No. 16-466

IN THE

Supreme Court of the United States

BRISTOL-MYERS SQUIBB CO.,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF MONEYMUTUAL LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

MoneyMutual LLC is a Nevada limited liability company. Its sole member is Selling Source LLC. No publicly held corporation owns 10 percent or more of an interest in either MoneyMutual LLC or Selling Source LLC.

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INTEREST OF AMICUS CURIAE

Amicus MoneyMutual LLC has an important interest in this case.[1] It is the petitioner in No. 16-705, which presents a similar question regarding the constitutional limits of personal jurisdiction.

MoneyMutual is a Nevada LLC that operates an automated website (*www.moneymutual.com*) allowing potential borrowers to electronically submit loan applications for consideration by independent third-party lenders. MoneyMutual is not a lender and is not a party to any loans. It is not involved in setting loan terms and is not informed of whether a loan agreement is ultimately completed or the terms of any such agreement. Rather, MoneyMutual is a marketing and advertising "lead generator." Individuals may use the MoneyMutual website to submit information and request that it be transmitted to prospective third-party lenders. MoneyMutual markets on a nationwide basis via television advertising and the internet, through both its website and emails.

Nevertheless, the Minnesota Supreme Court held that MoneyMutual was subject to specific personal jurisdiction in Minnesota in an action brought by four Minnesota residents who alleged that they used MoneyMutual's website to submit applications to third-party lenders. *See Rilley v. MoneyMutual, LLC*, 884 N.W.2d 321 (Minn. 2016). The Minnesota court denied MoneyMutual's motion to dismiss, even in the

[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

absence of any proximate causal nexus between its electronic communications and the actual harm upon which the Minnesota residents based their claims: loan transactions with third-party lenders, the terms of which allegedly violate Minnesota law. *Id.* at 335-37. The Minnesota Supreme Court acknowledged that the state and federal courts have adopted conflicting legal standards for determining the requisite causal nexus to establish specific personal jurisdiction, and conflicting positions as to whether electronic communications, without more, can be sufficient "minimum contacts" for specific personal jurisdiction in a non-defamation, tort context. *Id.* at 336-37.

Because of the nature of its business, MoneyMutual has a strong interest in establishing that, under the constitutional test for specific jurisdiction, the defendant's forum contacts must be a proximate cause of the plaintiff's claim and the alleged harm suffered by the plaintiff. Further, in the Information Age where jurisdictional contacts are increasingly electronic in nature, MoneyMutual has an important interest in establishing that any online jurisdictional contacts be subject to careful judicial review, to enforce the constitutional limits of specific jurisdiction.

SUMMARY OF ARGUMENT

This Court has held that, to demonstrate "specific" personal jurisdiction, a plaintiff must demonstrate that the plaintiff's claims "arise out of or relate to" the defendant's contacts with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 & n. 15 (1985) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984));

see also Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011).

This Court should now make clear that in order for a plaintiff's claims to be sufficiently related to the defendant's forum contacts to establish specific jurisdiction, those contacts must be a *proximate cause* of the plaintiff's claim and the alleged harm suffered by the plaintiff. In particular, it is not enough for this Court simply to opine that *some, unspecified* degree of causal nexus is required under the specific jurisdiction test. Rather, this Court should go further to make clear that a *proximate-cause standard* is required.

Such a holding is necessary to fully resolve the conflict among the lower courts on the question presented. The lower courts have offered three principal answers to the question of what sort of ties must exist between a defendant's contacts with a forum and plaintiff's claims: some courts have adopted a "proximate cause" standard, others a broader "but for" standard, and still others a malleable "substantial connection" or sliding-scale test. As the Respondents recognized in their Brief in Opposition, this Court should fully resolve the conflict in the lower courts regarding the question presented. *See* BIO 17. The purposes of constitutional limits on personal jurisdiction are undermined not only by overbroad or unpredictable tests, but also by significant variance among the tests.

This Court should adopt the proximate-cause test. Only such a standard is consonant with the requirement that personal jurisdiction be limited to forums where the defendant has "manifest[ed] an intention to submit to the power of [the] sovereign."

J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 882 (2011) (plurality). And only such a test supplies the necessary clarity and predictability to allow a defendant reasonably to anticipate its jurisdictional exposure based on its own actions, which is an essential purpose of the "relatedness" element of the specific jurisdiction inquiry. *Burger King Corp.*, 471 U.S. at 474-75.

