No. 16-1171

In the Supreme Court of the United States

GLAXOSMITHKLINE LLC,
Petitioner,

v.

M.M. EX REL. MEYERS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When the Petitioner argued for a "but for" causation test in the court below, can it seek review of an alleged split in the lower courts on whether due process requires satisfaction of a "but for" or "proximate cause" test to satisfy personal jurisdiction?

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents M.M., a minor, and other minors, by their parents, respectfully request that the Court deny GlaxoSmithKline LLC's Petition for a writ of certiorari seeking review of the decision of the Illinois Appellate Court.

Petitioner presents a question about whether a meaningful causal link must exist for a claim to "arise out of or relate to" a defendant's forum-state contacts, in order for a State to exercise personal jurisdiction over an out-of-state defendant. However, the court below did not disagree with that proposition and utilized it. It simply reached a result, based on the record before it, that is not to Petitioner's liking.

Though the Question Presented is framed that way, the Petition argues for certiorari on an entirely different basis. Petitioner urges the Court to take this case to decide whether the correct causation standard is a but-for or proximate-cause test. However, that question was not presented to the courts below, and Petitioner relied below on a state case that used the but-for standard that it now asserts is incorrect. Having urged the court to follow that case, it may not now claim that Illinois uses an incorrect causal standard or that this decision deepened an existing conflict, deserving of this Court's exercise of its discretion to resolve it or to provide Petitioner with a new bite at the same apple to correct its error by granting, vacating and remanding the case in light of another case now pending before it. Additionally, the record satisfies the proximate-cause test now urged by the Petitioner. The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Eight sets of mothers and children commenced this lawsuit in Illinois state court to recover for catastrophic congenital birth defects, including heart abnormalities, resulting from the mothers' ingestion of Petitioner GlaxoSmithKline LLC's (GSK) drug, Paxil, an orally administered psychotropic drug. Pet. App. 3-4. Two mother-child sets reside in Illinois, two in Florida, and one each in Colorado, Virginia, Michigan and Wisconsin. *Id*. at 4.

In addition to GSK, which designed, tested, manufactured, and sold the drug, plaintiffs sued Wolters Kluwer Health, Inc. and Wolters Kluwer United States, the companies that provided drug information about Paxil to pharmacies, and Walgreen Co., the company that sold Paxil to some of the plaintiffs. *Id*. at 5. The complaint stated causes of action for failure to warn, design defect, negligence, breach of implied and express warranty, and negligent misrepresentation and concealment.

The plaintiffs alleged that GSK knew or should have known of the significantly increased risks of congenital defects in babies whose mothers took Paxil, yet it aggressively promoted the drug as safe for pregnant women. *Id*. at 6. Adequate warnings would have deterred plaintiffs' physicians from prescribing Paxil and plaintiffs from ingesting it, the complaint further stated. *Id*. It also alleged that GSK failed to conduct appropriate tests or follow-up to confirm Paxil's safety or dangers. *Id*. at 6-7.

GSK responded to the complaint by seeking dismissal of the out-of-state plaintiffs arguing that it

was not at home in Illinois and that these plaintiffs' claims did not arise from GSK's Illinois activities. *Id*. at 7. It also argued that its "actions or omissions in Illinois were not the 'but for' cause of the alleged harm." *Id*. at 8.

GSK is a Delaware corporation, with its principal place of business in Delaware as well, though it also has corporate and administrative headquarters in Pennsylvania and North Carolina.[1] *Id*. at 4. GSK has 217 employees in Illinois, as well as an agent for service of process. *Id*. at 8. The record showed that GSK had 184 sales representatives in Illinois and, over a period of 200-2006, between 79 and 121 who specifically marketed Paxil in the state. *Id*. GSK also conducted at least 18 preclinical and clinical studies on Paxil in Illinois. *Id*.

Contrary to GSK's portrayal in its petition that pregnant women were excluded from the trials and were not subject to any further study, Pet. 4, 9, 22 n.3,

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[1] In the trial court, GSK argued it "might be" at home in Pennsylvania and North Carolina. Pet. App. 10. That GSK has a principal place of business in Delaware appears to be a legal fiction. GSK's

> presence in Wilmington[, Delaware] is minimal. It subleases a small, ten-by-ten foot office from Wilmington Trust [which serves as the Delaware presence for numerous corporations], but that office is rarely visited, and it serves primarily to house GSK Holdings' books and records. … GSK Holdings has one Delaware bank account that, as of November 2010, had less than $25 in it.

