No. 18-311

IN THE
Supreme Court of the United States

EXXON MOBIL CORPORATION, PETITIONER,

v.

MAURA HEALEY, ATTORNEY GENERAL OF MASSACHUSETTS, RESPONDENT.

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

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

JOHN F. KUPPENS
President
DRI–THE VOICE OF THE DEFENSE BAR
55 West Monroe Street
Chicago, IL 60603
(615) 428-8638
john.kuppens@nelsonmullins.com

MATTHEW T. NELSON
Counsel of Record
ADAM T. RATLIFF
WARNER NORCROSS + JUDD LLP
900 Fifth Third Center
111 Lyon Street N.W.
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com

Counsel for Amicus Curiae

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BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

Amicus curiae, DRI–The Voice of the Defense Bar, respectfully submits that the Petition for Certiorari should be granted and the judgment of the Supreme Judicial Court of Massachusetts should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae DRI–The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. In furtherance of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its members, their clients, and the judicial system. This is such a case.

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[1] In accordance with this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and both parties have consented.

The issue in this case—the type of relationship required between a plaintiff's claims and a defendant's contacts with a forum state to satisfy due process—is a subject of fundamental importance to DRI and the civil defense bar. The importance to DRI and its members is only heightened by the context in which the issue arises here: court-ordered compliance with a state attorney general's civil investigative demand unrelated to the defendant's contacts with the forum state.

A state court's assertion of personal jurisdiction over nonresident defendants implicates the fairness of the civil justice system, as this Court has repeatedly noted. See *Walden* v. *Fiore*, 571 U.S. 277, 283 (2014) (quoting *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945)); *Daimler AG* v. *Bauman*, 571 U.S. 117, 126 (2014); *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 918-19 (2011).

The "[d]ue process limits on the State's adjudicative authority" that promote this fairness "principally protect the liberty of the defendant." *Walden*, 571 U.S. at 284. But restrictions on personal jurisdiction are also "a consequence of territorial limitations on the power of the respective States." *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958).

The Supreme Judicial Court of Massachusetts' decision tramples on Exxon Mobil's liberty interests and disregards the constitutional limits on state court authority. That court enforced the Massachusetts Attorney General's costly and intrusive civil investigative demand because it concluded that the Exxon Mobil's franchise agreements with service

stations in Massachusetts were the but-for cause of the Massachusetts Attorney General's investigation. It reached this conclusion even though the investigation's focus was on possible violations of Massachusetts law stemming from a failure to disclose the climate risks associated with burning fossil fuels. App. 15a-16a. That nebulous connection thwarts non-residents' ability to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). And it flouts the rule that an out-of-state resident is only subject to the forum state's judicial authority when "a controversy is related to or 'arises out of' a defendant's contact with the forum." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 (1984). The Massachusetts court's but-for approach to relatedness is so overinclusive as to be no limit at all.

The context in which this case arises demonstrates the issue's continued importance. Investigations by state attorneys general have been growing in number and partisanship in recent years. The coercive power of state attorneys general is formidable, and DRI's members and their clients attest to the disruption and expense associated with such investigations. The limits on personal jurisdiction imposed by the Due Process Clause provide a significant check on the extra-territorial authority of state law enforcement agencies, and are thus all the more important to DRI, its constituents, and the nation.

SUMMARY OF ARGUMENT

The Court should grant the Petition because the purposes of the Due Process Clause are undermined by the multiplicity of approaches to determining whether a defendant's contacts with a forum state have a sufficient causal connection to the harm suffered by a plaintiff to give rise to personal jurisdiction. As the decision of the Supreme Judicial Court of Massachusetts in this case and the discussion below demonstrate, out-of-state residents cannot have the minimum assurance as to where their conduct will or will not render them liable to suit in other states as required by the Constitution. And this is all the more true in the context of pre-litigation discovery by state attorneys general.

More than three decades ago, the Court emphasized that personal jurisdiction requires more than a showing that the defendant had sufficient minimal contacts with the forum state. The Court explained that constitutional due process also requires that the plaintiff's suit arises from or relate to the defendant's conduct. The Petitioner correctly points out that the but-for relatedness test adopted by the Supreme Judicial Court of Massachusetts has been criticized and rejected by all but a handful of state and federal courts because in hindsight, almost any contact can be deemed to be a but-for cause supporting a cause of action. But the confusion that reigns among state and federal courts about what level of relatedness is required by the Due Process Clause is, if anything, understated by the Petition. The federal courts of appeals have adopted no less than four different approaches to relatedness, with some courts adopting different standards in different

decisions without acknowledging the conflict. Indeed, the Sixth Circuit has seemingly adopted three conflicting approaches. Nor has allowing the issue to percolate in the state and lower federal courts brought clarity—the conflict has only become more entrenched with age.