The proximate-cause test protects a defendant's liberty interests by ensuring that he will not be haled into court and forced to incur the burden of defending in a distant forum, when the plaintiff cannot even plead or offer facts showing that the forum contacts proximately caused the plaintiff's injury. In other words, the test guarantees that a defendant will not face the prospect of extraterritorial jurisdiction in a potentially hostile forum when his forum-related conduct was not the legally cognizable cause of plaintiff's injury. The test also ensures that a state is not allowed to reach beyond its borders to subject a "foreign" citizen to its courts for a matter for which the defendant's forum-related conduct was not a legally cognizable cause. Further, this Court consistently has recognized that proximate cause is the long-standing and accepted standard arising out of the common law and applicable to federal statutory interpretation, thereby assuring familiarity and ease of application by the courts; those considerations apply with equal force in the jurisdictional realm, where as reflected in *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014), this Court has emphasized the importance of clear and consistent rules of general application focused on protecting the due process rights of defendants.

The facts of MoneyMutual's own litigation in Minnesota demonstrate the need for this Court to adopt a proximate-cause standard. MoneyMutual operates an automated website (*www.moneymutual.com*) allowing potential borrowers to submit loan applications electronically to independent third-party lenders. The Minnesota Supreme Court conceded that "MoneyMutual never extended a loan," that consumers never had a borrowing relationship with MoneyMutual, and that they "never paid MoneyMutual." *Rilley*, 884 N.W.2d at 330 n.8. The court nonetheless held that MoneyMutual was subject to specific personal jurisdiction in Minnesota. The court reasoned that "the connection requirement does not require proof that the litigation was strictly caused by or '[arose] out of' the defendant's contacts; rather, it is sufficient to show that the contacts are 'substantially connected' or 'related to' the litigation." *Id.* at 336. The court found MoneyMutual's email communications with Minnesota residents and an alleged Google AdWords campaign supposedly involving the terms "Minnesota" and "Minneapolis" were "substantially connected" or "related to" the claims by Minnesota residents, without the need to demonstrate that those jurisdictional contacts proximately caused the actual harm upon which the Minnesota residents based their claims: the culmination of a loan transaction whose terms allegedly violate Minnesota law. For example, the court noted that "[a]lthough at this early stage of the litigation there is no evidence that the Google Ads actually *caused* any of the claims, the Google Ads are sufficiently *related* to the claims of respondents to survive a motion to dismiss." *Id.* at 337 (emphasis in original). The Minnesota court's approach

demonstrates the need for a proximate-cause test in order to confine the exercise of personal jurisdiction within constitutional limits.

The question presented is particularly important in the context of the modern Internet age, which threatens to erase many of the limits on specific jurisdiction this Court has established. Nationwide (and even global) electronic contacts have become inevitable for any business seeking to participate in the Information Economy. This Court should ensure that constitutional protections for nonresident defendants, as well as fundamental limits on the extraterritorial projection of state authority, are not eliminated by technological advances that have become a dominant personal and commercial choice for communications.

ARGUMENT

I. This Court Should Fully Resolve The Conflict That Was The Predicate Of The Petition For Writ Of Certiorari In This Case.

This Court has instructed that, to establish specific personal jurisdiction over a nonresident defendant, a plaintiff must establish "minimum contacts" resulting from the defendant's conduct "targeting" the forum state (and not just its residents), and also that the plaintiff's claims "arise out of or [be] connected with the activities within the state." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). This Court has explained that "the central concern of the inquiry into personal jurisdiction" is "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

However, this Court has never defined the precise nature of the requisite causal nexus between a plaintiffs' claims and a defendant's jurisdictional contacts. It should take the opportunity presented by this case to announce that the proximate-cause standard is the proper test.

A. The Lower Courts Have Adopted Three Different Tests For Determining The Requisite Causal Nexus.

The petition for writ of certiorari in this case was predicated on a conflict among *three* fundamentally different positions among the lower courts. *See* Pet. 9-19. As the Minnesota Supreme Court has observed, "[c]ourts disagree about how to apply this connection requirement (also referred to as the 'relatedness' or 'nexus' requirement) for specific personal jurisdiction." 884 N.W.2d at 336. The court identified "three major approaches": "a strict 'proximate cause' standard; a 'but for' standard; and a more lenient 'substantial connection' standard." *Id.* Numerous other decisions have recognized the same conflict in the lower courts.[2]

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[2] *See, e.g.*, *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 912 (8th Cir. 2012) ("The various circuits interpret the 'arise out of or relate to' requirement differently, and three domina[nt] approaches have emerged."); *id.* ("The first interpretation is referred to as the proximate-cause standard. This standard requires the defendant's contacts with the forum state to be the 'legal cause,' (i.e., proximate cause) of the plaintiff's injuries. The second interpretation is more relaxed and 'requires only "but for" causation. As the name indicates, this standard is satisfied when the plaintiff's claim would not have arisen in the absence of the defendant's contacts.' The third standard, referred to as the 'substantial connection' standard, examines 'whether the tie

The First and Sixth Circuits have opined that the defendant's forum contacts must be a proximate cause of the plaintiff's injury. *See, e.g., Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 35 (1st Cir. 1998) (quotation marks omitted) (holding that the defendant's contacts must be the "legal cause" of the plaintiff's injury "i.e., the defendant's in-state conduct [must] g[i]ve birth to the cause of action."); *Beydoun v. Watamiya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 508 (6th Cir. 2014) (emphasis in original) (holding that "only consequences that *proximately* result from a party's contacts with a forum state will give rise to jurisdiction.")

