars in Exxon common stock. *Id.* at 330, 802, 804. Investment advisors at those entities make decisions about purchasing and selling Exxon securities based on what Exxon communicates to them, whether directly or indirectly, through private and public statements about future earnings and risks to the value of its assets over time; for example, even before the multiple pending securities fraud lawsuits were filed against Exxon, *supra* at 5 & n.2, one Massachusetts investment firm manager had stated that Exxon has presented publicly a "willfully distorted view" of the environmental risks to the value of its assets "to minimize" investors' ability to "accurately price [that risk] into Exxon's shares," S.J.C. App. 700.

4. On June 16, 2016, Exxon filed a petition asking the Massachusetts Superior Court for Suffolk County to set aside or modify the civil investigative demand or

---

locations identified by Exxon for consumers on its website. S.J.C. App. 760-75.

to stay it pending resolution of a parallel federal court challenge filed the previous day. Pet. App. 2a.[5] Among other grounds, the petition alleged that the court lacked personal jurisdiction over Exxon to enforce the civil investigative demand. The Attorney General answered and cross-moved for an order compelling Exxon's compliance. *Id.* Exxon argued to the trial court that, under the Due Process Clause, the company's in-state contacts would be "sufficiently related to a cause of action only if the injury . . . 'would not have occurred *but for* the defendant's forum-state activity.'" Exxon's Consol. Mem. in Further Supp. of its Emergency Mot. and in Opp. to Mot. to Compel, No. 16-1888-F, at 5 (Mass. Super. Ct. Sept. 8, 2016) (citation omitted, emphasis added).

The Superior Court denied Exxon's motion, allowed the Attorney General's cross-motion to compel, and directed the parties to apprise the court of any document-production-related disputes in need of resolution. Pet. App. 27a, 39a, 42a.[6] The court found that "the Attorney General ha[d] assayed sufficient

---

[5] Exxon filed the federal-court challenge in the Northern District of Texas against both the Massachusetts and New York Attorneys General. *See* Pet. App. 2a n.1. The suit was later transferred to the Southern District of New York, and the district court granted the Attorneys Generals' motions to dismiss. *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679 (S.D.N.Y. 2018), *appeal pending sub nom.*, *Exxon Mobil Corp. v. Healey*, No. 18-1170 (2d Cir.).

[6] While the order thus contemplated additional trial court proceedings regarding the document production, the order is treated as an appealable final judgment under Massachusetts law. *See CUNA Mutual Insurance Society v. Attorney General*, 404 N.E.2d 1219, 1221-22 (Mass. 1980).

grounds—her concerns about Exxon's possible misrepresentations to Massachusetts consumers—upon which to issue the [demand]," *id.* at 37a, the scope and specificity of which the court also upheld, *id.* at 38a-39a. The court also found that Exxon's Massachusetts contacts satisfied both Massachusetts' long-arm statute, Mass. Gen. Laws ch. 223A, § 3, and the Due Process Clause's three-part specific personal jurisdiction inquiry. Pet. App. 29a-35a. With respect to consideration of relatedness in those analyses, the court relied on a but-for relatedness test only in its state-law long-arm analysis, *id*. at 30a, and noted that, for due process purposes, a court considers "the relation of the claim to the defendant's forum contacts," *id.* at 34a. In that regard, the court found that Exxon's franchise contracts give Exxon direct control of "the very conduct at issue in th[e] investigation—the marketing of Exxon products to consumers." *Id.* at 33a. The court did not rely on or consider Exxon's other Massachusetts-based contacts cited by the Attorney General in support of specific jurisdiction. *See id.* at 29a-35a.

The Supreme Judicial Court affirmed. Pet. App. 2a-3a. Before that court, Exxon contested personal jurisdiction only on relatedness grounds under the Due Process Clause, waiving any argument regarding the other constitutional prerequisites: that it had not purposefully availed itself of the privilege of conducting business in Massachusetts, or that exercising jurisdiction over Exxon would offend traditional notions of fair play and substantial justice. Exxon S.J.C. Br. 1; *see also* Pet. App. 12a-17a (concluding that these prerequisites were in any case met). In its argument, Exxon accurately stated that the Supreme Judicial Court has used a "but for" test only in its long-arm analysis, and

not also in its due process analysis. S.J.C. Br. 16. Exxon's opening brief initially contended that jurisdiction would be proper only where the "*legal claims* . . . 'arise[] out of or relate[] to the [non-resident's] contacts with the forum,'" *id.* at 16 (emphasis added, citation omitted), and added that the "'in-state conduct must . . . form an important, or at least material, element' of *the legal claim*," *id.* (emphasis added, citation omitted). Because this matter concerns a civil investigative demand, not a plaintiff's legal claim, the Attorney General responded that the court should focus its relatedness inquiry on "the relationship between Exxon's Massachusetts contacts and the [demand's] areas of inquiry—not a particular [potential] future" claim. A.G. S.J.C. Br. 29 (citations omitted). Exxon in reply urged the court to employ that test too. S.J.C. Reply Br. 8-9.

The Supreme Judicial Court accordingly started its opinion by stating that it would focus on investigation-related conduct, not "suit-related" conduct, because this case "involves an investigation." Pet. App. 4a. Thus, the court noted, its analysis should "consider the relationship between Exxon's Massachusetts activities and the 'central areas of inquiry covered by the [Attorney General's] investigation.'" *Id.* (citations omitted).

