COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. 2017-P-0366

EXXON MOBIL CORPORATION,

Petitioner-Appellant,

v.

OFFICE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondent-Appellee.

ON APPEAL FROM SUFFOLK SUPERIOR COURT
CIVIL ACTION NO. 16-1888F

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER-APPELLANT

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RULE 1:21 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the "Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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I. INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many Chamber members conduct business in States other than their State of incorporation and State of principal place of business—*i.e.*, the forums in which they are subject to general personal jurisdiction, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). They therefore have a substantial interest in the rules governing the extent to which a state can subject nonresident corporations to specific personal jurisdiction. The Chamber has accordingly filed *amicus curiae* briefs in numerous cases in state and federal court regarding the proper scope of specific

jurisdiction. *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017); *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Rilley v. MoneyMutual, LLC*, 884 N.W.2d 321 (Minn. 2016); *State v. LG Elecs., Inc.*, 375 P.3d 1035 (Wash. 2016).

Subjecting corporations to specific jurisdiction without establishing the required connection between the corporations' in-state activities and the particular lawsuit before the court would eviscerate the due process limits on personal jurisdiction. The Chamber files this brief to explain that the holding below is irreconcilable with the Supreme Court's precedents and that the Superior Court's expansive approach to specific jurisdiction would impose unfair burdens on out-of-state businesses.

II. STATEMENT OF THE ISSUES

The Chamber's brief will address only the first issue raised by appellant Exxon Mobil Corporation ("Exxon") on appeal: *i.e.*, whether courts in Massachusetts may exercise personal jurisdiction over Exxon. *See* Opening Br. 15-33. The Chamber takes no position on the other issues raised by Exxon.

III. INTRODUCTION

In recent years, the U.S. Supreme Court has

issued multiple decisions, including *Walden v. Fiore* and *Bristol-Myers Squibb v. Superior Court of California* ("*BMS*"), that hold that there must be a "substantial connection" between the claims in a lawsuit and the defendant's activities in the state for a state court to have specific personal jurisdiction over an out-of-state defendant. In the decision below, however, the Superior Court failed even to ask whether such a connection existed between Exxon's activities in Massachusetts and the subject matter of the Attorney General's Civil Investigative Demand ("CID"). Instead, the lower court predicated its finding of personal jurisdiction on (1) Massachusetts' interest in enforcing its consumer protection laws and (2) Exxon's putting products into a "stream of commerce" that would reach Massachusetts – as it would every other state.

That reasoning is incorrect because it cannot be squared with the U.S. Supreme Court's definitive pronouncements in this area. The decision below would allow Massachusetts courts to exercise specific jurisdiction over virtually every business whose products find their way to Massachusetts, even if the claims in a particular case have little or nothing

anything to do with that activity. But *Walden* and *BMS* expressly hold that a State *cannot* exercise specific jurisdiction over a defendant unless the defendant has substantial contacts with the forum that are "suit-related." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

Accordingly, the Superior Court's order should be reversed and the Superior Court should be directed to grant Exxon's motion to quash the civil investigative demand for lack of personal jurisdiction, and to deny the Attorney General's cross-motion to enforce. In the alternative, the decision below should be vacated and the case remanded for consideration of whether personal jurisdiction exists under the proper legal standard.

IV. ARGUMENT

A. Specific Jurisdiction Requires A "Substantial Connection" Between A Nonresident Defendant's In-State Activities And The Litigation.

The key difference between general jurisdiction and specific jurisdiction is that the former is all-purpose, while the latter must be linked to the particular case at hand.[1] This case presents the

[1] Neither the trial court nor the Attorney General has suggested that appellant is subject to *general*

question whether Exxon is subject to "specific jurisdiction" in Massachusetts for purposes of the Attorney General's CID.

It has been established for decades that, for an exercise of specific jurisdiction to comport with due process, the defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)(quotation marks omitted).

