No. 16-466

In the

Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

PETITIONER,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

RESPONDENTS.

On Writ of Certiorari to the California Supreme Court

BRIEF OF *AMICUS CURIAE* GLAXOSMITHKLINE LLC IN SUPPORT OF PETITIONER

JEFFREY S. BUCHOLTZ
Counsel of Record
ETHAN P. DAVIS
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500
jbucholtz@kslaw.com

Counsel for Amicus Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Amicus curiae GlaxoSmithKline LLC ("GSK") is a pharmaceutical company that researches and develops medicines, vaccines, and consumer healthcare products. GSK is a Delaware limited liability company with large corporate/administrative headquarters in Pennsylvania and North Carolina. Its sole member is GlaxoSmithKline Holdings (Americas) Inc., a Delaware corporation with its principal place of business in Delaware.

Like petitioner, GSK is often targeted by plaintiffs' lawyers seeking to bring mass-tort lawsuits in jurisdictions of their choosing. The lawyers select forums that they believe are favorable, regardless of where their clients reside or where their clients were prescribed the medication that forms the basis of the suit. The lawyers then join together dozens or even hundreds of plaintiffs, most of whom have no connection with the chosen forum, to bring claims that also have nothing to do with the forum. As a result, GSK is forced to defend cases in states where it has little or no presence, where key witnesses are often unavailable to testify in person at trial, and where it is often unclear which state's law applies.

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[1] Petitioner and respondents have filed blanket consent letters with the Court. Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part and that no person or entity other than amicus and its counsel contributed monetarily to its preparation or submission.

GSK supports petitioner because the California Supreme Court's "sliding-scale" approach to personal jurisdiction enables blatant forum shopping, inappropriately burdens defendants, courts, and witnesses, and cannot be squared with this Court's due process jurisprudence.

The Court has recognized two categories of personal jurisdiction: general and specific. Under general jurisdiction, a defendant is subject to suit on any cause of action, even claims unrelated to the defendant's forum-state contacts, but only in forums where the defendant is incorporated or maintains its principal place of business and thus is "at home." Specific jurisdiction permits suit to be brought in a state where the defendant is not at home, but only when the claim itself is tied to the defendant's forum-state contacts. California's sliding-scale approach effectively would create a third category of personal jurisdiction, where neither basis for jurisdiction under this Court's precedents is satisfied—the defendant is not at home in the plaintiff's chosen forum, and the claim is not meaningfully tied to the forum—but where jurisdiction is somehow nonetheless permitted if the court thinks that result is reasonable. That relaxed and malleable approach to the fundamental question of a court's power guts important due process protections and ignores this Court's admonitions that the personal-jurisdiction doctrine is designed to allow defendants to predict and even control where they are subject to suit.

INTRODUCTION AND SUMMARY OF ARGUMENT

Three years ago, in *Daimler AG v. Bauman*, the Court held that a corporation is subject to general jurisdiction only where it is "at home," which typically means "where it is incorporated or has its principal place of business." 134 S. Ct. 746, 751, 760 (2014). Before *Daimler*, some courts had found general jurisdiction everywhere the defendant had "continuous and systematic" contacts, which amounted to universal general jurisdiction for large companies with nationwide operations. *See id.* at 761. *Daimler* explicitly rejected that standard and the "exorbitant exercises of all-purpose jurisdiction" that had been permitted under it. *Id.*

Under *Daimler*'s direct compulsion, the California Supreme Court acknowledged that petitioner is not "at home" in California and therefore not subject to general jurisdiction there. But the majority then emptied that holding of all its significance. Invoking the same "continuous and systematic" contacts that are concededly not enough for *general* jurisdiction, the majority found them sufficient for *specific* jurisdiction. It did so by loosening the "arising from" requirement—which is supposed to distinguish specific from general jurisdiction—until specific jurisdiction is no longer specific to the plaintiff's claim and is really general jurisdiction by another name.

The court below thus effectively reinstated the theory of personal jurisdiction that this Court rejected. Under the decision below, a company with nationwide operations is subject to "specific"

jurisdiction virtually anywhere on virtually any claim. But there is something obviously wrong with a theory of "specific" jurisdiction that permits universal general jurisdiction. As the dissent observed, "[w]hat the federal high court wrought in *Daimler*—a shift in the general jurisdiction standard from the 'continuous and systematic' test of *Helicopteros* to a much tighter 'at home' limit—this court undoes today under the rubric of specific jurisdiction." Pet. App. 50a–51a (Werdegar, J., dissenting).