The court then considered whether jurisdiction was proper under Massachusetts' long-arm statute and the Due Process Clause. *Id.* at 7a-17a & n.3. The court found that Exxon's activities satisfied the long-arm statute, because, for example, "Exxon has the right to control the [franchisees'] advertising of its fossil fuel products to Massachusetts consumers," *id.* at 10a—communications to consumers the demand seeks

to discover, *see id.* at 11a. Turning to the due process analysis, the court returned to Exxon's network of service-station franchisees and its contractual right to control their marketing and then considered many of Exxon's other contacts with Massachusetts: its creation of Massachusetts-specific print and radio advertisements, its website directing consumers to Massachusetts-based Exxon-branded stations, its enjoyment of fees from its Massachusetts stations, and its assisting Massachusetts stations in procuring the additives necessary for Exxon-branded fuel. *Id.* at 14a-16a.

Working within the framework established by this Court's opinions, the court concluded that those contacts satisfied the constitutional minimum. *Id.* at 12a-15a (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)). With respect to the relatedness inquiry, the court concluded that the Attorney General's Consumer Protection Act investigation did "'arise out of, or relate to' these contacts." *Id.* at 15a (citation and alterations omitted). Noting the Act's prohibition on deceptive advertising and requirement of honest disclosures in business transactions, the court found that Exxon's potential "misrepresentations or omissions about" the long-term viability of its business model (*i.e.*, the production, promotion, and sale of fossil-fuel products) would be "highly relevant" to its Massachusetts franchisees, who enter into fifteen-year-long contracts to sell those products to Massachusetts consumers. *Id.* at 16a. At no point in its decision did the court employ a "but for" relatedness analysis. *See id.* at 12a-17a.

REASONS TO DENY THE WRIT

I. This Case Does Not Present a Split of Authority Warranting the Court's Consideration.

A state court's exercise of personal jurisdiction over an out-of-state corporation is consistent with the Due Process Clause if the corporation has established "minimum contacts with [the forum state] such that [a] . . . suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted). Since *International Shoe*, the Court has distinguished between "general or all-purpose jurisdiction, and specific or case-linked jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citation omitted). Specific jurisdiction exists when three requirements are met, including that the claim "aris[es] out of or relat[es] to the defendant's contacts with the forum." *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (citation omitted).[7] This Court has refused to create any "talismanic jurisdictional formulas" to govern this context-specific inquiry, *Burger King*, 471 U.S. at 485, because the "boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative," *International Shoe*, 326 U.S. at 319.

---

[7] As discussed, *supra* at 9, Exxon has not disputed that the other two constitutional criteria for specific jurisdiction are met here: that it "purposefully avail[ed] itself of the privilege of conducting activities within" Massachusetts, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), and that jurisdiction over it in Massachusetts is "fair," *Burger King*, 471 U.S. at 476 (citation omitted).

The petition does not present a question warranting review. The petition contends that courts are divided between supposed "but for" and "proximate cause" tests for evaluating whether a defendant's contacts are sufficiently related *to a legal claim*. Pet. 12-16. But any such division of authority regarding this context-dependent analysis is not presented here, in a case that concerns an investigatory demand for documents, not a legal claim. Only two other courts have considered the relatedness standard in the investigation context, and they applied a standard consistent with the court below. And, even among cases that do analyze relatedness in the context of a plaintiff's legal claims, no clear split exists; the Supreme Judicial Court itself does not examine legal claims with a "but for" test in its due process analyses, and no court has adopted the inflexible "proximate cause" formula Exxon desires. Moreover, contrary to Exxon's suggestion, the purported "confusion" regarding agency law provides no reason for this Court to grant the petition. Pet. 20. That issue is not fairly included in the question presented; it presents an unreviewable state-law question; and, as Exxon tacitly admits, no cognizable split exists.

A. The Case Does Not Present a Split Regarding the Relatedness Inquiry for Specific Jurisdiction.

1. Only Three Courts Have Considered the Relatedness Requirement for Investigatory Subpoenas and Have Applied a Consistent Standard.

The actual question presented—how to analyze relatedness where a nonresident target of an investigation challenges a court's jurisdiction to enforce an administrative subpoena for documents the government seeks to ascertain whether the nonresident's conduct may give rise to a future claim for liability—appears to have been considered by only two other courts aside from the court below. All three decisions are in harmony, inquiring into whether the subject matter of the subpoena concerns the target's contacts in the forum state.

First, the Tenth Circuit has considered whether a district court had specific personal jurisdiction to enforce administrative subpoenas served by the SEC on a foreign individual in a federal securities investigation. *SEC v. Knowles*, 87 F.3d 413, 414-15 (10th Cir. 1996). In resolving that issue, the court applied the "arise out of or relate to" standard. *Id.* at 418 (citing *Burger King*, 471 U.S. at 462). The court concluded that jurisdiction existed because "the underlying SEC investigation concern[ed Knowles'] . . . admitted contacts." *Id.* at 419 (citations omitted); *see also id.* at 418 ("Th[e] contacts involve activities that are the very source of the SEC's interest in the two corporations.").