Johnson v. SmithKline Beecham Corp., 724 F.3d 337, 342-43 (3d Cir. 2013).

at least one of the clinical studies instructed that those conducting them that "[s]ubjects who became pregnant during the study were to be withdrawn from the study immediately." Pet. App. 8. Continued monitoring of those subjects was required. *Id*. at 8-9.

In response to the motion to dismiss, the non-resident plaintiffs asserted that their claims arose directly from GSK's 18 to 21 clinical trials in Illinois, conducted by 17 physicians in the state on a continuous basis over nearly two decades. *Id*. at 9. Yet, another study, in which GSK was a collaborator, was also conducted in Illinois. *Id*. At the same time, the non-residents claims were based on the "same alleged wrongs" as the Illinois plaintiffs. *Id*. Moreover, the plaintiffs asserted that the Illinois clinical trials bore 18 pregnancies, that GSK failed to track all of those pregnancies, and, in several instances GSK learned fetal abnormalities, including a heart abnormality, occurred. *Id*. at 10.

The trial court denied the motion to dismiss because GSK's purposefully availed itself of the privileges and benefits of Illinois, something GSK had conceded. *Id*. at 12, 10, 17. It further noted that GSK "may have failed to adequately interpret or … collect [data]" from the Illinois clinical trials and that plaintiffs' claims relate to or arise from these substantial Illinois contacts. *Id*. at 12.

Of the various defendants, only GSK sought interlocutory review. *Id*. at 5. Before the intermediate appellate court, the only issue was whether Illinois had specific jurisdiction over GSK. *Id*. at 16. Because there was no dispute about whether GSK purposely directed its activities at Illinois, the decision below focused on

whether the claims arose from or related to GSK's purposeful activities in the state. *See id*. at 19-23, 25-29. Plaintiffs argued that the Illinois clinical trials related to their claims because the trials resulted in at least 18 pregnancies that GSK failed to track that would have revealed issues and difficulties for the children born that had a direct impact on the missing warnings that would have affected plaintiffs' use of Paxil. *Id*. at 20. GSK defended their failure by arguing that the FDA had required them to exclude pregnant women from its trials, but the FDA also requires pharmaceutical companies to pay special attention to groups with unique risk considerations and that "[f]ollowup evaluation of the pregnancy, fetus, and child [when pregnancy occurs during a clinical trial] is *very important*." *Id*. at 20-21 (citing International Conference on Harmonisation: Guidance on General Considerations for Clinical Trials, 62 Fed. Reg. 66113-02, 66117 (Dec. 17, 1997) (emphasis added by court).

The court concluded that "if defendant GSK failed to adequately track the pregnancies of women who participated in its clinical trials, a portion of which occurred in Illinois, plaintiffs' claims would thus arise from or relate to defendant GSK's purposeful activities in Illinois." *Id*. at 21. Reviewing the complaint's allegations and the evidence in the record, the court concluded that plaintiffs had made out a *prima facie* case that their claims arose from GSK's Paxil clinical trials in Illinois. *Id*.

Because Illinois permits a defendant to "'overcome [the] plaintiff's *prima facie* case for jurisdiction by offering uncontradicted evidence that defeats jurisdiction,'" *id*. at 23 (quoting *Russell v. SNFA,* 987

N.E.2d 778, 784 (Ill.), *cert. denied,* 134 S.Ct. 295 (2013) (brackets in orig.), the court considered GSK's assertion that only a "small fraction" of the clinical trials took place in Illinois (17 of 351, or five percent of all Paxil trials worldwide, according to GSK). *Id*. at 25. GSK also asserted that plaintiffs had to meet a "but for" causal test. *Id*. at 27.

Further, GSK argued that Plaintiffs did not allege that the 18 pregnancies occurred in Illinois, but failed to offer any evidence to show that they did not, despite "uniquely ha[ving] access to this type of information." *Id*. at 27. For that reason, the court below determined that GSK had failed to meet its burden "to negate plaintiffs' *prima facie* showing of specific jurisdiction." *Id*. at 28. Thus, it held that "plaintiffs' injuries allegedly arose from acts of omission during the clinical trials and the resulting inadequate warning labels." *Id*.

The Illinois Supreme Court denied GSK's petition for leave to appeal on November 23, 2016.