The California Supreme Court's "sliding-scale" approach further encourages plaintiffs' lawyers to assemble mass-tort actions of national scope in their favored jurisdictions, without regard to whether the claims have a meaningful nexus to the forum. GSK is already facing many such suits across the country, including in Missouri, California, and Illinois. In those cases, plaintiffs' lawyers use one or a few in-state plaintiffs as the key to unlock the courthouse doors for dozens of non-resident plaintiffs. GSK's experience is far from unique. Plaintiffs' lawyers target many other companies with the same types of lawsuits, with the result that a few plaintiff-chosen jurisdictions host a highly anomalous concentration of these claims. These jurisdictions are attractive to plaintiffs because of perceived favorable evidentiary and discovery rulings, because of juries that they believe are more likely to award large verdicts, and because aggregating large numbers of plaintiffs makes it difficult if not impossible for defendants to defend each claim on its merits.

As this Court has explained, such "exorbitant" exercises of personal jurisdiction "are barred by due process constraints on the assertion of adjudicatory authority." *Daimler*, 134 S. Ct. at 751. When a state court reaches out to decide a dispute that arose in a different state, the defendant will have trouble obtaining testimony from the most important witnesses. State courts generally lack subpoena power outside the state's borders, making it difficult or impossible for defendants to obtain live trial testimony from critical witnesses like the prescribing physician. The defendant's attorneys often have to settle for taking an out-of-state deposition that doubles as both a discovery and a cross-examination deposition and then trying to splice together a video to present at trial. The result is an awkward presentation that lacks the force of a live cross-examination and that bears little resemblance to "the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence." *Watkins v. Sowders*, 449 U.S. 341, 349 (1981). Moreover, without the ability to compel these witnesses to testify at trial, the defendant cannot question them about any opposing expert opinions disclosed at or near trial or otherwise tailor their examination to what occurs at trial.

The California Supreme Court's decision is also contrary to basic principles of federalism. A state should not want to require its citizens to serve as jurors—in trials that can last weeks—to adjudicate disputes that lack any meaningful connection to the state. But regardless of a state's wishes, a state lacks the constitutional authority to declare itself the hub of a nationwide multi-district litigation, reaching

out to decide controversies that properly belong in other states.

What is more, the decision below complicates mass-tort litigation by sometimes creating difficult choice-of-law issues. When the plaintiff, the defendant, and the injury are all out of state, a court must decide whether to apply the substantive law of the state where the claim arose (often but not necessarily the plaintiff's home state) or that of the forum state. These issues make dispositive-motion practice and the development of jury instructions more convoluted, creating more opportunities for error.

The Court should put an end to this inappropriate forum shopping by holding that a plaintiff must show a relationship of proximate causation between the defendant's forum-state contacts and the plaintiff's injuries. The California Supreme Court's holding that no causal relationship is required blends the required specific jurisdiction analysis into an amorphous "reasonableness" soup. And because but-for causation lacks a limiting principle, a but-for causation standard would be nearly as indeterminate as the California Supreme Court's avowedly non-causal standard. The proximate-cause standard, in contrast, properly addresses the fairness, predictability, and federalism concerns that animate personal jurisdiction jurisprudence.

ARGUMENT

Using the decision below and others with similar reasoning, plaintiffs' lawyers have engaged in blatant

forum shopping. Lawyers select jurisdictions not meaningfully related to their clients' claims, because they believe that those jurisdictions have favorable judges and juries willing to award large verdicts. By authorizing litigation in jurisdictions far from where the relevant events occurred, the California Supreme Court's approach imposes significant burdens on defendants, courts, and witnesses. The Court should adopt a proximate-causation standard to protect the core principles of fairness, predictability, and federalism that underpin personal jurisdiction jurisprudence.

I. The Decision Below Invites Gamesmanship By Plaintiffs' Lawyers.

The malleable, non-causal standard adopted by the California Supreme Court authorizes—indeed, rewards—plaintiffs' lawyers' tactic of concentrating cases in plaintiff-friendly jurisdictions even where their clients' claims have no connection to the chosen forum. The decision below blesses a legal landscape where a few jurisdictions—notably, Missouri, California, and Illinois—are serving as the effective hubs of nationwide mass-tort actions, even though those jurisdictions have virtually no connection to the cases they are hosting.

A. GSK Is Defending Hundreds of Claims in Missouri, California, and Illinois That Do Not Arise Out of GSK's Contacts With Those States.

GSK is at ground zero of this forum-shopping epidemic. In mass-tort suits around the country, plaintiffs' lawyers are recruiting a few in-state

plaintiffs to use as anchors to bring large numbers of claims by out-of-state plaintiffs in the lawyers' preferred jurisdictions.