Second, a magistrate judge in the U.S. District Court for the District of Columbia was presented with

the question in another SEC administrative subpoena enforcement proceeding. The court there likewise held that the "relationship necessary for the Court to assert specific personal jurisdiction over the [recipient] . . . is between the [recipient's] jurisdictional contacts and the central areas of inquiry covered by the SEC investigation." *SEC v. Lines Overseas Mgmt., Ltd.*, No. 04-302-RWR/AK, 2005 WL 3627141, at *4 (D.D.C. Jan. 7, 2005) (unpublished).[8]

Consistent with those decisions, the Supreme Judicial Court below "consider[ed] the relationship between Exxon's Massachusetts activities and the 'central areas of inquiry covered by the [Attorney General's] investigation, regardless of whether that investigation has yet to indicate [any] . . . wrongdoing." Pet

[8] A few state appellate courts have also touched or ruled on specific personal jurisdiction in the context of enforcing administrative subpoenas—but without analyzing relatedness in this context as such. *See, e.g.*, *Tulips Investments, LLC v. State ex rel. Suthers*, 340 P.3d 1126, 1133 (Colo. 2015) (recipient had waived personal jurisdiction defense); *Cogswell v. American Transit Insurance Co.*, 923 A.2d 638, 651, 654-56 (Conn. 2007) (noting the "arise out of or relate to" standard but focusing on the purposeful-availment prong, which the court found not met); *Silverman v. Berkson*, 661 A.2d 1266, 1267, 1273-76 (N.J. 1995) (noting trial court's finding that the recipient "had repeated substantial contacts within New Jersey related to the . . . investigation," but focusing analysis on purposeful availment); *Everdry Marketing and Management, Inc. v. Carter*, 885 N.E.2d 6, 11-13 (Ind. Ct. App. 2008) (finding specific personal jurisdiction to enforce civil investigative demand against franchisor where, among other things, the "investigation involve[d] matters connected to [its in-state] franchising activities," but not discussing relatedness as such); *see also American Dental Cooperative, Inc. v. Attorney General*, 514 N.Y.S.2d 228, 233 (N.Y. App. Div. 1987) (considering only New York's long-arm statute and finding it satisfied).

App. 4a (quoting *Lines Overseas*, 2005 WL 3627141, at *4).

The petition thus presents no conflict on the question of how to apply the relatedness standard in the context of an administrative subpoena enforcement proceeding. Indeed, Exxon concedes, as it did below, that these courts' approach is the appropriate way to apply the relatedness standard in this context. Pet. 16 (citing Pet. App. 4a & *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 141-42 (2d Cir. 2014) (applying this standard in the third-party discovery subpoena context)).[9]

2. Although This Petition Does Not Present the Issue, There Also Is No Split Warranting Review Regarding the Relatedness Test for Filed Legal Claims.

Exxon's claim of "disarray in the lower courts" on the question of "what type of relationship is required between a plaintiff's claims and a defendant's forum

[9] Exxon's concession is well founded. A claim-related analysis would effectively force the government "to litigate . . . the very subject which [it] desires to investigate." *United States v. Powell*, 379 U.S. 48, 54 (1964); *see also Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 201 (1946) ("The very purpose of [an administrative subpoena] . . . is to discover and procure evidence, not to prove a pending . . . complaint, but upon which to make one if, in the [Attorney General's] judgment, the facts thus discovered should justify doing so."). Thus, while Exxon cites a First Circuit relatedness case as requiring "the defendants' in-state conduct [to] form an important, or at least material, element of proof in the plaintiff's case," Pet. 15 (quoting *Harlow v. Children's Hospital*, 432 F.3d 50, 60-61 (1st Cir. 2005)), an investigation, unlike a claim, does not have fixed "elements," and the evidence is necessarily still in development.

contacts" is not only not presented here, but also unfounded. Pet. 11-12. Lower courts have applied the relatedness standard announced in *International Shoe* to plaintiffs' claims for more than seventy years without the need for this Court's further guidance except in a few outlier cases. *E.g.*, *Bristol-Myers*, 137 S. Ct. at 1781 (rejecting the California Supreme Court's sliding scale approach as a "loose and spurious form of general jurisdiction"). Consistent with the Court's rejection of "any talismanic jurisdictional formulas," *Burger King*, 417 U.S. at 485, courts evaluate the relatedness of a plaintiff's claims to the defendant's contacts within the clear but purposefully flexible boundaries established by this Court. The cases Exxon cites hew to this guidance and certainly do not limn a clear split between supposed "but for" and "proximate cause" jurisdictions. *Cf.* Pet. 13-14.

To begin with, the Supreme Judicial Court itself does not apply a "but for" test in its due process analysis (and did not apply one in this case, *see* Pet App. 1a-17a). Although the Supreme Judicial Court has applied a but-for test as part of its state long-arm statutory analysis, it does not do so with respect to the Due Process Clause's relatedness inquiry. *See Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 553 (Mass. 1994) (concluding that "but for" approach was "consistent with the language of our statute"); *see also id.* at 554 (conducting separate due process analysis without reference to but-for test, reciting instead the "arise out of, or relate to" standard from *Burger King*, 471 U.S. at 472); *Bulldog Investors General Partnership v. Secretary of the Commonwealth*, 929 N.E.2d 293, 300 (Mass. 2010) (citing *Tatro*, 625 N.E.2d at 554); Exxon S.J.C.