REASONS FOR DENYING THE PETITION

GSK seeks this Court's intervention in this case on two grounds, neither of which warrant it. First, it seeks to hook its wagon to this Court's forthcoming decision in *Bristol-Myers Squibb v. Superior Court,* No. 16-466, where the question presented is whether a state must apply a causal standard in evaluating specific jurisdiction. That question, however answered, is not worthy of an order granting, vacating, and remanding, simply because the Illinois appellate court in this case utilized a causation test. GSK's complaint is merely that it is unhappy with the conclusion adopted by the court below, questioning the validity of its reading of

the causal evidence before it. GSK's petition, accordingly, is best understood as a request for error correction—a request this Court routinely denies. *See* Sup. Ct. R. 10. Even so, there is no error to correct here.

Alternatively, though not reflected by the Question Presented, GSK argues that the lower courts are deeply split between a proximate-cause standard and a but-for standard in evaluating causation for personal jurisdiction purposes and asks this Court to take this case to resolve the split. Pet. 2, 3, 14-23.

There are multiple problems with that request. First, the court below was not presented with that question and therefore did not determine it. Second, GSK advocated a but-for standard in that court and cannot now complain that it is the wrong standard. Third, the split it proffers is largely a product of its own imagination. Finally, to the extent that courts have taken different views of the causal relationship between the claims and the jurisdiction, those differences properly reflect choices made by a state in devising the scope of its long-arm statute, which need not extend, as Illinois' does, to the full reach permitted by Due Process.

Because this case presents a poor vehicle to consider either the Question Presented or the alleged split in the lower courts, the Petition should be denied, and this case, which is here after a permissive interlocutory appeal from a motion to dismiss, should be allowed to proceed with an answer, discovery, and a trial.

I. THE ILLINOIS APPELLATE COURT APPLIED CAUSAL CRITERIA TO THE QUESTION OF PERSONAL JURISDICTION, LEAVING NO QUESTION FOR THIS COURT TO DECIDE.

GSK asks this Court to grant certiorari to determine, "[f]or a claim to 'arise out of or relate to' a defendant's forum-state contacts, must there be a meaningful causal link between the defendant's forum-state contacts and the plaintiff's claim?" Pet. i.

The decision of the Illinois Appellate Court already answered that question affirmatively, which is the answer GSK seeks. No reason exists to review this case because there is no controversy on that issue for this Court to decide.

The Illinois court first found that GSK did not dispute and explicitly conceded that GSK "purposefully directed its activities at Illinois." Pet. App. 17. Even in the absence of that concession, the court concluded that this part of the specific-jurisdiction inquiry was satisfied. *Id*. The court then took up the question of whether the alleged injuries "arose out of or related to defendant's in-state activities." *Id*. at 19 (citations omitted).

Plaintiffs alleged that their injuries arose out of deficiencies in GSK's Paxil clinical trials in Illinois. *Id*. 19-20. The court below found that the allegation, supported by competent evidence, made out a *prima facie* case that the claims "thus arise from or relate to defendant GSK's purposeful activities in Illinois." *Id*. at 21, 22.

The court then found that GSK failed to rebut that *prima facie* showing. *Id*. at 25. GSK argued that there was no "meaningful link" between claims and the number of Paxil trials in Illinois, because there were a larger number of trials that took place among 44 states and a number of foreign countries. *Id*. at 25-26. In addition, it argued that, under *Keller v. Henderson,* 834 N.E.2d 930, 939 (Ill. App. 2005), the Illinois activities must be both the "cause in fact" and "legal cause." Pet. App. 26. *Keller* defines those terms in the sentence that follows the one GSK relied upon. It states that "'cause in fact' refers to whether the injury would not have occurred 'but for' the defendant's forum activities." *Keller,* 834 N.E.2d at 939 (citation omitted). It further defines "legal cause" as referring to "whether the defendant's forum conduct 'gave birth to' the cause of action." *Id*.

The Illinois court did not specifically state what causation standard it applied and did not dispute *Keller's* holdings. Instead, its ruling relied upon the fact that "GSK did not offer 'uncontradicted evidence' that defeats jurisdiction." Pet. App. 27. Despite its "unique[] access to this type of information" concerning where the 18 pregnancies during clinical trials took place, GSK failed to show that the plaintiffs were wrong to assert a connection to the Illinois trials *Id*. To the Illinois Appellate Court, that failure allowed the prima facie case made by Plaintiffs to stand unrebutted.