The context in which the issue arises here underlines the need for this Court's review. State attorneys general have become increasingly active in pursuing investigations and actions against out-of-state residents. Such actions raise federalism concerns as state attorneys general who seek to make national policy are unaccountable to out-of-state residents. The law of most states provides attorneys general with wide-ranging power to conduct pre-litigation discovery, as demonstrated by the Massachusetts court's decision requiring Exxon Mobil to produce decades of information potentially amounting to millions of pages with almost no judicial oversight. In cases like this one, the only real limitations on the power of state attorneys general as to out-of-state residents is provided by the Due Process Clause.

In 1991 and again last term, the Court heard cases in which the issue of what level of relatedness was required by the Due Process Clause was raised, but in neither case was the issue squarely presented. Here, the issue is squarely presented in a case where requiring relatedness greater than but-for causation is dispositive. *Amicus* respectfully submits that the time has come for the Court to address this issue.

ARGUMENT

I. The Court should grant the Petition because the question presented has plagued federal and state courts, resulting in uneven application of critical Due Process Clause protections.

The requirement of personal jurisdiction protects out-of-state residents from binding judgments in fora with which they have no meaningful contacts. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 471-72 (1985). The Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286, 297 (1980). As the Petition demonstrates, this due-process protection is being unevenly applied and thus thwarted by the continued confusion in the federal and state courts regarding what sort of "affiliation between the forum and the underlying controversy" must exist for a court to exercise personal jurisdiction. See *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919 (2011).

The Court specifically identified the need for a connection between the controversy and a defendant's contacts with the forum state in *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-18 (1984). There, the Court explained that its earlier decisions showed that when "a controversy is related to or 'arises out of' a defendant's contact with the forum, . . . a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction." *Id.* at 414 (quoting *Shaffer* v.

Heitner, 433 U.S. 186, 204 (1977)). But the Court specifically reserved the question of "what sort of tie between a cause of action and defendants' contacts with a forum is necessary." *Id.* at 415 n.10.

The Court has not resolved the issue. It granted certiorari on a question that raised this issue in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 589 (1991), but resolved the case on different grounds. Last term, the Court rejected California's sliding-scale approach to relatedness. *Bristol-Myers Squibb Co.* v. *Superior Court of Cal.*, 137 S. Ct. 1773, 1781, 1784 (2017). But the case did not raise the issue of what type of tie between a cause of action and the defendants' contacts with a forum is constitutionally required.

In the nearly 35 years since *Helicopteros*, the question of what level of relationship is necessary "under the 'arise out of or relate to' requirement" has "plagued" federal and state courts. *Miller Yacht Sales, Inc.* v. *Smith*, 384 F.3d 93, 99-100 (3d Cir. 2004). It is frequently said that the federal and state courts have adopted three divergent rules for assessing relatedness. See, *e.g.*, *Myers* v. *Casino Queen, Inc.*, 689 F.3d 904, 912-13 (8th Cir. 2012) (discussing three tests); *Employers Mut. Cas. Co.* v. *Bartile Roofs, Inc.*, 618 F.2d 1153, 1161 (10th Cir. 2010) (same). The reality is even more anarchic. Courts have adopted variations on the main tests and used different terms to describe the same tests. Indeed, some courts have applied different tests in different cases (frequently without identifying the conflict with earlier decisions).

The but-for relatedness test is the most readily identifiable. As the Petitioner points out, the Ninth Circuit, Massachusetts, and Washington all apply a

but-for test to assess the sufficiency of the connection between the plaintiff's claims and the defendant's contacts with the forum state. Pet. 13. This approach had been applied by the Fifth and Sixth Circuits, but both have since implemented other approaches. *Prejean* v. *Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981); *Lanier* v. *Am. Bd. of Endodontics*, 843 F.2d 901, 908-11 (6th Cir. 1988); *Moki Mac River Expeditions* v. *Drugg*, 221 S.W.3d 569, 581 (Tex. 2007) (citing cases showing the Fifth and Sixth Circuits' movement away from the but-for test).

As the Petition correctly notes, several courts have concluded that something more than but-for causation is required to support the relatedness inquiry for personal jurisdiction. Pet. 14. The second test is alternatively referred to as the proximate-cause or substantive-relevance test. *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 318-19 (3d Cir. 2007). This test "examines whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim." *Id.* The test has been adopted in decisions by the First and Sixth Circuits, as well as in various contract disputes addressed by the Tenth Circuit. *Beydoun* v. *Wataniya Rest. Holding, Q.S.C.*, 768 F.3d 499, 507-08 (6th Cir. 2014), *Employers Mut.*, 618 F.3d at 1161 n.7; *Pizarro* v. *Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1259 (1st Cir. 1990). And the Tenth Circuit has said that it has not adopted a particular test except in the context of contract disputes, suggesting it might apply different personal jurisdiction standards to different claims. See *Employers Mut.*, 618 F.3d at 1161 & n.7.