Br. 16 (pointing out that Supreme Judicial Court's but-for test applies only to long-arm analysis).[10]

There is thus no split between the Supreme Judicial Court and the First Circuit, a supposed "proximate cause" jurisdiction by Exxon's incorrect account. Pet. 14-15, 19. Indeed, the First Circuit *agreed* with the Supreme Judicial Court that specific personal jurisdiction was proper in a "factual scenario" the First Circuit found "analogous in all essential respects" to the Supreme Judicial Court's *Tatro* opinion. *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 712 (1st Cir. 1996) (discussing *Tatro*, 625 N.E.2d at 554).[11] To be sure, the First Circuit has criticized exclusive reliance on a but-for test, *id.* at 715-16, but that court also has emphasized the importance of "flexibility" and refused to accept a "proximate cause"-only test, *id.* at 716; *see also C.W. Downer & Co. v. Bioriginal Food & Science Corp.*, 771 F.3d 59, 66 (1st Cir. 2014) (requiring "demonstrable nexus").

Like the First Circuit, other courts have heeded this Court's instruction to eschew rigid formulations in their context-specific analyses of the relationship between a plaintiff's filed legal claims and a defendant's contacts. While the Third, Sixth, Seventh, and Eleventh Circuits, and the Oregon Supreme Court have indeed held that but-for causation is insufficient

---

[10] As Exxon notes, Pet. 16-17, the Attorney General imprecisely observed in a single footnote in her brief to the Supreme Judicial Court that Massachusetts courts have "employed a 'but for' test" in connection with the due process analysis. A.G. S.J.C. Br. 28 n.28. The Attorney General did not advocate application of that test, however, *see id.*, and, as explained in the text, the court did not apply it to the due process inquiry.

[11] Forum shopping is thus not a concern here. *Cf.* Pet. 19.

on its own, *cf.* Pet. 14, they also have not adopted a rigid proximate cause formulation. *E.g.*, *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 322-23 (3d Cir. 2007) ("[B]y ensuring the existence of some minimal link between contacts and claims, but-for causation provides a useful starting point for the relatedness inquiry," but "it cannot end there"; "there is no 'specific rule' susceptible to mechanical application in every case," and "[t]he causal connection can be somewhat looser than the tort concept of proximate causation."); *accord Beydoun v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 508 (6th Cir. 2014); *uBid, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 430 (7th Cir. 2010); *see also Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222 (11th Cir. 2009) ("heed[ing] th[is] . . . Court's warning against using 'mechanical or quantitative' tests")[12]; *Robinson v. Harley-Davidson Motor Co.*, 316 P.3d 287, 300 (Or. 2013) (similar).

The Ninth Circuit and the Washington state courts have indeed for decades inquired whether a plaintiff's claims would have arisen "but for" a defendant's contacts, Pet. 13, but it is far from clear that use of this test leads these courts to different conclusions on the ultimate constitutional question. Scrupulous consideration of the purposeful availment and fairness prongs of the three-part inquiry may compensate for the relatively broader sweep of a but-for causal standard; indeed, application of the but-for test has not inevitably resulted in rulings in plaintiffs' favor in these

[12] *Cf. Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1314 (11th Cir. 2018) (describing *Oldfield* as having established but-for test for tort claims).

jurisdictions.[13] As when courts employ a but-for analysis in examining relatedness but then also consider foreseeability, *see, e.g.*, *Oldfield*, 558 F.3d at 1222-23; *Robinson*, 316 P.3d at 300, these but-for-only courts can "fall back on the third step of the analysis—whether jurisdiction is otherwise fair and reasonable—to protect against the but-for test's causative excesses," *O'Connor*, 496 F.3d at 322.

There is thus no meaningful conflict among the lower courts' analyses of whether a plaintiff's filed legal claims sufficiently relate to a defendant's in-state contacts. Perhaps that is why this Court chose once again not to adopt a bright-line relatedness test when it was recently offered that opportunity in *Bristol-Myers*. *E.g.*, Brief of Petitioner 37-46, *Bristol-Myers*, 137 S. Ct. 1773 (2017) (No. 16-466) (asking Court to impose proximate cause requirement). Preserving the flexibility necessary to apply the due process analysis across all types of claims, the Court instead applied "settled principles," *Bristol-Myers*, 137 S. Ct. at 1781, and recited the familiar "aris[e] out of or relat[e] to" standard, *id.* at 1780 (quoting *Daimler*, 571 U.S. at 754). In so doing, the Court emphasized that what is required is "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* (quoting *Goodyear*, 564 U.S. at 919). *Bristol-Myers*' recent

---

[13] *See, e.g.*, *Doe v. American National Red Cross*, 112 F.3d 1048, 1051-52 (9th Cir. 1997); *Terracom v. Valley National Bank,* 49 F.3d 555, 561 (9th Cir. 1995); *SeaHAVN, Ltd. v. Glitnir Bank*, 226 P.3d 141, 152 (Wash. Ct. App. 2010); *CTVC of Hawaii, Co. v. Shinawatra*, 919 P.2d 1243, 1254 (Wash. Ct. App. 1996), *modified*, 932 P.2d 664 (Wash. Ct. App. 1997).

reaffirmation of a familiar and long-established standard thus supplies an additional reason to deny the petition.[14]

B. The State-Law Agency Issue Discussed in the Petition Is Not Reviewable by This Court.

1. The Question Presented Does Not Fairly Include the Agency-Law Issue.

The petition presents a single question about the relatedness inquiry under *International Shoe*: "Whether 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). Yet, eleven pages in, Exxon introduces a second issue: "whether an unexercised contractual power to be involved in another party's potential contact with a forum State has any relevance to the specific-jurisdiction inquiry (and, if so, in what way)." Pet. 11. This second issue is not "fairly included" in the question presented. *See* Rule 14(1)(a). And "the fact that" it was "discussed . . . in the text of [its] petition . . . does not" alter that conclusion. *Wood v. Allen*, 558 U.S. 290, 304 (2010) (citation omitted).