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between the defendant's contacts and the plaintiff's claim is close enough to make jurisdiction fair and reasonable.'") (citations omitted); *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 318-20 (3d Cir. 2007) ("Three approaches predominate. The most restrictive standard is the 'proximate cause' or 'substantive relevance' test. . . . A second, more relaxed test requires only 'but-for' causation. As the name indicates, this standard is satisfied when the plaintiff's claim would not have arisen in the absence of the defendant's contacts. . . . A third standard looks for a 'substantial connection' or 'discernible relationship.'"); *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) ("[T]here appears to be a split in the Circuits on the standard to be applied in determining if a tort claim 'relates' to the defendant's activities within the state. Some Circuits have held that in order for the defendant to be subject to the jurisdiction of a state the conduct within the state must be a proximate cause of the plaintiff's injury. Others have held that it is sufficient if the defendant's conduct in the state is a 'but for' cause of the plaintiff's injury."); *Tamburo v. Dworkin*, 601 F.3d 693, 708 (7th Cir. 2010) ("The First Circuit has held that at least with respect to intentional tort claims, the defendant's contacts with the forum must constitute both the cause in fact and the proximate cause of the injury. The Ninth and Fifth Circuits, on the other hand, require only that the contacts constitute a but-for cause of the injury.").

Other courts have held that, while a causal connection is required, a but-for connection will suffice. *See Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007); *Tatro v. Manor Care, Inc.*, 625 N.E. 2d 549, 553 (Mass. 1994); *Shute v. Carnival Cruise Lines*, 783 P.2d 78, 81-92 (Wash. 1989) (en banc). Still other courts have refrained from choosing between the "proximate cause" and "but for" causation standards, because the courts have found that the defendant's contacts with the forum were both a cause-in-fact and proximate cause of the plaintiff's claim.[3]

The third principal position is a "sliding scale" approach taken by the California Supreme Court below under which a defendant with wide ranging forum contacts can be subject to specific jurisdiction even when the defendant's contacts with the forum have no causal connection to the plaintiff's injury. Pet. App. 21a. Other courts with similar positions include the Federal Circuit, Minnesota Supreme Court, and District of Columbia Court of Appeals. *See Avocent Huntsville Corp. v. Aten Int'l Co.*, 552 F.3d

[3] *E.g.*, *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 912-13 (8th Cir. 2012); *Employers Mutual Casualty Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1160-61 (10th Cir.); *Tamburo*, 601 F.3d at 708; *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078-1079 (10th Cir.); *see also Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 801-802 (7th Cir. 2014) ("Specific jurisdiction must rest on the litigation-specific conduct of the defendant in the proposed forum state.").

1324, 1336-37 (Fed. Cir. 2008); *Shoppers Food Warehouse*, 746 A.2d at 333, 336 (D.C. 2000).

Given the varying approaches in the lower courts, this Court should fully resolve the conflict by addressing not only *whether* a causal nexus is required between the defendants' jurisdictional contacts and the plaintiff's claim and alleged harm, but also *what sort* of causal nexus is required. Numerous lower courts have noted the need for clarification by this Court on this precise question.[4] And the Respondents themselves recognized in their Brief in Opposition that this Court should fully resolve the conflict in the lower courts regarding the question presented. *See* BIO 17 (urging Court to address the "choice between but for and proximate causation" and "resolve *which* causation test is proper") (emphasis in original).

The very existence of multiple tests undermines the due process principles that limits on personal jurisdiction are meant to protect. Nationwide businesses face conflicting jurisdictional tests across the country. The due process principle of fair warning is undermined not only by unpredictability under a

[4] *See*, *e.g.*, *Tamburo*, 601 F.3d at 708 ("The Supreme Court has not elaborated on this [arise out of or relate to] requirement, and the occasional difficulty in applying it has led to conflict among the circuits."); *O'Connor*, 496 F.3d at 318 ("Unfortunately, the Supreme Court has not yet explained the scope of this requirement. State and lower federal courts have stepped in to fill the void, but their decisions lack any consensus."); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 579 (Tex. 2007) ("To support specific jurisdiction, the Supreme Court has given relatively little guidance as to how closely related a cause of action must be to the defendant's forum activities.").

particular test but also by substantial variance between tests.