Even before this Court, GSK concedes that multiple clinical trials took place at various sites in Illinois, but argues that it is "difficult to credit" the connection between the injuries and trials that the trial court and appellate court both found to exist. Pet. 4. Yet, the

Illinois Appellate Court determined that GSK's forum contacts in the form of clinical trials contributed to the plaintiffs' claims. In essence, GSK's Petition asks this Court to re-weigh the evidence and make a determination of evidentiary sufficiency for the lower court's ruling, rather than decide a question of law. Yet, this Court's rules discourage writs of certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10. There is no reason to depart from this longstanding refusal to serve as a court of error.

There are two takeaways from the court's conclusions. First, the court accepted and applied the requirement that there must be a meaningful causal link between the injury and the forum state, even if the court's application of the facts to the test were not to GSK's liking. Second, the decision below turned on the lack of evidence that GSK proffered, not a question of law. For these reasons, the Question Presented is not joined by the facts of this case. The Petition should be denied and should not benefit from a GVR order.

II. THE ALTERNATIVE QUESTION WAS NOT BEFORE THE COURT BELOW AND, IF THE COURT ERRED, IT WAS INVITED ERROR.

Even though its Question Presented asks whether a meaningful link between the injury and conduct in the forum state must exist more generally, GSK tells this Court that it should decide whether a "plaintiff [must] show that the defendant's forum-state contacts *proximately* caused the plaintiff's injuries, or is it

enough that those contacts were a *but-for* cause of the plaintiff's injuries?" Pet. 2 (emphasis in original).

The problem with this alternative question is that the issue was never presented below. At no time while the case was pending in the Illinois courts did GSK argue that the court needed to apply a proximate-cause standard, rather than a but-for test. Ordinarily, "this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller,* 425 U.S. 231, 234 (1976). *See also Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367, 379 n.5 (1996) (Court "generally do[es] not address arguments that were not the basis for the decision below."); *Duignan v. United States,* 274 U.S. 195, 200 (1927) (same).

While this limitation on issues eligible for review comprises a prudential consideration, rather than a restriction on jurisdiction, this Court has made plain that it will not depart from that general rule absent a showing of "'unusual circumstances.'" *Taylor v. Freeland & Kronz,* 503 U.S. 638, 646 (1992) (citation omitted). *Cf.* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure: Civil 2D § 2805, at 57-58 ("A principle that strikes very deep is that a new trial will not be granted on grounds not called to the court's attention during the trial unless the error was so fundamental that gross injustice would result.").

Further militating against GSK's Petition is that the company invited the claimed error. GSK urged the Illinois Appellate Court to require a meaningful connection by urging it to adopt the approach to "cause in fact" and "legal cause" used in the *Keller* case. *See* Pet. App. 26. That approach utilizes the but-for test.

Id., relying on *Keller,* 834 N.E.2d at 939. Thus, the court below cannot be faulted if it adopted the but-for approach.[2]

While not conceding that the court below made any error at all, if *sub silentio* application of the but-for test was error, the invited-error doctrine "prevents a party who induces an erroneous ruling from being able to have it set aside on appeal." *United States v. Burson,* 952 F.2d 1196, 1203 (10th Cir.1991). Therefore, "[h]aving induced the court to rely on a particular erroneous proposition of law or fact, a party ... may not at a later stage ... use the error to set aside the immediate consequences of the error." *Fryman v. Fed. Crop Ins. Corp.,* 936 F.2d 244, 249 (6th Cir. 1991) (internal quotation marks omitted). Notably, Illinois follows the same rule. *See Gaffney v. Bd. of Trustees of Orland Fire Prot. Dist.,* 969 N.E.2d 359, 368 (Ill. 2012) ("The rule prohibits a party from requesting to proceed in one manner and then contending on appeal that the requested action was error.").

Because the issue GSK actually briefs and wants this Court to take up was not presented below and because GSK led the court to believe it favored the but-for test, this case presents no opportunity to resolve the question of proximate cause versus but for.

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[2] Although the court below references the but-for test in *Keller,* it never discusses it otherwise. It is therefore unclear whether the test ever entered into consideration in the decision.