In Missouri, for example, 96 plaintiffs whose claims have no connection to Missouri joined with a mere three in-state plaintiffs to bring a mass action in St. Louis. *See Fitts, et al. v. GSK*, Cause No. 1622-CC00539 (22nd Jud. Cir. Ct., City of St. Louis).[2] The plaintiffs are mother-child pairs who allege that the unborn children were injured when their mothers ingested Paxil, a drug that is FDA-approved to treat depression, obsessive-compulsive disorder, and anxiety. The 96 out-of-state plaintiffs reside in 30 different states. The trial court asserted personal jurisdiction as to the out-of-state plaintiffs' claims on the bizarre rationale that the *plaintiffs* had "consented to personal jurisdiction" and GSK's agent had been served in Missouri—skipping entirely over the question whether the nexus required by due process existed between the out-of-state plaintiffs' claims and GSK's Missouri contacts. *Fitts*, Order at 2-3 (Nov. 9, 2016).[3] In a similar case, not

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[2] It is not a coincidence that the total number of plaintiffs is precisely 99, as the Class Action Fairness Act permits removal to federal court of a "mass action" containing 100 or more plaintiffs. *See* 28 U.S.C. § 1332(d)(11).

[3] GSK's petition for a writ of prohibition was denied by the Missouri Court of Appeals and is now pending in the Missouri Supreme Court. *See* GSK's Pet. Writ Proh., *State ex rel. SmithKline Beecham Corp. v. Moriarty*, No. ED105081 (Mo. App. E.D. filed Dec. 8, 2016), *denied*, (Dec. 9, 2016); GSK's Pet. Writ Proh., *State ex rel. SmithKline Beecham Corp. v. Moriarty*, No. SC96133 (Mo. filed Dec. 29, 2016).

coincidentally also filed in St. Louis, 61 non-Missouri plaintiffs combined their claims with those of four Missouri residents. *See Orrick v. GSK*, Cause No. 1322-CC00079-01 (22nd Jud. Cir. Ct., City of St. Louis).

California is another attractive destination for plaintiffs' lawyers. Although GSK is not "at home" in California under *Daimler*, out-of-state plaintiffs have filed 13 suits against GSK in California state courts over the past four years. Those complaints name 27 California residents and 31 non-California residents as plaintiffs. The non-California plaintiffs live in states all over the country, including Illinois, Pennsylvania, Kentucky, New Hampshire, Oklahoma, Michigan, Missouri, Arizona, Wisconsin, Wyoming, Louisiana, Texas, and Mississippi. They do not allege that their physicians prescribed Paxil in California, that the plaintiffs ingested Paxil in California, or any other facts linking their claims to California. Instead, like respondents here, they argue that personal jurisdiction is proper simply because GSK marketed and sold Paxil in California as a general matter—in-state sales that potentially give rise to claims by *other* plaintiffs, but not their own claims. The trial court invoked the California Supreme Court's decision and denied GSK's motion to quash. *See* Order Denying Defendant GlaxoSmithKline, LLC's Motion to Quash for Lack of Personal Jurisdiction of Non-California Plaintiffs, *Paxil II Product Liability Cases*, JCCP 4786 (Nov. 4, 2016). GSK's petition for a writ of mandate is pending. *See GlaxoSmithKline LLC v. Superior Court*, No. B279328 (Cal. Ct. App.).

Plaintiffs' attorneys also perceive Illinois as a favorable jurisdiction. There, six mother-child pairs from Florida, Colorado, Virginia, Michigan, and Wisconsin used one pair from Illinois as an anchor to sue GSK in the Circuit Court of Cook County. *See Meyers, et al. v. GlaxoSmithKline LLC*, 2016 IL App (1st) 151909, *leave to appeal denied* (Ill. Nov. 23, 2016). Lacking confidence in the theory endorsed by the court below, the out-of-state plaintiffs relied on a twist: They contended that their claims arose out of GSK's worldwide clinical trial program for Paxil. That program had only the most miniscule connection to Illinois: 95 percent of the over 300 clinical trials did not have even a single study site or investigator in Illinois, and even the few trials that had a site in Illinois had the vast majority of their sites elsewhere. And the plaintiffs did not allege that their claims had anything to do with the tiny portion of the clinical trial program that occurred in Illinois. Nonetheless, the trial court and the Illinois Appellate Court thought it was enough that the data from the handful of Illinois study sites—in the handful of trials that had even one Illinois site—was "aggregated" with the data GSK collected across the country and around the world. 2016 IL App (1st) 151909, at ¶ 52. Under that loose approach to the "arising from" requirement, GSK would be subject to specific jurisdiction essentially everywhere on essentially any claim.[4]

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[4] GSK intends to petition for certiorari in *Meyers* to ask the Court to resolve the split over but-for versus proximate causation, if the Court does not resolve that question in this

Plaintiffs' lawyers seek out what they refer to as "favorable jurisdictions" advisedly. William Cash, *Is It Time to Rethink the MDL for Mass Tort Cases?* The Trial Lawyer Magazine (Sept. 2015), *available at* http://www.thenationaltriallawyers.org/2015/09/rethink-the-mdl-for-mass-tort-cases/. Plaintiffs' lawyers believe that they can obtain favorable discovery and evidentiary rulings in these courts. And they consider the jury pools to be optimal. "It is certainly fair to summarize all of this by saying that juries in California put a higher value on personal injury cases than the average American does." Ronald V. Miller, Jr., "Average Injury Verdicts in California," Accident Injury Lawyer Blog (Dec. 15, 2010), *available at* http://www.accidentinjurylawyerblog.com/2010/12/average_injury_verdicts_in_cal.html.