B. This Court Previously Has Acknowledged This Issue, But Ultimately Declined to Address It.

The importance of resolving the precise nature of the "casual nexus" requirement for specific personal jurisdiction is illustrated by the fact that this Court has previously identified the issue in prior cases. It is a recurring question that constitutes an important issue of federal law.

In *Helicopteros*, this Court noted the issue but declined to resolve it:

> Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

466 U.S. at 415 n.10 (emphasis added).

Seven year later, in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), this Court again declined to decide the meaning of the "relatedness" test for specific personal jurisdiction, even though it had granted certiorari on the issue. *Id.* at 589.

The instant case presents the very question raised in *Helicopteros* and *Carnival Cruise Lines*.

II. Constitutional Principles Require A Proximate-Cause Test.

"Due process limits on the State's adjudicative authority principally protect the liberty of the

nonresident defendant — not the convenience of plaintiffs or third parties." *Walden*, 134 S. Ct. 1122. Due process also "act[s] as an instrument of interstate federalism"; minimum contacts serve "to ensure that the States[,] through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *Nicastro*, 564 U.S. at 881-82 (plurality).

Those whose "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State. are subject to general jurisdiction over all claims against them, *Goodyear Dunlop Tires,* 564 U.S. at 919 (quoting *International Shoe*, 326 U.S. at 317). But "those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter." *Nicastro*, 564 U.S. at 881 (plurality). They are subject only to specific jurisdiction that "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919 (citation omitted).

In *Walden* this Court affirmed three essential limits on specific jurisdiction. First, the defendant must have established "contacts with the *forum State* itself, not . . . contacts with persons who reside there." 134 S. Ct. at 1122 (emphasis added). Thus, "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id.* at 1123.

Second, the contacts between the defendant and the forum state must be "contacts that the 'defendant

himself' creates." *Id.* at 1122 (quoting *Burger King*, 471 U.S. at 475). Conversely, specific jurisdiction may not be based on the "'unilateral activity'" of persons other than the defendant. *See id.* at 1123 (quoting *Burger King*, 471 U.S. at 475). This Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id.* at 1122.

Third, the contacts upon which specific jurisdiction is based must be "suit-related." *Id.* at 1121. Contacts that have nothing to do with the "underlying controversy" in the litigation are irrelevant to specific jurisdiction. *Id.* at 1121 n.6. Indeed, this requirement is the core of what distinguishes specific jurisdiction from general jurisdiction. *Id.* at 1121 n.6.

A proximate-cause test best promotes the principles articulated by this Court in *Walden.* This Court should hold that specific personal jurisdiction requires that the defendant's jurisdictional contacts be a *proximate cause* of the plaintiff's claim and the alleged harm suffered by the plaintiff. Where such a nexus is absent, the defendant is not subject to specific jurisdiction in the forum.

A. The Proximate-Cause Test Is Necessary To Vindicate A Defendant's Liberty Interests And Principles Of Interstate Federalism.

A proximate-cause test serves the liberty interests and federalism principles the due process clause is designed to protect. A proximate-cause standard is a familiar legal test that allows courts to render accurate and predictable decisions and enables defendants better to anticipate the conduct

that might subject them to a state's jurisdiction. It also directly connects the defendant's decisions that give rise to the suit with the state's regulatory interests. Under the proximate-cause test, the defendant's forum contacts must be both the cause-in-fact and the legal cause of plaintiff's injury, and "the defendant's in-state conduct must form an 'important, or [at least] material, element of proof' in the plaintiff's case." *United Elec. Workers v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992).

Further, a proximate-cause test maintains the important distinction between general and specific jurisdiction. In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Goodyear*, 564 U.S. at 919 (citation omitted). Unless the "relatedness" requirement is rigorously enforced, the line between general and specific jurisdiction will blur. The proximate-cause test best maintains the distinction by ensuring the "substantial connection," *Walden*, 134 S. Ct. at 1122, between the defendant, the litigation and the forum that specific jurisdiction requires.

This test ensures that a defendant has "fair warning" as to where its conduct will subject it to suit." *Burger King*, 471 U.S. at 471-72 (citations omitted). To provide fair warning, a test must "give[] 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 Corp.*, 444 U.S. at 297.

The proximate-cause standard provides such predictability to jurisdictional decisions. "The *term* 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011). "What we ... mean by the word 'proximate,' " one noted jurist has explained, is simply this: "[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting). "That venerable principle [of proximate cause] reflects the reality that 'the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing.'" *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 536 (1983)); *see also Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992) ("[P]roximate cause" "limit[s] a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'") (citation omitted).