III. THE COMPLAINED-OF SPLIT AMONG THE LOWER COURTS DOES NOT REQUIRE THIS COURT'S INTERVENTION.

A. This Court Should Accord the Lower Courts Time to Work through Its Most Recent Jurisprudence.

It is noteworthy that all three cases that GSK alleges have adopted the but-for test pre-date this Court's recent personal jurisdiction jurisprudence, suggesting that any differences that might exist among jurisdictions will be reexamined by the respective jurisdictions independently of any action on this Petition. Certainly, this Court's decisions in *Daimler AG v. Bauman,* 134 S. Ct. 746 (2014) and *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915 (2011), regarding general jurisdiction, and its decisions in *Walden v. Fiore,* 134 S. Ct. 1115 (2014) and *J. McIntyre Mach., Ltd. v. Nicastro,* 564 U.S. 873 (2011), regarding specific jurisdiction, have started a broad reexamination of state personal jurisdiction standards. *See* Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction,* 68 SMU L. Rev. 107 (2015) (stating the new cases ushered in "a new era in the law of general and specific personal jurisdiction"). *See also, e.g., Magill v. Ford Motor Co.,* 379 P.3d 1033, 1038 (Colo. 2016) ("in *Daimler,* the U.S. Supreme Court clarified the law of general personal jurisdiction"); *Picot v. Weston*, 780 F.3d 1206 (9th Cir. 2015) (applying *Walden* to deny specific jurisdiction).

Even if the question of the but-for versus proximate-cause tests is eventually certworthy, this case is a classic instance where it would be wise to permit the

issue to percolate further before this Court issues a definitive ruling. The benefits of percolation have long been recognized as a reason for denying certiorari. As Justice Frankfurter, writing for the Court, stated in *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 918 (1950):

> A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.

The issue is best presented where the record is clear, and courts have struck fundamentally different stances on a key legal question. When cases present that clear record and affirmatively take a stance in light of the current caselaw, this Court will have the benefit of the analysis and cross-commentary of various courts. That is not the case here. The record in this case demonstrates that the issue was not appropriately joined, either in legal argument or in evidentiary presentation. The court below also did not make clear the causal standard it was adopting because it became unnecessary to do so when rebuttal evidence was not forthcoming. And, the positions of the states and circuits have not yet caught up to this Court's recent jurisprudence, which they have just begun to consider. Further percolation is especially appropriate.

B. GSK Cites Only One Federal Circuit and Two States as Supposed Outliers.

GSK cites only three cases on the "but-for" side of the ledger, all of which are at least ten years old and thus substantially predate this Court's recent

controlling personal-jurisdiction decisions. The most recent is a decade-old Ninth Circuit decision that forthrightly declares that the Circuit follows a but-for test. *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007) (citation omitted). However, in application, the test appears to be indistinguishable with proximate cause. In *Menken,* the issue was whether an Arizona judgment debtor could assert personal jurisdiction in that state over a Nevada creditor in a dispute about property in Arizona. The Ninth Circuit held that jurisdiction existed because the injury, the inability of the plaintiff to sell his home due to an illegal lien placed on it by the creditor, arose directly out of the creditor's lien on that home. *Id*. at 1059 (9th Cir. 2007). The nexus between the forum state and the injury there satisfies the most rigorous formulation of causal connection that can be imagined.

GSK's two other cases adopting the but-for test, were decided in 1994 and 1989. The first, a Massachusetts decision, *Tatro v. Manor Care, Inc.,* 625 N.E.2d 549, 554 (Mass. 1994), adopted the but-for test. Subsequent cases, however, hold that the decision must still be read against the background of *"Automatic" Sprinkler Corp. of Am. v. Seneca Foods Corp.,* 280 N.E.2d 423 (Mass. 1972), which denied jurisdiction over an out-of-state defendant over a single transaction contact with the state. Massachusetts continues to leaven its causal analysis with the lessons of *"Automatic" Sprinkler. See, e.g., Rolivia, Inc. v. Emporium Nostrum, Inc.*, 2013 WL 6034920, *3-5 (Mass. App. 2013), and may more accurately be read as a form of but-for plus test, with exceptions.

The final case from GSK's but-for grouping, from Washington, answered a certified question from the Ninth Circuit by adopting the test the Ninth Circuit had used in the same case. *Shute v. Carnival Cruise Lines*, 113 Wash. 2d 763, 772, 783 P.2d 78, 82 (1989) ("adopt[ing] the 'but for' test of *Shute v. Carnival Cruise Lines,* 863 F.2d 1437 (9th Cir. 1988), *withdrawn,* 872 F.2d 930 (1989). The decision hardly seems to add weight to the asserted deep split among the lower courts.