The "unexercised contractual power" issue is not a "subsidiary" one. Pet. 11. Exxon's single question asks only whether its contacts ("principally" contacts through third parties) satisfy the relatedness prong of

---

[14] *See also* Pet. App. 13a n.8 (describing reasons why decision below is consistent with *Bristol-Myers*).

the Due Process Clause's minimum contacts requirement. Pet. (I). The second issue—cast by Exxon as whether "and, if so, in what way" certain unexercised contractual powers have "any relevance *to the specific-jurisdiction inquiry*," Pet. 11 (emphasis added)—is broader than the question presented; it is not moored to the relatedness prong and could implicate the purposeful availment and fairness prongs that Exxon has waived in this litigation. *See supra* at 9. And the state-law question whether certain contacts can be attributed to Exxon is a question about the nature of Exxon's jurisdictional contacts—not about relatedness itself, *i.e.*, whether the investigation "arise[s] out of, or relate[s] to," Exxon's contacts with Massachusetts, *Burger King*, 471 U.S. at 472. The Court should therefore decline to consider this issue, which is at best only "*related* to" the one Exxon presented. *Yee v. Escondido*, 503 U.S. 519, 537 (1992).[15]

2. Even if Included, the Agency Issue Is Governed by State Law and Was Waived Below.

The improperly presented issue also turns on an unreviewable question of state agency law—and one that Exxon has waived.

---

[15] *See also Wood*, 558 U.S. at 304-05 (whether counsel's strategic decision was reasonable was not fairly included in question whether counsel had made strategic decision); *JAMA v. Immigration and Customs Enforcement*, 543 U.S. 335, 352 n.13 (2005) (whether Somalia was a country was not fairly included in question whether Attorney General could "remove an alien to" country that met statutory criteria).

The question whether particular actions may be attributed to a party under an agency theory for personal jurisdiction purposes rests on state law. An agent's actions may indeed be attributed to the principal for personal jurisdiction purposes, *e.g.*, *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 55 (1st Cir. 2002); *International Medical Group v. American Arbitration Ass'n*, 312 F.3d 833, 845 (7th Cir. 2002); *Taylor v. Phelan,* 912 F.2d 429, 433 (10th Cir. 1990), and the forum state's agency law determines whether the agent's contacts may be imputed to the principal. *E.g.*, *Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1069 (10th Cir. 2007) (applying Colorado law). Indeed, excepting the Federal Circuit's application of federal common law, all the cases Exxon cites apply *state* agency law to resolve the issue.[16]

Accordingly, the Supreme Judicial Court below applied Massachusetts' state agency law in assessing the extent of Exxon's Massachusetts contacts via its 300 Exxon-branded retail service stations. Pet. App. 10a-11a, 16a. In particular, the court (and Exxon) relied on *Depianti v. Jan-Pro Franchising International,*

---

[16] *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1024-25 (9th Cir. 2017) (relying on cases applying California law); *In re Chinese-Manufactured Drywall Product Liability Litigation*, 753 F.3d 521, 529-30 (5th Cir. 2014) (Florida law); *Gordon v. Greenview Hospital, Inc.*, 300 S.W.3d 635, 653-54 (Tenn. 2009) (Tennessee law); *Jackson v. Loews Washington Cinemas, Inc.*, 944 A.2d 1088, 1097 (D.C. 2008) (District of Columbia law); *Ross v. First Savings Bank*, 675 N.W.2d 812, 819 (Iowa 2004) (Iowa law); *Worthy v. Cyberworks Technologies, Inc.*, 835 So.2d 972, 981 (Ala. 2002) (Alabama law); *cf. Celgard, LLC v. SK Innovation Co.*, 792 F.3d 1373, 1379 (Fed. Cir. 2015) (federal common law).

Inc., 990 N.E.2d 1054 (Mass. 2013). *Id.* at 10a.[17] In *Depianti*, the court surveyed its common law precedents and other jurisdictions' application of their agency rules in the franchise context and then adopted as a matter of state law an "instrumentality test" for deciding when Massachusetts state courts may find a franchisor vicariously liable for its franchisee's acts. 990 N.E.2d at 1062-64 (noting test "accords with the approach of the majority of courts that have considered" the question).

This Court, of course, does not "hold a supervisory power" over state courts to alter their common-law rules and the application of those rules to the facts of each case. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 345 (2006) (quoting *Dickerson v. United States*, 530 U.S. 428, 438 (2000)); *see also Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635 (1875) (state court decision "conclusive" on state law). It therefore may not review here the issue whether an unexercised right to control may be imputed to the principal.

3. In Any Event, the Alleged "Confusion" Is Illusory.

Insofar as reliance on state agency law in a specific jurisdictional analysis could implicate a federal question, there is no "confusion" on when courts may impute an agent's conduct to its principal, Pet. 20, let alone a split of authority warranting this Court's review. The dual "right to control" and "actual exercise of control" tests simply reflect two different factual

---

[17] Exxon relied on *Depianti* in its briefing and did not make any alternative argument that a different test should apply. *Compare* Pet. App. 10a, *with* Exxon S.J.C. Br. 19-20; Exxon S.J.C. Reply Br. 5-6. Exxon has therefore waived this argument.

scenarios under which an agent's acts may be attributed to a principal under state and federal common law—and, if indeed attributed, have potential relevance under *International Shoe* and its progeny. *See Daimler*, 571 U.S. at 135 n.13 (noting that "[a]gency relationships . . . may be relevant to the existence of *specific* jurisdiction").