The proximate-cause standard responds to the recognition that, "'[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond.'" *CSX Transp.,* 564 U.S. at 701 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984)). "To prevent 'infinite liability,' courts and legislatures appropriately place limits on the chain of

causation that may support recovery on any particular claim." *Id.* (quoting Prosser and Keeton at § 41, p. 264); *see also Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) ("Every event has many causes, however, 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. . . . A requirement of proximate cause thus serves, *inter alia*, 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."); *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996) ("[P]roximate causation principles are generally thought to be a necessary limitation on liability. . . . 'Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity.'") (citation omitted).

B. The Same Policy Reasons Motivating This Court to Make Proximate-Cause the Default Requirement for Liability in Statutory Interpretation, Warrant Its Employment in the Specific Jurisdiction Context.

This Court consistently has defaulted to the proximate-cause standard in statutory interpretation. Familiarity, ease of application, and other practical considerations bearing on judicial administrability all have been identified by the Court as key considerations. This Court has explained:

> We generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the

> statute. For centuries, it has been "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.*, 11 Pet. 213, 223 (1837); *see Holmes*, 503 U.S., at 287 (Scalia, J., concurring in judgment). That venerable principle reflects the reality that "the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Associated Gen. Contractors*, 459 U.S. at 536. Congress, we assume, is familiar with the common-law rule and does not mean to displace it sub silentio. We have thus construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation.

Lexmark, 134 S. Ct. at 1390 (citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (securities fraud); *Holmes*, 503 U.S. at 268–70 (RICO); *Associated Gen. Contractors*, 459 U.S. at 529–35 (Clayton Act)).

"The proximate-cause inquiry is not easy to define, and over the years it has taken various forms; but courts have a great deal of experience applying it, and there is a wealth of precedent for them to draw upon in doing so." *Lexmark,* 134 S. Ct. at 1390. *See also Associated General Contractors of California, Inc. v. California*, 459 U.S. 519, 543-45 (1983) (indirectness of alleged injury "also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits.").

The same reasons that have led this Court to adopt the proximate-cause standard as a default in statutory interpretation cases apply with equal force regarding specific personal jurisdiction. There is no justification for choosing a lesser standard for "relatedness" than the proximate cause standard, particularly when the plaintiff ultimately will be required to demonstrate proximate cause in order to prove liability. The proximate-cause test therefore protects defendants' liberty interests by ensuring that they will not be haled into court in distant and potentially hostile forums and forced to incur the burden and expense of defending themselves, when the plaintiff cannot plead or offer facts (even at the jurisdictional stage) showing that the defendant's forum-directed conduct proximately caused the plaintiff's injury and is therefore legally-cognizable *even in the plaintiff's chosen forum*.

Adopting a proximate-cause standard would be consistent with this Court's thrust (evident in this Court's recent decision in *Walden*) toward clarifying and simplifying the key issues of personal jurisdiction. *Walden* made clear that the standards articulated in that decision applied to *all* cases involving challenges to specific personal jurisdiction and emphasized the need to focus on minimum contacts directed at the forum, rather than forum residents. *See* 134 S. Ct. at 1122-23, 1125. Tellingly, for its next major case addressing specific personal jurisdiction, this Court has chosen to review *Bristol-Myers Squibb*, which exemplifies lower-court drift in the law of specific personal jurisdiction. The California Supreme Court's decision in this case unconstitutionally expands state judicial authority at the expense of federal due process protections.

A proximate-cause test also serves as an "instrument of interstate federalism" by acting "to ensure that the States[,] through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 293; *Nicastro*, 564 U.S. at 881–83 (plurality). For a state to exercise personal jurisdiction over a nonresident defendant, the state must have a significant interest over which it is asserting sovereignty, and it must not elevate its own preferences over those of others in a case with which it has little connection. By requiring that "the defendant's in-state conduct must form an 'important, or [at least] material, element of proof' in the plaintiff's case," *Pleasant Street*, 960 F.2d at 1089, the proximate-cause test ensures that the plaintiff's cause of action arises out of the specific contacts between the defendant and the forum state. If a plaintiff cannot even plead facts adequately showing a proximate causal connection between the defendant's forum-directed conduct and the plaintiff's injury, a forum surely lacks the requisite interest in asserting judicial authority over the nonresident. After all, the plaintiff in such circumstances cannot even plead facts showing that he is entitled to redress.

C. A Proximate-Cause Test Best Harmonizes This Court's Prior Precedent.

Although it has declined to date to explicate the precise contours of the causation requirement, this Court traditionally has sought the very sort of nexus required by the proximate cause inquiry – a nexus between the defendant's forum activities and the material facts in the litigation, evaluating whether the nonresident's forum conduct implicated the controlling law.