Other lawyers are even more explicit. "What I call the 'magic jurisdiction' [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges . . . and it's almost impossible to get a fair trial if you're a defendant in some of these places. . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is." Richard "Dickie" Scruggs, Asbestos for Lunch, panel discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in INDUSTRY COMMENTARY (Prudential Securities, Inc., New York), June 11, 2002, at 5.

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case. *See GlaxoSmithKline LLC v. M.M., et al.*, No. 16A806 (Feb. 10, 2017 order extending time for petition until March 23).

B. GSK's Experience Is Illustrative.

GSK's experience is a microcosm of a larger forum-shopping problem involving many other non-resident defendants. In recent years, for example, plaintiffs' lawyers have repeatedly sued Johnson & Johnson in Missouri about alleged risks posed by talcum powder. *See, e.g.*, *Timms v. Johnson & Johnson*, No. 4:16-cv-00733-JAR, 2016 WL 3667982 (E.D. Mo. Jul. 11, 2016) (remanding action to City of St. Louis Circuit Court and denying motion to dismiss for lack of personal jurisdiction in action involving 80 unrelated plaintiffs from 31 states, with only three from Missouri); *Swann v. Johnson & Johnson*, No. 4:14-cv-1546 CAS, 2014 WL 6850776 (E.D. Mo. Dec. 3, 2014) (remanding action involving 62 plaintiffs from 27 different states to City of St. Louis Circuit Court).

Missouri is also hosting dozens of lawsuits by out-of-state plaintiffs against Pfizer involving the prescription drug Zoloft. *See Robinson v. Pfizer Inc.*, No. 4:16-CV-439 (CEJ), 2016 WL 1721143 (E.D. Mo. Apr. 29, 2016) (remanding action brought by 64 plaintiffs from 29 different states to City of St. Louis Circuit Court); *see also In re Zoloft (Sertraline Hydrochloride) Prod. Liab. Litig.*, MDL No. 2342, 2015 WL 12844391 (E.D. Pa. Nov. 17, 2015) (remanding complaint involving 41 plaintiff families from 29 different states originally filed in City of St. Louis Circuit Court). General Motors, too, is litigating a case in Missouri state court related to allegedly defective ignition switches in which 28 plaintiffs from 15 different states joined with one who was allegedly injured in Missouri. *See Shell, et*

al. v. General Motors, No. 1522-cc00346 (22nd Jud. Cir. Ct., City of St. Louis); *see also State of Missouri ex rel. General Motors, LLC v. The Honorable David W. Dowd*, No. SC95385 (Mo. Sup. Ct. Nov. 30, 2015) (denying writ of prohibition).[5]

Janssen Pharmaceuticals is also facing a mass-tort action of national scope in state court in St. Louis. *See Allen et al. v. Janssen Pharm. et al.*, No. 1522-CC00187-01 (22nd Jud. Cir. Ct., City of St. Louis Nov. 9, 2016) (denying motion to dismiss for lack of personal jurisdiction in suit involving 64 plaintiffs from 30 different states). And Abbott Laboratories is defending litigation in St. Louis involving Depakote brought by 24 plaintiffs from 13 different states. *See Barron, et al. v. Abbott Labs. Inc.*, No. 1222-cc02479-01 (22nd Jud. Cir. Ct., City of St. Louis).[6] As suggested by the decision below, California is hosting many similar cases as well. Between 2010 and 2016, plaintiffs' lawyers filed thousands of cases in state court in California involving tens of thousands of plaintiffs, with 89.9

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[5] *See also Felix et al. v. General Motors, LLC*, No. 1422-cc09472 (22nd Jud. Cir. Ct., City of St. Louis) (filed Aug. 20, 2014); *Alden et al. v. General Motors LLC*, No. 1522-CC09842 (22nd Jud. Cir. Ct., City of St. Louis) (filed June 5, 2015).

[6] The Missouri Court of Appeals initially affirmed a plaintiff's judgment but then transferred the case to the Missouri Supreme Court, where it is pending. *See* No. ED103508 (Mo. App. E.D. Jan. 9, 2017).

percent of the plaintiffs residing outside of California.[7]

Because trials in cases like this happen one by one, the few in-state plaintiffs' claims may never be litigated—further confirming that the in-state plaintiffs serve only a forum-shopping purpose. The St. Louis trials in the talc cases, for example, involved plaintiffs from Alabama, South Dakota, and California. *See Hogans et al. v. Johnson & Johnson et al.*, No. 1422-CC09012-01 (22nd Jud. Cir. Ct., City of St. Louis Jan. 7, 2016). And in the Missouri Paxil cases, the first case set for trial involved a plaintiff from West Virginia. When a state court hosts what amounts to a nationwide multi-district litigation in which in-state plaintiffs barely participate, that is a sure sign that something is amiss.