No division exists between supposed "right to control" and "actual exercise of control" jurisdictions, as Exxon telegraphs with its references to "suggested" and "seemingly adopted" rules. Pet. 20-21. As the Supreme Judicial Court stated below, depending on the circumstances, either control itself "or" a right to control may be sufficient to attribute an agent's conduct to its principal. Pet App. 10a (quoting *Depianti*, 990 N.E.2d at 1064). The cases Exxon cites from the Ninth Circuit, Alabama, and the District of Columbia as representing a "right to control" camp are simply instances where the courts considered whether, under the circumstances, a right to control existed so as to impute the third-party contacts. *See* Pet. 20-21 (describing *Williams v. Yamaha Motor Co.*, 851 F.3d 1015 (9th Cir. 2017); *Worthy v. Cyberworks Technologies, Inc.*, 835 So. 2d 972 (Ala. 2002); *Jackson v. Loews Washington Cinemas, Inc.*, 944 A.2d 1088 (D.C. 2008)).

Nor have other courts adopted a competing exclusive "exercise of control" test. For example, while Exxon accurately quotes the Federal Circuit's opinion in *Celgard, LLC v. SK Innovation Co.*, 792 F.3d 1373 (Fed. Cir. 2015), as stating that a "plaintiff must show that the defendant exercises control over the activities of the third-party," the court there considered evidence regarding whether the defendant had "a right to

control." 792 F.3d at 1379; *see also id.* (finding no evidence of "any attempt by [defendant] to purposefully direct or control [third parties'] activities"); *Breckenridge Pharmaceutical, Inc. v. Metabolite Laboratories, Inc.*, 444 F.3d 1356, 1366-67 (Fed. Cir. 2006) (a party's "right to exercise control over the licensee's sales or marketing activities" is sufficient for personal jurisdiction). Likewise, the Fifth Circuit did not purport to adopt an exclusive exercise-of-control rule in *In re Chinese-Manufactured Drywall Product Liability Litigation*, 753 F.3d 521 (5th Cir. 2014), in applying Florida's agency law, *id.* at 753.[18] And the Iowa and Tennessee Supreme Courts employ both "right to control" and "exercise of control" analyses too, as the circumstances warrant. *See Deeds v. City of Marion*, 914 N.W.2d 330, 349 (Iowa 2018) (examining whether "City 'controlled' or had a right to control"); *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 395 (Tenn. 2002) (party that "clearly lacks the *right* to control," may still be liable where it "exercise[s] *actual* control").[19]

Thus, no such "confusion" conceivably infecting federal common law exists.

---

[18] Indeed, such a rule would have conflicted with Florida law. *See Villazo v. Prudential Health Care Plan, Inc.*, 843 So.2d 842, 853 (Fla. 2003) ("right to control, rather than actual control"); *Domino's Pizza, LLC v. Wiederhold*, 248 So.3d 212, 222 (Fla. Dist. Ct. App. 2018) (franchisor may be liable when it "has direct control of, or the right to control").

[19] *See also Gordon*, 300 S.W.3d at 654 (referring to "the parent corporation's *right* to or *exercise* of control" (emphasis added)); *Ross*, 675 N.W.2d at 819 (using "under the control of" as a proxy for the right to control test); *Mermigis v. Servicemaster Industries, Inc.*, 437 N.W.2d 242, 246 (Iowa 1989) ("right of control remains . . . primary"). *Cf.* Pet. 22.

II. This Case Is a Poor Vehicle to Decide the Question Presented.

A. Exxon Waived the Question Presented.

Exxon acknowledged below that the Supreme Judicial Court does not apply a but-for test in its due process relatedness analysis, *supra* at 9-10, and, accordingly, Exxon did not press the Supreme Judicial Court to review, alter, or abandon such a test. *See* S.J.C. Br. 16; S.J.C. Reply Br. 8-9.[20] Nor did Exxon ask the court below to adopt the exclusive "proximate cause" test it now advances. Pet. 18-19; *see* S.J.C. Br. 16; S.J.C. Reply Br. 8-9. "Because this argument was not raised below, it is waived." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). And, having endorsed the relatedness standard identified by the Attorney General, *compare* A.G. S.J.C. Br. 29-30 & n.29 (citing *Lines Overseas*, 2005 WL 3627141, at *4), *with* Exxon S.J.C. Reply Br. 8-9 (same)), which was then applied by the Supreme Judicial Court in its opinion, Pet. App. 4a, Exxon also arguably should be estopped from pressing for a different standard before this Court based on "the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (citation omitted).[21]

---

[20] These briefs are accessible on the Supreme Judicial Court's docket: https://tinyurl.com/y9m9nkkk.

[21] The same rules should also foreclose consideration of Exxon's supposed state-law agency issue. *Supra* at 22-24 & n.17.