IV. PRACTICAL AND FLEXIBLE CONSIDERATIONS GOVERN COURTS' RELATEDNESS INQUIRIES.

Any fair reading of the caselaw reveals that courts have taken to heart this Court's instruction to avoid the use of "mechanical or quantitative" tests. *International Shoe Co. v. Washington,* 326 U.S. 310, 319 (1945). *International Shoe* remains the "canonical opinion," *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 923), in personal jurisdiction jurisprudence and establishes a flexible, circumstance-driven standard so long as it accords with "traditional notions of fair play and substantial justice." *International Shoe,* 326 U.S. at 316. The court below and courts throughout the Nation focus heavily on the circumstances involved, as the *International Shoe* mandate requires.

This Court's aversion to rigid tests in this field also reflects another observation of this Court: "few answers will be written 'in black and white. The greys are dominant and even among them the shades are

innumerable.'" *Kulko v. Superior Court,* 436 U.S. 84, 92 (1978) (quoting *Estin v. Estin,* 334 U.S. 541, 545 (1948)).

It also aligns with other considerations that suggest why this Court has refrained from adopting a bright-line test. Respect for our federalist system animates much of our constitutional jurisprudence and operates to "preserve[] the integrity, dignity, and residual sovereignty of the States." *Bond v. United States,* 564 U.S. 211, 221 (2011). Rather than impose nationally uniform criteria to personal jurisdiction, this Court has acknowledged that the Constitution does not compel any particular approach and that states are free to adopt an individualized jurisdictional standard. *See Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 440 (1952).

Illinois, the State from which this case emerges, was the first in the nation to enact a long-arm jurisdiction statute when it did so in 1955. Civil Practice Act, 1955 Ill. Laws 2238, 2245-46, Ill. Rev. Stat. ch. 110, § 17 (1956) (codified as amended at 735 Ill. Comp. Stat. Ann. 5/2-209). A significant number of states modeled their acts on that of Illinois, though there is some disagreement about how many. *Compare* Keith H. Beyler, *The Illinois Long Arm Statute: Background, Meaning, and Needed Repairs,* 12 S. Ill. U. L.J. 293, 296 (1988) (counting 39 states in that category), with 1 Robert C. Casad & William B. Richman, Jurisdiction in Civil Actions § 4-1, at 382 n.9 (3d ed. 1998) (pegging the number at 15).

Today, states take several different approaches, largely either defining specific acts necessary to assert jurisdiction[3] or extending their jurisdictional reach to the limits contemplated by Due Process.[4] That the States have adopted different standards naturally supports differing approaches to the causal relationship between the injury and the forum state, not unlike this Court's observation that "[p]roximate-cause analysis is controlled by the nature of the [underlying] statutory cause of action." *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377, 1390 (2014). When state long-arm statutes differ, the applicable causal standard may as well.

That tolerance for federal-state differences that is a function of Our Federalism also explains why this Court should reject GSK's argument that a certworthy issue exists because of the alleged difference between the Seventh Circuit's causal strictures, which reject the but-for test, and Illinois's more "lenient" and "flexible" approach. *See* Pet. 22. After all, every circuit recognizes that a federal court, sitting in diversity, applies the forum state's jurisdictional statute, not federal law. *See, e.g., Cossart v. United Excel Corp.*, 804 F.3d 13, 18

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[3] *See, e.g.,* Ky. Rev. Stat. Ann. § 454.210; *Caesars Riverboat Casino, LLC v. Beach,* 336 S.W.3d 51, 57 (Ky. 2011) (describing Kentucky's approach as a "two-step process" that first determines whether "the cause of action arises from actions enumerated by the state long-arm statute and then checks to assure itself that exercising jurisdiction would not violate the defendant's due-process rights). Kentucky has categorically denied that its personal jurisdictional reach "extends to the outer limits of federal due process." *Id*. at 56.

[4] *See, e.g., Coen v. Coen,* 509 F.3d 900, 905 (8th Cir. 2007), *cert. denied,* 554 U.S. 905 (2008) (Minnesota).