II. The California Supreme Court's Approach Creates Practical Difficulties for Defendants, Courts, and Witnesses.

A. The Decision Below Is Contrary to Principles of Federalism and Due Process.

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). These

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[7] *See* Executive Summary: Are Out of State Plaintiffs Clogging California Courts?, Civil Justice Association of California (2016), *available at* http://cjac.org/what/research/CJAC _Out_of_ State_Plaintiffs_Exec_Summary.pdf.

constitutional limits "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum." *Id.* at 292.

The decision below disregards these principles and exposes defendants to exactly the burdens that the Due Process Clause is meant to prevent. The most obvious problem is how to obtain live trial testimony from out-of-state witnesses, such as the plaintiff's doctors, family, friends, and co-workers. This is particularly problematic when it comes to the prescribing physician, who is typically a key witness. That doctor will testify about why she prescribed the drug, whether a different warning would have changed her treatment recommendation, and what the drug was intended to treat. Under the learned intermediary doctrine, moreover, a manufacturer fulfills its duty to warn by advising the prescribing physician of the risks, meaning that the physician's testimony can be crucial. *See, e.g.*, *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966); *Hansen v. Baxter Healthcare Corp.*, 764 N.E.2d 35, 42 (Ill. 2002) (manufacturers of prescription drugs need not warn patients directly, but must "warn prescribing physicians . . . of the product's known dangerous propensities").

But getting the doctor's testimony is a tricky endeavor. Doctors generally do not jump at the opportunity to testify, particularly far from home. And defendants cannot force them to do so, because state courts lack the power to compel out-of-state witnesses to attend trial. *See, e.g.*, *Gridley v. State Farm Mut. Ins. Co.*, 840 N.E. 2d 269, 279 (Ill. 2005) ("Illinois courts do not have subpoena power in

Louisiana, so . . . State Farm would not be able to compel the attendance of the Louisiana witnesses in Illinois.").

In practice, then, the defendant will depose the doctor in her home state. That is not a simple process. The defendant often must ask the court in the plaintiff's chosen forum to authorize the taking of the foreign deposition.[8] Then, the defendant often hires a local lawyer in the physician's state and files a separate lawsuit in a local court to obtain the foreign jurisdiction's authorization to take the deposition.

At the deposition, the defendant faces a strategic dilemma. The defendant cannot compel the doctor to appear at trial, so a video recording of the deposition may be the only way to present the doctor's testimony to the jury. But the defendant's attorney has not spoken with the doctor, because most states do not allow ex parte discussions by defense counsel with a plaintiff's doctor. As a result, the defendant does not know what the doctor is going to say.

So the defendant has two unpalatable choices. It can combine a discovery and a cross-examination deposition into one, requiring defense counsel to artfully begin with open-ended questions and then close things off with cross-examination questions developed on the spot. Then, the defendant can splice together the deposition clips, producing a disjointed and awkward presentation. Or the

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[8] *See, e.g.*, Commission to Take Deposition Outside California, http://www.courts.ca.gov/documents/disc030.pdf.

defendant can try to depose the doctor twice, if the defendant can persuade the forum state's court and the local court to allow it (a difficult thing to do).

In either event, the jury is deprived of the benefit of live testimony. And the defendant is denied the opportunity to prepare and deliver an effective cross-examination—"[t]he age-old tool for ferreting out truth in the trial process." *Perry v. Leeke*, 488 U.S. 272, 283 n.7 (1989). Instead, the judge turns down the lights, the screen comes on, and the jurors nod off. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("[T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants."). In an effort to liven things up, two attorneys will sometimes role-play by reading the deposition transcript aloud. Apart from being nearly as sleep-inducing as playing the video, this creates its own problems, because the jury is viewing the lawyers' demeanor instead of the witness's. More substantively, without witnesses actually present, the defendant cannot ask them questions tailored to what has occurs at trial. If a plaintiff's expert testifies at trial that the defendant should have published a particular warning, for example, the defendant cannot ask the prescribing physician if such a warning would have changed her decision to prescribe the medication.