In *Rush v. Savchuk*, 444 U.S. 320, 329 (1980), for example, this Court evaluated whether there was personal jurisdiction in Minnesota over a non-resident defendant in a personal-injury action stemming from a car accident in Indiana. Plaintiff asserted that personal jurisdiction was proper because the defendant's insurance company did business in Minnesota and its property was subject to garnishment in Minnesota if an adverse judgment was entered against the defendant. *Rush* rejected this argument on the basis that the insurance contract "was not related to the operative facts of the litigation." It explained:

> The insurance policy is not the subject matter of the case, however, nor is it related to the operative facts of the negligence action. The contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance, of the litigation, and accordingly do not affect the court's jurisdiction unless they demonstrate ties between the defendant and the forum.

Id. at 329.

Similarly, *Hanson* held that a court in Florida could not exercise jurisdiction over a Delaware trust company even though the settlor had executed in Florida the powers of appointment under which beneficiaries and appointees claimed. The Court explained that the "validity of the trust agreement, not the appointment, [was] at issue here." 357 U.S. at 253. Florida had not relied on an exceptional interest to enact special legislation that would apply. *Id.* at 252.

Moreover, the Court emphasized, the focus must be the connection between the defendant's forum contact and the litigation, not just between the forum and the litigation.

> [The State] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the (appellants).

Id. at 254.

In *Shaffer*, the Court again emphasized the lack of a connection between the purported basis of the jurisdiction and the substance of the litigation when it held there was no jurisdiction in Delaware over a shareholder derivative action alleging wrongdoing by officers and directors in Oregon. *Shaffer*, 433 U.S. at 216. The plaintiffs asserted jurisdiction based on property – namely stock owned by defendants that was located in Delaware. The Court held the location of the property could not establish jurisdiction at least in circumstances in which the stock was "not the subject-matter of [the] litigation, nor [was] the underlying cause of action related to the property." *Id.* at 213.

Thus, the decisions in which this Court has held personal jurisdiction lacking discuss the nexus requirement in terms similar to the proximate-cause test. The decisions in which the Court has upheld personal jurisdiction over a non-resident defendant are also consistent with a proximate-cause test. They are all decisions in which the connection between the defendant's acts connected with the forum constituted an element of the suit and were proximately

connected with the defendant's injury. *See International Shoe*, 326 U.S. at 320 (action for payment into fund for unemployment compensation arose out of company's employment of salesmen in state); *Burger King*, 471 U.S. at 479 (franchise dispute over failure to make payments "grew directly out of" a contract formed in Florida); *Calder v. Jones*, 465 U.S. 783, 789 (1984) (alleged defamatory statements "were expressly aimed" at California); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776-777 (1984) (defamation action based on sale of magazines in New Hampshire injuring plaintiff's reputation there); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (action based on life insurance contract delivered in California).

Thus, this Court's holdings are consistent with a proximate-cause test; its reasoning provides support for such a test, as do the due process principles it has articulated.

III. A "But-For" Test Would Be Inconsistent With Constitutional Principles.

One principal alternative to the proximate-cause test is the but-for test that has been adopted by the Ninth and Tenth Circuits and several state courts. *See supra* § I(A). The question under this test is whether "[i]n the absence of [the defendant's forum-related] activity, the * * * [plaintiff's] injury would not have occurred." *Shute*, 897 F.2d at 386. This test is inconsistent with basic due process principles by failing to ensure that the defendant's forum contacts evidence purposeful availment, render litigation in the forum foreseeable, and are subject to state regulatory interests considered in light of principles of federalism. 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. *See Int'l Shoe*, 326 U.S. at 319.

As the First Circuit explained, "[a] 'but for' requirement ... has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996). Defendants would also be subject to personal jurisdiction in forums where jurisdiction was not even foreseeable. A but-for standard fails to ensure foreseeable jurisdiction for the same reasons that standard fails to sufficiently limit causation requirements in tort suits. There are infinite possible but for causes of any particular result tracing back decades or even centuries. As this Court has observed, "'[r]eally, universally, relations stop nowhere.'" *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (citation omitted). A court's evaluation of which of these causes it will consider is entirely unpredictable. And, as the Third Circuit has noted, "even courts that embrace the but-for test recognize its overinclusiveness." *O'Connor*, 496 F.3d at 323 (citing *Shute*, 897 F.2d at 385).

The overinclusiveness is sweeping. In considering whether there was personal jurisdiction over a German company in a trademark infringement action in Massachusetts, the First Circuit gave an example of such overincluseness:

> Suppose Goebel had been founded in Massachusetts but then reorganized as a German partnership in 1930. Formation in

> Massachusetts would arguably be a "but for" cause of its subsequent operations, but it would hardly be an adequate nexus.