In two recent decisions, the Supreme Court has elaborated on what the "minimum contacts" test requires, explaining that "the defendant's *suit-related* conduct must create a *substantial connection*

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personal jurisdiction in Massachusetts. Nor could they have done so. As the Supreme Court made clear in *Daimler AG v. Bauman*, a corporation is ordinarily subject to general jurisdiction only in its state of incorporation and its principal place of business. 134 S. Ct. at 760. A corporation can only be subject to general jurisdiction *outside* those two forums in an "exceptional case," such as when its headquarters has temporarily relocated. *See id.* at 761 n.19 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)). Here, appellant's state of incorporation and principal place of business are New Jersey and Texas, respectively (Appellant's Add. 2-3), and there is nothing in the record to suggest that any "exceptional" circumstances exist to warrant finding appellant to be "at home" outside those two forums.

with the forum State." *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121 (2014) (emphases added).

In *Walden v. Fiore*, the Court set out two important principles that govern the assessment of whether a plaintiff has shown the required "substantial connection" between the defendant's in-state activities and the lawsuit. First, "the relationship must arise out of contacts that the *defendant himself creates* with the forum State." *Id.* at 1122 (emphasis added; quotation marks omitted). And second, the analysis "looks to the defendant's contacts with the *forum State itself*, not the defendant's contacts with persons who reside there." *Id.* (emphasis added).

The Court recently elaborated on the substantial connection requirement in *Bristol-Myers Squibb Co.* v. *Superior Court of California*, 137 S. Ct. 1773 (2017). *BMS* arose out of a product liability action brought in California state court by a large group of plaintiffs, the majority of whom resided outside of California, against a drug manufacturer. *Id.* at 1778. The defendant argued that California lacked personal jurisdiction over it with respect to the out-of-state plaintiffs' claims because none of the events relevant

to those claims occurred in California. The California Supreme Court disagreed, holding that California courts had specific jurisdiction over those claims because the defendant had conducted a substantial amount of marketing activity in California as part of a "common nationwide course of distribution" that gave rise to both the in-State and out-of-State plaintiffs' claims. See *Bristol-Myers Squibb Co.* v. *Superior Court*, 377 P.3d 874, 888 (Cal. 2016). It was not necessary, in the California Supreme Court's view, that each plaintiff's claims "arise directly from the defendant's forum contacts." *Id.* at 887 (quotation marks omitted).

The Supreme Court reversed, holding that specific jurisdiction requires "an activity or occurrence that takes place in the forum State" that is connected to "the *specific claims* at issue." 137 S. Ct. at 1781 (emphasis added). "When there is no such connection," the Court held, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* The Court directly rejected the California court's approach – under which "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if

the defendant has extensive forum contacts that are unrelated to those claims" – calling it a "loose and spurious form of general jurisdiction" with "no support" in the Supreme Court's case law. *Id.* "For specific jurisdiction," the Court emphasized, "a defendant's general connections with the forum are not enough." *Id.*

In sum, *Walden* and *BMS*, clarified that a court must not exercise specific jurisdiction over a nonresident defendant unless the court (1) identifies particular, purposeful activity by the defendant in the forum state; (2) determines that activity gave rise to the claims in the lawsuit; and (3) determines the connection between the defendant's in-state activities and the claims in the lawsuit is "substantial," based on the strength of the causal connection.

B. The Superior Court's Decision Cannot Be Squared With *BMS*, And Its Approach To Jurisdiction Would Do Serious Harm To Out-Of-State Businesses.

The Superior Court's decision is at odds with *BMS*'s emphatic affirmation of the substantial-connection requirement for specific jurisdiction. The Superior Court gave only two reasons – offered up in a single paragraph – why it believed specific

jurisdiction was permissible. But neither had anything to do with whether there was a connection between Exxon's activities in Massachusetts and the subject matter of the CID. First, the court declared that if it did not exercise specific jurisdiction here, Chapter 93A would be "de-fanged." Appellant's Add. 7. And second, the court held that "insofar as Exxon delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts, it is not overly burdened by being called into court in Massachusetts." *Id.* at 7-8.