An example from the *Orrick* case in Missouri (*see supra* at 9) illustrates this problem. As explained, that case involved a large number of out-of-state plaintiffs who used a handful of Missouri plaintiffs as

an anchor. The first claim set for trial involved a plaintiff from West Virginia, and the plaintiff's mother's testimony about other drugs she had ingested, other risk factors, and warnings she had seen was highly relevant. Shortly before trial, however, plaintiff's counsel replaced the mother with the plaintiff's grandmother as the next friend of the plaintiff and decided not to bring the mother to trial. As a result, GSK would not have been able to compel critically important witnesses in the case—the mother and the out-of-state prescribing physicians—to testify in front of the Missouri jury.

The decision below also upends the principles of federalism that the Due Process Clause protects. "The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *World-Wide Volkswagen*, 444 U.S. at 293. For that reason, a state lacks the constitutional authority to decide claims that lack the required connection to the state. *Id.*

The California Supreme Court's view—that a defendant with nationwide operations may be forced to defend virtually any claim in virtually any state—does not even purport to account for these principles. The decision below usurps the authority of other states that have a stronger interest in adjudicating these claims. *See Daimler*, 134 S. Ct. at 762 n.20 ("Nothing in *International Shoe* and its progeny suggests that 'a particular quantum of local activity' should give a State authority over a 'far larger

quantum of . . . activity' having no connection to any in-state activity.").

The decision below also improperly burdens the California courts and the California citizens who would be called upon to serve as jurors—not to mention the California citizens whose cases are delayed because the courts are clogged with out-of-state matters. The typical pharmaceutical product-liability trial lasts three weeks or more, and "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil*, 330 U.S. at 508–09. That should be California's view too. But even if California (or Missouri or Illinois) wishes to burden its citizens in this manner, a state lacks the constitutional authority to effectively designate itself the hub of a nationwide multi-district litigation so it can adjudicate claims where the plaintiff, the defendant, the defendant's challenged conduct, and the claimed injury are all out of state.[9]

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[9] The doctrine of forum non conveniens is not an adequate substitute for the due process protections embodied in this Court's personal jurisdiction jurisprudence. Unlike the decision whether to dismiss for lack of personal jurisdiction, a forum non conveniens determination "is committed to the sound discretion of the trial court." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994); *see also, e.g.*, *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 751 (1991) ("Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise . . . jurisdiction . . . .").

B. The Decision Below Also Creates Choice-of-Law Problems.

Aside from the due process and federalism problems discussed above, the decision below often forces judges to learn and apply the laws of jurisdictions other than their own. When a plaintiff resides out of state and suffered her alleged injuries out of state, the forum court must wrestle with what state's law governs. For example, if the plaintiff lives in Mississippi and her claim arose there, does the forum court apply Mississippi substantive product-liability law? No clear legal rule always dictates the answer to that question. In California, if there is a conflict between state laws, "the court analyzes the jurisdictions' respective interests to determine which jurisdiction's interests would be more severely impaired if that jurisdiction's law were not applied in the particular context presented by the case." *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 100 (2006); *cf. BMW of N. Am, Inc. v. Gore*, 517 U.S. 559, 602 (1996) (Scalia, J., dissenting) (noting the "'interest analysis' that has laid waste the formerly comprehensible field of conflict of laws"). In cases with plaintiffs who reside in dozens of different states, the difficulties can sometimes multiply exponentially.

Different and sometimes conflicting state laws can dramatically change the scope and complexity of the case and the issues that are litigated. For example, unlike in California, Mississippi's Product Liability Act expressly subsumes common-law claims, leaving plaintiffs with a statutory cause of action only. *See* Miss. Code. Ann. § 11-1-63. In

Pennsylvania, a plaintiff must prove punitive damages by a preponderance of the evidence; in Mississippi, clear and convincing evidence is required. *Compare Sprague v. Walter*, 656 A.2d 890, 923 (Pa. Super. 1995), *with Muirhead v. Cogan*, 158 So. 3d 1259, 1266 (Miss. Ct. App. 2015). In North Carolina, a plaintiff's contributory negligence (of any degree) deprives the plaintiff of the right to recover. *McCauley v. Thomas ex rel. Progressive Universal Ins. Co.*, 774 S.E.2d 421, 426 (N.C. Ct. App. 2015). But not in California. *Harb v. City of Bakersfield*, 233 Cal. App. 4th 606, 626 (2015), *review denied* (Cal. Apr. 29, 2015).

After deciding what law to apply, the parties and the court must develop jury instructions. This often happens in the charged and frantic atmosphere of trial, as attorneys must haggle over and turn a foreign jurisdiction's law into a format accessible to a jury. The foreign jurisdiction sometimes has no pattern jury instructions to rely on. And even when it does, the parties and the court often must splice together the foreign jurisdiction's substantive law with the forum state's procedural law. It is no surprise that error often occurs. For these reasons, "[t]here is an appropriateness . . . in having the trial .. . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of

laws, and in law foreign to itself." *Gulf Oil*, 330 U.S. at 509.[10]

III. The Court Should Hold That a Proximate Causal Relationship Is Required.

Petitioner's brief correctly explains why the California Supreme Court's amorphous sliding-scale approach is inconsistent with this Court's precedents and an invitation to abuse. In its place, the Court should adopt the proximate-causation standard.