Cambridge Literary Properties, Ltd. V. W. Goebel Porzellanfabrik G.m.b.H. & Co. Kg., 295 F.3d 59 (1st Cir. 2002). Or as Professor Brilmayer explained, "what if" a plaintiff who was on the way from New York to Maine before having an accident in Massachusetts "attempts to sue in Connecticut or Maine on the grounds that the defendant drove through Connecticut on the way to Massachusetts or was in Massachusetts on the way to Maine?" Lea Brilmayer, *Related Contacts and Personal Jurisdiction,* 100 Harv. L. Rev. 1444, 1445 (1988).

Or consider this Court's decision in *Rush*, where, as Professor Brilmayer explained,

> it is not difficult to argue some "but for" relationship between the property and the litigation. People buy auto insurance in order to protect themselves against litigation such as the suit in question, and also because some states require it as a condition for driving on the open road. The defendant might never have had the accident and might not have been worth suing if he had not had insurance.

Id. at 1463.

In each of these examples, the but-for test would have resulted in the conclusion that a state was an appropriate forum, even though it was not one in which the defendant purposefully availed itself of benefits in the state related to the behavior that led to the litigation, was not one that had a regulatory interest in the litigation, and was not one in which the

defendant would have had "fair warning" that it was subject to suit.

Indeed, when analyzed on the basis of its potential effects, the "but for" test can be seen for what it really is: an end-run around due process limitations on state sovereignty. The "but for" standard takes away what the "minimum contacts" requirement is intended to give: assurance that a foreign defendant will not be required to defend (and, frankly, will not be coerced into settling) in a potentially hostile forum unless the defendant has *truly* availed himself or herself of the forum's protections and benefits. The but-for test is inadequate because it does not demand the plaintiff to show that the defendant is *sufficiently* responsible for a forum-related injury that he should be held to account there.

IV. The Growth Of The Information Economy Makes It Imperative To Adopt A Proximate-Cause Standard.

This Court has expressed concern regarding the application of specific jurisdiction principles in the Internet age. In *Walden*, this Court went out of its way to pose the "questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State." 134 S. Ct. at 1125 n.9. Similarly, in *Nicastro*, Justice Breyer, joined in a concurring opinion by Justice Alito, asked, "[W]hat do those standards [of personal jurisdiction] mean" in the context of e-commerce? 564 U.S. at 890 (Breyer, J., concurring).

The need for a proximate-cause standard is particularly apparent given the growth of the information economy. Individuals and companies

should be able to structure their affairs to avoid having to defend themselves in distant jurisdictions lacking genuine connection to the events of the lawsuit. But today's Internet age, where nationwide (and indeed global) jurisdictional "contacts" are ubiquitous and inevitable, threatens to erase the important limits on specific jurisdiction that this Court has established. A proximate-cause standard would best preserve those limits.

Today, a nationally (and globally) accessible website is a necessity for any business. This includes even small traditional brick and mortar businesses like local restaurants, and specific internet businesses like *amicus* MoneyMutual. Moreover, "virtually every website is now interactive in some measure." *Sportschannel New England, LLP v. Fancaster, Inc.*, 2010 WL 3895177, *5 (D. Mass. 2010). "[W]e are [i]n the era of Facebook, where most websites now allow users to "share" an article, choose to "like" a particular page, add comments, and e-mail the site owners. . . ." *Id.* *See also*, *e.g.*, *Kauffman Racing Equip., LLC v. Roberts*, 930 N.E.2d 784 (Ohio 2010) (finding personal jurisdiction in Ohio over a suit against a dissatisfied customer who posted numerous criticisms on various websites devoted to automobile racing).

Interactivity has only magnified what was apparent from the dawn of today's internet age, the expansive geographic reach of activities that are increasingly routine:

> One of the most striking aspects of cyberspace is that it "provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions." This characteristic

> sharply contrasts with traditional forms of mass communication, such as television, radio, newspapers, and magazines, which require significant start-up and operating costs and therefore tend to concentrate communications power in a limited number of hands. Anyone with access to the Internet, however, can communicate and interact with a vast and rapidly expanding cyberspace audience.

Developments in the Law – The Law of Cyberspace, 112 HARV. L. REV. 1574, 1633 (1999) (quoting *ACLU v. Reno*, 521 U.S. 844, 853 (1997)).

Further, email between parties can take place regardless of their geographic location – whether next door or around the world. Indeed, a party's email address need not reveal any information about that party's actual physical location, particularly at the moment an email is actually sent. Accordingly, often an individual or business communicating with others does not even know the location of those with whom they are communicating. *See*, *e.g.*, *Real Action Paintball, Inc.,* 751 F.3d at 803 ("[E]mail ... bounces from one server to another ... it winds up wherever the recipient happens to be at that instant. The connection between the place where an email is opened and a lawsuit is entirely fortuitous."); *Shrader v. Biddinger,* 633 F.3d 1235, 1247–48 (10th Cir. 2011) ("Although email is directed to particular recipients, email addresses typically do not reveal anything about the geographic location of the addressee.").