B. This Petition Concerns a Civil Investigative Demand in an Ongoing Investigation and Could Soon Be Rendered Moot.

This petition is also a poor vehicle for deciding any question, because it may imminently become moot. *Cf. Board of License Commissioners of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (noting parties' obligation to "inform the Court of any development which may conceivably . . . depriv[e] the Court of jurisdiction due to the absence of a continuing case or controversy" (citations omitted)). The petition concerns a civil investigative demand in an ongoing state investigation that may come to an end, as investigations do, upon the filing of a complaint, or upon a decision to close the investigation based on its findings, enforcement priorities, or resources. *See Morton Salt*, 338 U.S. at 642-43. The New York Attorney General, for example, recently concluded her own parallel Exxon investigation, *see* S.J.C. App. 1455 (NY administrative subpoena),[22] and filed a state-court complaint alleging that Exxon engaged in a "fraudulent scheme . . . to deceive investors and the investment community . . . concerning . . . the risks posed to its business" by environmental regulation. NY Compl. ¶ 1, *supra* at 5 n.2.

A decision by the Attorney General to end the underlying investigation and withdraw the civil investigative demand at issue—either to end the matter entirely, or because she filed suit against Exxon—would render this petition moot. *See, e.g.*, *Senate Permanent*

---

[22] Stipulation of Discontinuance with Prejudice, *New York v. PricewaterhouseCoopers LLP*, Index No. 451962/2016 (N.Y. Sup. Ct. Nov. 21, 2018), https://tinyurl.com/y9atjmoa.

Subcommittee on Investigations v. Ferrer, 856 F.3d 1080, 1083 (D.C. Cir. 2017) (dismissing appeal challenging administrative subpoena where investigation concluded and no further subpoena enforcement was sought). While this Court has held that the potential for an investigating agency to return subpoenaed documents may in some circumstances defeat mootness, *see Church of Scientology of California v. United States*, 506 U.S. 9, 12-13 (1992), Exxon has not produced a single document to the Attorney General, and that exception therefore would not apply. *See id.*; *see also Pastore*, 469 U.S. at 239-40. As of the date of this filing, Massachusetts' investigation remains active and ongoing. If that should change, the Attorney General will promptly notify the Court.

C. Rejecting a "But For" Relatedness Test Would Not Affect the Decision Below, Because the Supreme Judicial Court Did Not Employ That Test.

Exxon's petition is a poor vehicle for correcting any supposed error by "but for" jurisdictions, because, as discussed above, the Supreme Judicial Court has not adopted a "but for" relatedness test and did not apply one in this case. *Supra* at 17-18. Indeed, the phrase "but for" does not appear in the court's opinion, nor does the opinion contain any equivalent reasoning. Pet. App. 1a-26a.

Exxon's suggestion that the court silently applied a but-for test by citing its earlier opinion in *Tatro*, Pet. 10, 16, is meritless. Again, *Tatro* did conclude that a but-for test was consistent with Massachusetts' long-arm statute, but did not adopt or apply that test for its due process analysis. 625 N.E.2d at 552-55. To meet

the constitutional prerequisite, the *Tatro* court correctly recited, a "plaintiff's claim must arise out of, or relate to, the defendant's forum contacts." *Id.* at 554 (citing *Burger King*, 471 U.S. at 472).

Accordingly, even if Exxon were to prevail in convincing this Court to ban use of but-for causation analysis in assessing relatedness—notwithstanding this Court's longstanding commitment to flexibility—Exxon would not benefit, and the Supreme Judicial Court could readily reaffirm the result it has already reached. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (declining to resolve question where it would not affect case's outcome); Stephen M. Shapiro et al., *Supreme Court Practice* 249 (10th ed. 2013) (certiorari may be denied where resolution of question "is irrelevant to . . . outcome").

III. The Fact-Bound Decision Below Is Correct and Further Supported by Alternative Grounds.

This Court's review is unwarranted for the additional reason that the Supreme Judicial Court's opinion is correct. Exxon and the Attorney General agree that the governing standard in this case is whether a "nexus" exists "between the document request or subject matter of the investigation and [Exxon's] forum contacts." Pet. 16; *compare* A.G. S.J.C. Br. 29-30 & n.29 (citing *Lines Overseas*, 2005 WL 3627141, at *4) *and* Exxon S.J.C. Reply Br. 8-9 (same), *with* Pet. App. 4a (following *Lines Overseas*, 2005 WL 3627141, at *4). This "Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certio-

rari should generally (*i.e.*, except in cases of the plainest error) be denied." *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting). No such error exists in the Supreme Judicial Court's analysis of the 1,600-page record here; indeed, the record contains additional bases for affirmance.

The Attorney General's civil investigative demand seeks information to determine whether Exxon violated Massachusetts law. "[A] corporation [that] exercises the privilege of conducting activities within a state" both "enjoys the benefits and protection of the [state's] laws" and assumes the "obligation" to comply with state laws "connected with th[ose] activities." *International Shoe*, 326 U.S. at 319. Massachusetts law prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in" the "advertising, the offering for sale . . . [and] the sale . . . or distribution of any services," "property," or "security" in Massachusetts. Mass. Gen. Laws ch. 93A, §§ 1(b), 2(a). In that regard, the demand seeks documents related to activities that Exxon has conducted in Massachusetts to exploit the Massachusetts market: Exxon's "marketing and/or sale of energy and other fossil fuel derived products to consumers in . . . [Massachusetts]," and its "marketing and/or sale of securities . . . to investors in . . . [Massachusetts]." Pet App. 28a. The demand seeks those documents to ascertain, among other things, what Exxon has communicated to Massachusetts consumers and investors—and whether its public communications have been consistent with its knowledge—about the environmental damage caused by its fossil-fuel products and the risk regulatory responses to halt and mitigate that damage pose for the

value of its business. *Supra* at 4 (describing specific requests).