An intermediate test that resembles the proximate-cause standard in many respects but uses language adopted from but-for causation has also arisen. This approach, dubbed the "but-for and foreseeability of litigation test" by the Oregon Supreme Court, applies a but-for test as a threshold standard and then analyzes the defendant's contacts to objectively assess the foreseeability of the pending litigation. *Robinson* v. *Harley-Davidson Motor Co.*, 316 P.3d 287, 298 (Ore. 2013). Variations on this approach have been adopted by the Third, Seventh, and Eleventh Circuits. *Id.* at 298-301 (discussing *O'Connor*, 496 F.3d at 322-23; *Oldfield* v. *Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1223-24 (11th Cir. 2009)); *uBID Inc.* v. *GoDaddy Grp., Inc.*, 623 F.3d 421, 430 (7th Cir. 2010).

Yet another frequently used relatedness test is the substantial-connection or discernable-relationship test. See *O'Connor*, 496 F.3d at 319-20. The sliding-scale approach adopted by California and rejected by this Court last term was one variation on this approach. See *Vons Cos.* v. *Seabest Foods, Inc.*, 926 P.2d 1085, 1094-99 (Cal. 1996); *Bristol-Myers Squibb Co.* v. *Superior Court*, 377 P.3d 874, 878 (Cal. 2016) *rev'd* 137 S. Ct. 1773 (2017). But other variations of this test have been adopted by Second Circuit and District of Columbia courts. *Chew* v. *Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (where a defendant has limited contacts, "it may be appropriate" to require the plaintiff's injury to be proximately caused by the defendant's contacts, but where the defendant's contacts are "more substantial," personal jurisdiction can exist in the absence of proximate cause); *Shoppers Food Warehouse* v. *Moreno*, 746 A.2d 320, 333-36 (D.C. 2000). The Second Circuit continues to apply its

version of the substantial-connection, even after this Court's decision in *Bristol-Myers Squibb Co.* v. *Superior Court of California*, 137 S. Ct. 1773 (2017). *SPV Osus Ltd.* v. *UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018) (applying *Chew*).

The Sixth Circuit's peripatetic implementation of varying standards is a microcosm of the national confusion in this area. It adopted a but-for standard. *Lanier*, 843 F.2d at 908-11. Then it reiterated its earlier standard, requiring that the cause of action "'have a substantial connection with the defendant's in-state activities.'" *Third Nat'l Bank in Nashville* v. *WEDGE Grp., Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989) (quoting *Southern Machine Co.* v. *Mohasco Indus., Inc.*, 401 F.2d 374, 384 n.27 (6th Cir. 1968)). And most recently, the Sixth Circuit held that proximate cause was necessary, albeit without addressing its earlier decisions. *Beydoun*, 768 F.3d at 507-08.

This Court has emphasized that the Due Process Clause must be interpreted in such a way as to provide "a degree of predictability to the legal system" and thereby allow out-of-state individuals to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Due process should ensure that out-of-state residents can go about their business "confident that transactions in one context will not come back to haunt them unexpectedly in another." *RAR, Inc.* v. *Turner Diesel, Ltd.*, 107 F.3d 1272, 1277-78 (7th Cir. 1997).

As the Petitioner explains, the splintering of the relatedness standard has resulted in some defendants being subject to substantively different stan-

dards for personal jurisdiction in the same state depending on the availability of a federal forum. Pet. 19 & n.7. That result cannot be squared with the minimum requirements of due process identified by this Court.

It may well be that the "line in this area will not always be a bright one." *RAR*, 107 F.3d at 1278. But the line the Court has so far drawn is too faint to serve the purposes of due process and has resulted in a splintering of decisions on a national constitutional standard. In the decades since *Helicopteros*, the state and federal courts have not been able to coalesce around a single, national relatedness standard. The Court should grant the Petition to resolve this long-standing constitutional dispute.

II. The Court should also grant the Petition because constitutional personal jurisdiction requirements are among the only boundaries on state attorneys general's authority to investigate out-of-state residents.

The context in which this case arises emphasizes the importance of the due process limits on personal jurisdiction. State attorneys general have been increasingly active in pursuing national policy goals through multi-state and individual lawsuits. Indeed, the Massachusetts Attorney General's investigation here arose in apparent collaboration with other state attorneys general. See Pet. 5-6 (citing record). As one commentator observed, the rise in state attorneys general's activism has important implications for democratic accountability and federalism. Paul Nolette, *State attorneys general are more and more powerful. Is that a problem?* Washington Post (Mar. 5, 2015) available at https://tinyurl.com/y7ndyefz.