A. The Court Should Reject the California Supreme Court's Nebulous Approach.

The sliding-scale approach "inappropriately blurs the distinction between specific and general personal jurisdiction." *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) (Gorsuch, J.). While general jurisdiction does not require that the claim bear a relationship to the defendant's forum-state contacts, specific jurisdiction "is premised on something of a *quid pro quo*: in exchange for 'benefitting' from some purposive conduct directed at the forum state, a

[10] Even if the forum ostensibly defers by applying the law where each claim arose, its interpretation and application of that foreign law could interfere with the development of the law in the state where the claim arose. A California court's view of (say) North Carolina law is of course not binding on North Carolina courts. But if California can invite and seize control over an entire class of claims from across the country, "North Carolina law" as a practical matter will be made by California courts, with North Carolina's own courts rarely having an opportunity to weigh in.

party is deemed to consent to the exercise of jurisdiction for claims related to those contacts." *Id.* California's sliding scale, however, "varies the required connection between the contacts and the claims asserted based on the number of the contacts" and therefore "improperly conflates these two analytically distinct approaches to jurisdiction." *Id.*

As petitioner explains, the decision below circumvents *Daimler* and *Goodyear* by returning to the old, rejected general jurisdiction standard in the guise of specific jurisdiction. Under the sliding scale, substantial and continuous contacts, though no longer sufficient to openly exercise general jurisdiction, somehow justify lowering the standard normally required for specific jurisdiction. What makes "specific" jurisdiction specific, however, is the nexus to the specific claim at hand. If no causal nexus to that claim is required—if it is sufficient that the claim *resembles* claims that arise out of the defendant's California contacts—then what is being exercised should be called by its true name: universal general jurisdiction for large corporations with nationwide operations. To the extent the decision below merely recycles the old standard for general jurisdiction under a different label, the Court should not tolerate such circumvention of its precedent.

But even if the court below is understood to have invented a new, third type of jurisdiction that is neither general nor specific, the court had no warrant to do so. And if nothing else is clear about the sliding scale, it is clear that it "undermines the rationale for the relatedness inquiry: to allow a defendant to anticipate his jurisdictional exposure based on his

own actions." *Id.* at 1079. If specific jurisdiction's relatedness requirement does not require a causal connection, then its meaning is entirely in the eye of the beholder; the sliding scale is an inkblot, not a standard. *See* Pet. Br. 20.

Indeed, the California Supreme Court's opinion suggests that it intended to subordinate predictability to what it viewed as reasonableness in result. Petitioner pointed out the lack of any valid interest for California, as one among 50 states, to adjudicate claims of out-of-state plaintiffs, against an out-of-state defendant, based on out-of-state conduct. As explained above, each state's limited role in our federal system is an important element of personal jurisdiction jurisprudence. *See supra* at 18–19. But the court below viewed these objections not just as unpersuasive, but as misplaced. Rather than address these issues about California's constitutional role in the context of the key question of "whether the contested claims arise from or relate to [petitioner's] forum activities," the court below shunted them off to an even more amorphous "consideration of whether the exercise of specific jurisdiction is reasonable." Pet. App. 36a.

The court below thus dissolved what is supposed to be a predictable, causation-based standard—an actual standard, with real content, and with the burden squarely on the plaintiff—into a hazy "reasonableness" multi-factor balancing framework with the burden on the defendant. This Court has made clear that "reasonableness" is not the standard the plaintiff must satisfy to justify specific jurisdiction. Instead, it is a safety valve for unusual

cases where the plaintiff satisfies the test for specific jurisdiction but exercising jurisdiction is nonetheless unreasonable under the circumstances. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–78 (1985). It makes sense to reserve such a holistic (and therefore unpredictable) analysis for use as a defense in unusual cases. But the California Supreme Court improperly transformed that safety-valve defense into the personal jurisdiction standard itself.

That is radical and pernicious. The Court need look no further than the decision below for proof that a "reasonableness" analysis is no substitute for enforcement of a clear proximate-cause standard. The court below acknowledged that "[p]retrial preparation and discovery concerning plaintiffs' claims may pose challenges given the diversity of their states of residence." Pet. App. 38a. But the court then found that petitioner had failed to show that those challenges would be an "undue burden," Pet. App. 139a— "whatever that means" (Pet. Br. 20). The court also allowed that "the fact that the nonresident plaintiffs greatly outnumber the California plaintiffs does give us some pause." Pet. App. 39a. But it then reassured itself that the number of out-of-state plaintiffs did not change the result because "no one factor, by itself, is determinative." *Id.* In finding that the assertion of jurisdiction was reasonable, the court also relied on unspecified "overall savings of time and effort to the judicial system" and "concerns of delay and efficiency" in "the interstate judicial system." *Id.* at 42a, 43a. This vague discussion, to say the least, does not "lend[] predictability to the legal system by permitting potential defendants to structure their

conduct with at least some assurances as to where that conduct may render them liable to suit." *Rees v. Mosaic Techs., Inc.*, 742 F.2d 765, 768 (3d Cir. 1984).