Based on the extensive record before it, the Supreme Judicial Court found that "[t]he Attorney General's investigation 'arise[s] out of, or relate[s] to'" Exxon's Massachusetts contacts, Pet. App. 15a—that is, a nexus exists "between Exxon's Massachusetts activities and the 'central areas of inquiry covered by the [Attorney General's] investigation,'" *id.* at 4a. Among other things, the court found that "Exxon has a right to control the advertising of its fossil fuel products to Massachusetts consumers" through its more than 300 Massachusetts-franchised retail services stations. *Id.* at 10a; *see id.* at 9a-12a, 14a-16a. Exxon claims that these contacts are irrelevant because "the demand does not request any documents relating to" its franchisees, Pet. 26, but, as the Supreme Judicial Court noted, that assertion is false. Pet. App. 11a; *see* S.J.C. App. 109 (No. 24) ("advertisements . . . used by or for You [and] Your . . . franchisees"). And the fact that those advertisements may not expressly "address" the environmental topic at issue, Pet. 25, is far from dispositive, because "the crux of a failure to disclose theory is knowledge": what Exxon knew, when it knew it, and what it "told Massachusetts consumers," Pet. App. 6a. Indeed, the very nature of misleading omissions is their absence from a communication.

Exxon engaged in other Massachusetts-based contacts as well. *Cf.* Pet. (I) (referring to analysis "based *principally* on third-party contacts" (emphasis added)). Indeed, "Exxon admit[ed] that it created Massachusetts specific advertisements for its products in print and radio." Pet. App. 14a. Exxon's at-

tempt to dismiss those advertisements as merely concerning vehicle "engine-lubrication products," Pet. 5, is misplaced, because the civil investigative demand seeks documents about such "fossil fuel *derived* products," Pet. App. at 28a (emphasis added), and because Exxon has supplied such products to the Massachusetts state police, S.J.C. App. 795-96. The court also considered the fact that Exxon "operates a Web site that is accessible in Massachusetts and enables [Massachusetts residents] to locate the nearest Exxon- and Mobil-branded service station or retailer" in Massachusetts. Pet. App. 14a. Where Exxon "has continuously and deliberately exploited the [Massachusetts] market," *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984), it has no basis to complain about responding to a demand for documents arising from the very activities that have allowed the company to profit from them, *see International Shoe*, 326 U.S. at 320.

Additional securities-related contacts in the record before the court below but not addressed by its opinion further support finding specific jurisdiction here and establish alternative grounds for affirmance. *See* Pet. App. 17a n.9. The court declined to address these additional contacts because, among other reasons, the investor-related document requests "relate[d] sufficiently to the Attorney General's consumer deception theory." *Id.* True as that may be, Exxon admitted to directly selling securities to Massachusetts investors, S.J.C. App. 65, and Massachusetts institutional investors hold billions of dollars' worth of Exxon stock and thus stand to suffer significantly from any potential securities fraud, *see id.* at 801-02, 804. Indeed, at least one Massachusetts-based investment firm manager has complained publicly about how Exxon's "willfully

distorted view" on environmental risks to its assets' value was harming investors, S.J.C. App. 700. Massachusetts law prohibits Exxon from engaging in conduct that fails to disclose, or otherwise misleads investors with respect to, the impact on Exxon's business and the value of its assets imposed by fossil fuel emissions regulation. *See Marram v. Kobrick Offshore Fund, Ltd.*, 809 N.E.2d 1017, 1032 (Mass. 2004). The civil investigative demand includes multiple securities-related requests, S.J.C. App. 107-108 (Nos. 16, 19, 20, 21), 110 (Nos. 28(b), 31, 32), including for documents concerning future demand for oil and natural gas, *see id.* at 107-08 (No. 16), and "Exxon's consideration of public relations and marketing decisions . . . regarding . . . Exxon's future profitability in connection with Exxon's offering and selling Securities in Massachusetts," *id.* at 108 (No. 20). These requests, too, thus relate to Exxon's admitted in-state activities—the sale of securities to Massachusetts investors.

Massachusetts' "manifest interest" in investigating, prosecuting, and adjudicating violations of its state consumer and investor protection law is unquestionable. Pet. App. 16a; *see also Bulldog*, 929 N.E.2d at 301. And this Court has repeatedly recognized the importance of a state's interest in regulating "[an] activity or an occurrence that takes place in the forum State" in the jurisdictional inquiry. *Bristol-Myers*, 137 S. Ct. at 1780 (quoting *Goodyear*, 564 U.S. at 919). A civil investigative demand serves these important interests in enforcing state law with respect to in-state conduct that is subject to state regulation. As the court below rightly recognized in applying this Court's long-settled principles to an extensive factual record, Massachusetts courts have specific jurisdiction over

Exxon to enforce such a demand in the circumstances here. There is thus no need for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MAURA HEALEY,
Attorney General for the Commonwealth of Massachusetts
ELIZABETH N. DEWAR
State Solicitor
SETH SCHOFIELD*
Senior Appellate Counsel
AMANDA I. MOREJON
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
seth.schofield@mass.gov
(617) 963-2436
**Counsel of Record*

December 4, 2018