Not least among these implications is the lessening of democratic accountability—residents who are affected by the investigations of another state's attorney general have little recourse. *Id.* The Due Process Clause's limits on personal jurisdiction provide one of the few boundaries on the extra-territorial reach of state attorneys general.

State attorneys general have become much more active, and their national activities are becoming increasingly partisan. See Paul Nolette & Colin Provost, *Change & Continuity in the Role of State Attorneys General in the Obama & Trump Administrations*, 28 J. of Federalism 469 (2018). To be sure, the most partisan of this litigation activitism involve challenges to the federal government. *Id.* at 471-72. But state attorneys general continue to cooperatively pursue actions against businesses as well. *Id.* at 480. Consumer-protection and health-care-fraud actions tend to attract high levels of bipartisan support, but environmental disputes like this one are much more partisan. See *id.* at 471-79, 482-83. These broad, multi-state investigations often result in broad civil investigative demands and document subpoenas against out-of-state residents. And as the Massachusetts court's decision demonstrates, state attorneys general can frequently compel the production of vast quantities of information, including highly confidential business information, without any independent judicial oversight as to the merits of the inquiry and minimal oversight of the scope of the documentary demands. Indeed, some states authorize the attorney general to issue civil investigative demands with little, if any, proof of wrongdoing. See, *e.g.,* App. 35a-36a (observing that the Massachusetts Attorney General may initiate an investigation whenever "she *believes*

a person has engaged" in wrongdoing, without any requirement that such a belief be "reasonable" (emphasis in original)); *Evans* v. *State*, 963 P.2d 177, 182 (Utah 1998) (noting that the State can issue civil investigative demands on less evidence than required by the probable cause standard because they are part of an investigation, not an enforcement action); *People ex rel. Babbitt* v. *Herndon*, 581 P.2d 688, 692 (Ariz. 1978) (in challenge to the state attorney general's basis for a civil investigative demand, the court could not weigh the veracity of the attorney general's allegations, but was required to accept them as true).

This creates yet another problem. As this Court has recognized, federal investigations can be incredibly expensive to defend against, "so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason." *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 213 (1946). The experience of *Amicus*' members is that state attorney general investigations bear those same hallmarks. State attorney general investigations impose significant financial costs regardless of whether the client cooperates with the investigation or opposes it. Indeed, cooperation typically means committing to being at the government's disposal for an indeterminate period. Investigations also have other business consequences:

- Loss of investor confidence: The United States Attorney Manual acknowledges that protracted government investigation can disrupt and depress a company's stock price. United States Attorney Manual § 9-28.700, cmt. B. But an investigation

need not be protracted to have that effect – the news of an investigation is frequently sufficient.

- Customer uncertainty: Government investigations cast a pall over the perceived long-term stability of the target with customers. Further, business customers of the investigation's target may end the business relationship to avoid the risk of being dragged into the investigation.
- Talent flight: Investigations cause similar uncertainty in employees who may bolt to other employers to avoid being drawn into the investigation or because of fears of their employer's demise.

The due process limitations on personal jurisdiction are one of the only protections against these expensive intrusions by out-of-state political actors. Even these protections, however, are rarely invoked and then with limited success by defendants. See, *e.g.*, *Everdry Mktg. & Mgmt.* v. *Carter*, 885 N.E.2d 6 (Ind. Ct. App. 2008); *Jepsen* v. *Assured RX, LLC*, 2017 WL 6417819 (Conn. Super. Ct. Nov. 14, 2017); *Silverman* v. *Berkson*, 661 A.2d 1266 (N.J. 1995); *American Dental Co-op* v. *Attorney Gen. of State of N.Y.*, 514 N.Y.S.2d 228 (N.Y. App. Div. 1987).

The arguments made by the out-of-state defendants in these cases and Exxon Mobil also evoke the long-held understanding that personal jurisdiction is "a consequence of territorial limitations on the power of the respective States." *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958). This federalism concern is of sufficient import that it can be decisive in some cases. *Bristol-Myers Squibb*, 137 S. Ct. at 1780. And it is all the more important

where state attorneys general seek to impose their police powers on out-of-state defendants, as is the case here, which further emphasizes why the Court should grant the Petition.

CONCLUSION

For the reasons given above, the Petition should be granted and the judgment of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted,

JOHN F. KUPPENS
President
DRI–THE VOICE OF THE DEFENSE BAR
55 West Monroe Street
Chicago, IL 60603
(615) 428-8638
john.kuppens@nelsonmullins.com

MATTHEW T. NELSON
Counsel of Record
ADAM T. RATLIFF
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street N.W.
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com

Counsel for Amicus Curiae

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