(1st Cir. 2015); *Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29 (2d Cir. 1996); *Metcalfe v. Renaissance Marine, Inc.*, 566 F.3d 324, 330 (3d Cir. 2009); *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 753 F.3d 521, 535 (5th Cir. 2014); *Newberry v. Silverman*, 789 F.3d 636, 641 (6th Cir. 2015); *Madison Consulting Grp. v. State of S.C.,* 752 F.2d 1193, 1195 (7th Cir. 1985).

Simply put, the uniformity between state and federal jurisdictional rules that GSK seeks is not required by our Constitution, *Perkins,* 342 U.S. at 440, and may well be inconsistent with it. This Court has long recognized the "power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them … subject to the restrictions imposed by the Federal Constitution." *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934). While a "State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to Courts otherwise competent," *Kenney v. Supreme Lodge of the World,* 252 U.S. 411, 415 (1920), it has no obligation to restrict its jurisdictional reach below what the Constitution permits for what is unquestionably a state cause of action.

The tolerance for diversity of approach flows as well from *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), and its progeny. *Erie* teaches that federal courts sitting in diversity follow substantive state law, rather than apply federal law, making the federal court, "in effect, only another court of the State." *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 108 (1945).

In the end, we tolerate different approaches to jurisdiction because the Constitution recognizes each state's sovereignty, *see Alden v. Maine,* 527 U.S. 706, 714 (1999), which allows each state to determine how its courts will promote the public good through its courts to support socially desirable behavior and to discourage the infliction of harm. The choices made by Illinois, certainly within the context of this case, are well within the bounds the Constitution permits.

V. THE NEXUS BETWEEN GSK'S ILLINOIS CONTACTS AND PLAINTIFFS' INJURIES SATISFIES A RIGOROUS PROXIMATE-CAUSE TEST.

Even if GSK preserved the issue of but for versus proximate cause, this case is not certworthy. GSK does not dispute that its failure to conduct adequate product testing is subsumed within Plaintiffs' product-liability claims. In *Baylie v. Swift & Co.*, the Illinois Appellate Court held that where a defendant had the capability to test a product to ascertain its risk, but failed to do so, evidence of the inadequate testing was intertwined with the defendant's duty to warn and was properly before the jury. 670 N.E.2d 772, 782 (Ill. App. 1996), *appeal denied,* 677 N.E.2d 963 (Ill. 1997). The court reasoned that testing would have revealed that the substance constituted a hazard. *Id.*

More broadly, it is well-settled that "a manufacturer cannot escape liability by simply claiming not to know of various dangers." *Delvaux v. Ford Motor Co.*, 764 F.2d 469, 475 (7th Cir. 1985) Instead, the manufacturer "is charged with a knowledge he would have had, had he made the effort to acquire it." *Id*. A product manufacturer "cannot argue that he didn't know of a

certain danger when he would have known of it if he had performed reasonable tests." *Id*.

The record, including Plaintiffs' complaint and an affidavit GSK filed, establishes the following: The Complaint alleges the inadequacy of GSK's clinical trials led directly to inadequate warnings regarding risks of birth defects associated with Paxil. Pet. App. 19-20. The complaint alleges the inadequate warnings of risk of birth defects associated with Paxil directly led to Plaintiffs' birth defects. *Id*. GSK contracted with seventeen clinical trial investigators in Illinois to conduct clinical trials on the safety of Paxil. *Id.* at 17.

For nearly two decades, GSK continuously conducted clinical trials in Illinois on the safety of Paxil on women of childbearing age. *Id.* The clinical trial data generated in Illinois were aggregated with the data generated outside of Illinois to reach conclusions about safety. *Id.* at 21. Even if the clinical trials GSK conducted outside of Illinois could be said to have diluted the legal significance of GSK's nearly twenty years of clinical trials at Illinois study sites, proximate cause is still established. Regardless of the data generated elsewhere, the inadequacy of the Illinois trials proximately caused plaintiffs' alleged injuries.

Further, competent evidence established that the clinical trial investigators in Illinois had input into and control over the study design protocol used at study sites located in Illinois and elsewhere. *Id.* at 22. The clinical trial investigators in Illinois had input into and control over analysis of the aggregate data collected from study sites in Illinois and elsewhere. *Id*. That is, Illinois clinical trial investigators had input or control over the study protocols used worldwide and

aggregation of the data generated worldwide. Thus, even if the data aggregated with that generated in Illinois is considered, the processing of that aggregation had a distinctive Illinois stamp to it. The alleged inadequacy of those trials proximately caused plaintiffs' alleged injuries.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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