The ever-increasing importance of internet communications to both individuals and businesses makes it particularly important to have clear and

predictable jurisdictional rules so that individuals and businesses maintain an ability to structure their actions to avoid being haled into court in distant jurisdictions. It also strongly counsels in favor of the proximate-cause test and against any unpredictable or sweeping test of relatedness. A but-for test of relatedness, for example, potentially could subject virtually everyone to suit anywhere.

When a company or an individual transmits communications electronically, it often will do so using servers that are in, and a domain name registered in, a location that is different from that where either the sender or recipient of the communication is located. And the internet communication itself will be routed through locations all across the country and the world, as the message is broken into smaller chunks of data called packets each of which may be routed through a different path. *United States v. Lewis*, 554 F.3d 208, 210-11 (1st Cir. 2009).

This is true even for a static website. When someone visits that website, this results not only in transmission of packets to the computer hosting the website but also in a return from the website of "several packets that together contain the contents of the web page" that are then reassembled by the user's computer; "[a]lthough it appears to the user as though he is 'visiting' the website, the computers achieve this appearance through a complex exchange of packets across the Internet."[5] Under a pure but-for test uncircumscribed by additional limitations, there

[5] Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother that Isn't*, 97 NW. U.L.REV. 607, 613–14 & n. 29 (2003).

would be jurisdiction in each of the locations crossed by the multiple packets exchanged. "The Internet is wholly insensitive to geographic distinctions." *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 170 (S.D.N.Y. 1997).

Even if these intermediate locations were somehow excluded from the jurisdictional inquiry, a website operator could potentially become subject to jurisdiction of staggering scope. A Virginia resident who invited friends in multiple states to view her Facebook page, for example, could potentially become subject to a copyright or trademark infringement suit in any of those states, because but for the communication to individuals in those states, the magnitude of the alleged injury would have been less. A plaintiff could conceivably use the but-for test to argue that the routing of an internet communication through locations all across the country and the world gives rise to multiple possible locations for suit.

Amicus MoneyMutual's own litigation experience demonstrates the need for a proximate-cause standard and careful judicial review. MoneyMutual is a Nevada limited liability company that has no employees or operations but exists only to maintain the *www.moneymutual.com* website. The website enables individuals to submit loan applications for transmission to independent third-party lenders. MoneyMutual is compensated by lenders without regard for whether a loan is consummated and regardless of the terms of any loan.

The Minnesota Supreme Court nonetheless held that the state's courts could exercise personal jurisdiction over claims against MoneyMutual by a putative class of Minnesota residents. *See Rilley*, 884

N.W.2d at 321. As evidence of the requisite minimum contacts, the court relied on emails automatically sent by MoneyMutual to website users (including users in Minnesota) in response to information submitted by the users through the website. The emails either (a) informed applicants of the interest expressed by a lender; or (b) invited a prior applicant to submit a new application. *Id.* at 328-29 & n.13. The emails thus were not themselves the legal cause of the actual harm upon which plaintiffs based their claims: the culmination of a loan transaction whose terms allegedly violate Minnesota law. Yet the Minnesota Supreme Court concluded that they created a "'substantial connection' between the defendant, the forum, and the litigation." *Id.* at 332. The Minnesota Supreme Court also cited a Google "AdWords" campaign in which MoneyMutual had allegedly engaged, even though "none of the respondents or class members indicated that they actually came into contact with MoneyMutual's website as a result of a Google search or one of MoneyMutual's AdWords advertisements." *Id.* at 326. The court opined that "there is no evidence that the Google Ads actually *caused* any of the claims, the Google Ads are sufficiently *related* to the claims of respondents to survive a motion to dismiss." *Id.* at 337 (emphasis in original).

If such contacts (which are not themselves the proximate cause of any alleged harm to plaintiffs) may nevertheless serve as the source of personal jurisdiction wherever the users are located, no business or individual could structure its website to avoid nationwide jurisdiction. It would also render the "purposeful availment" requirement largely meaningless for anyone with a website. Such a result

would be inconsistent with the liberty interests of nonresident defendants and with the federalism-based limits on the jurisdiction a state may exercise. *See Walden*, 134 S. Ct. at 1122; *Daimler AG v. Bauman*, 134 S. Ct. 746, 761-62 (2014); *Burger King*, 471 U.S. at 472.

CONCLUSION

The judgment below should be reversed. This Court should make clear that in order for a plaintiff's claims to be sufficiently related to the defendant's forum contacts to establish specific jurisdiction, those contacts must be a *proximate cause* of the plaintiff's claim and the alleged harm suffered by the plaintiff.

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