B. The Proximate Causation Standard is Based in History And Experience.

In place of the California Supreme Court's malleable and unpredictable approach, this Court should adopt the proximate-cause standard, under which "the defendant's in-state conduct must form an important, or [at least] material, element of proof in the plaintiff's case." *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) (citation omitted). The Court has already strongly suggested that proximate cause is the appropriate standard. *See Burger King*, 471 U.S. at 473–74 ("[W]here individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise *proximately* from such activities.") (citation omitted) (emphasis added).

The proximate-cause standard furthers all the core purposes of personal jurisdiction: fairness, predictability, and federalism. "The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 223 (2012) (Scalia, J., concurring) (citation omitted). Put another way, "[e]very event has many causes . . . and only some of them are proximate, as the law uses that term. So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result." *Paroline v.*

United States, 134 S. Ct. 1710, 1719 (2014). Under this standard, a plaintiff seeking to hale a non-resident defendant into court must show a "direct relation between the injury asserted and the injurious conduct alleged" in the forum state. *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992).

The proximate-cause standard enables defendants to predict what types of contacts with particular states could lead to what types of lawsuits there. That is because "[p]roximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline*, 134 S. Ct. at 1719. As the First Circuit explained, the "proximate cause standard better comports with the relatedness inquiry because it so easily correlates to foreseeability, a significant component of the jurisdictional inquiry." *Harlow*, 432 F.3d at 61 (quoting *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996)).

A but-for standard, on the other hand, would be little better than the California Supreme Court's sliding scale. But-for causation may be satisfied by connections that are not meaningful. Its basic flaw is that it "has . . . no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 322 (3d Cir. 2007) (quoting *Nowak*, 94 F.3d at 715). A person's decision to go to work in the morning might be called a but-for cause of a car accident on the way home, because no accident would have occurred if the person had stayed home that day. But no one would call going to

work that morning a *proximate* cause of the accident. "Life is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith." *Holmes*, 503 U.S. at 287 (Scalia, J., concurring).

The proximate-cause standard avoids a but-for standard's lack of predictability by filtering out situations where the defendant's conduct can be called a "but for" cause in a loose sense, but did not meaningfully cause the plaintiff's injury. "A requirement of proximate cause thus serves . . . to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline*, 134 S. Ct. at 1719; *cf. Caterpillar, Inc. v. Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am.*, 107 F.3d 1052, 1068–69 (3d Cir. 1997) (en banc) (Alito, J., dissenting) (giving examples of weak but-for causes).

The proximate-cause standard also respects the relationship between the benefits that a defendant receives from accessing a forum state and the obligations the defendant incurs as a result. "But-for causation," on the other hand, "cannot be the sole measure of relatedness because it is vastly overinclusive in its calculation of a defendant's reciprocal obligations." *O'Connor*, 496 F.3d at 322. "If but-for causation sufficed, then defendants' jurisdictional obligations would bear no meaningful relationship to the scope of the benefits and

protection received from the forum." *Id.* (internal quotation marks omitted).

Finally, "proximate cause" is a workable standard because it has a "familiar" meaning with a firm historical pedigree. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). "It is a well-established principle of [the common] law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause." *Waters v. Merchants' Louisville Ins. Co.*, 36 U.S. 213, 223 (1837). Proximate cause is based on "the familiar maxim, 'Causa proxima, non remota, spectator,'" which means that in law the immediate, not the remote cause of any event is to be regarded. *The G.R. Booth*, 171 U.S. 450, 453 (1898).

This Court regularly draws on the established and familiar body of proximate-causation principles. Observing that "courts have a great deal of experience in applying" proximate causation and that "there is a wealth of precedent for them to draw upon in doing so," the Court has "construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). *See, e.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (securities fraud); *Holmes*, 503 U.S. at 268 (RICO); *cf. Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 839 (1996) ("courts sitting in admiralty may draw guidance from . . . the extensive body of state law applying proximate causation requirements").

The Court should do so here as well. It would accomplish little to reject California's non-causal

approach only to adopt in its place—or see the lower courts adopt—a but-for standard that is no more predictable, and only marginally less malleable, in its application.

CONCLUSION

The Court should reverse the California Supreme Court's decision.

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Counsel of Record
ETHAN P. DAVIS
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500
jbucholtz@kslaw.com

Counsel for Amicus Curiae

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