Neither of these is a proper basis for exercising specific jurisdiction. A state's interest in enforcing its laws is relevant to *one* aspect of the specific jurisdiction analysis – *i.e.*, whether exercising jurisdiction in the circumstances comports with "'fair play and substantial justice.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *Int'l Shoe*, 326 U.S. at 320). But that question becomes relevant only if a court already has found purposeful, in-state conduct by the defendant and a "connection between the forum and the specific claims at issue." *BMS*, 137 S. Ct. at 1781. Thus,

whatever Massachusetts's interest in enforcing consumer protection laws, due process forbids the Commonwealth from asserting specific jurisdiction over Exxon in the courts of the Commonwealth in the absence of a substantial connection between in-state activity by Exxon and the CID.

The Superior Court's fear that Chapter 93A would be "defanged" is entirely unwarranted. Chapter 93A would not become a dead letter under a proper application of specific personal jurisdiction. The Commonwealth would be free to resort to the courts of a corporate defendant's place of incorporation or its headquarters. Here, for example, the Attorney General could have sought to enforce the civil investigative demand in New Jersey or in Texas, and the courts in those States would have been obligated to give the Commonwealth's laws full faith and credit, consistent with due process – just as the courts in Massachusetts would have to do in return for another sovereign state seeking to enforce that state's laws against a Massachusetts corporation.

The Superior Court's other rationale – that Exxon put products into the "stream of commerce with the expectation that" they would be purchased in

Massachusetts – likewise does not suffice under the Due Process Clause. The sale of a product in a particular state, along with other facts, may be relevant to whether the defendant has "'purposefully avail[ed] itself of the privilege of conducting activities within the forum State.'" *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). But as *Walden* and *BMS* underscored, purposeful availment is *not enough* for specific jurisdiction in the absence of a "substantial connection" between the purposeful activity and the claims in suit. *Walden*, 134 S. Ct. at 1121. The Superior Court's opinion does not even attempt to identify such a connection, much less find one.

Moreover, if that were an adequate basis for specific jurisdiction, Exxon would be subject to specific jurisdiction everywhere in the country; as the Superior Court itself acknowledged, Exxon's products are purchased by "consumers in all states." Appellant's Add. 8.

For that reason (among others), the Superior Court's sweeping approach to specific jurisdiction — if approved by this Court — would significantly

undermine the due process protections afforded to out-of-state corporations. The courts have long drawn a vital distinction between general personal jurisdiction and specific personal jurisdiction, which is a much "more limited form of submission" to a State's authority. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion). The limits on specific jurisdiction "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*, 444 U.S. at 297. Defendants rely on their "due process right[s] not to be subjected to judgment in [the] courts" of a State other than their home State, unless they have affirmatively established contacts with the State itself that make them subject to specific jurisdiction there. *Nicastro*, 564 U.S. at 881; *see also Walden*, 134 S. Ct. at 1123. This reliance enables companies to avoid unwittingly bearing "the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen*, 444 U.S. at 292.

The Superior Court's approach, if endorsed by

this Court, would dramatically limit defendants' ability to control or predict where they are subject to specific jurisdiction. If any State can exercise specific personal jurisdiction over a company based on nothing more than putting its products into a general, nationwide "stream of commerce," a company like Exxon will have no way of avoiding being subject to suit anywhere in the country—no matter how "distant or inconvenient." *Id.* Applying specific jurisdiction in such an unpredictable and indiscriminate manner would cannot be reconciled with due process clause, which demands predictable personal jurisdiction rules to ensure fairness to defendants. *See Nicastro*, 564 U.S. at 885 (explaining that "[j]urisdictional rules should avoid the[] costs [of unpredictability] whenever possible"); *Burger King*, 471 U.S. at 475 n.17 (explaining that due process is violated when a defendant "has had no 'clear notice that it is subject to suit' in the forum and thus no opportunity to 'alleviate the risk of burdensome litigation' there" (quoting *World-Wide Volkswagen*, 444 U.S. at 297)).

C. There Is No Basis In The Present Record For Exercising Specific Jurisdiction Over Exxon Under The Proper Legal Standard.

Under the proper legal standard as articulated in *BMS*, there is no basis in the record developed below for subjecting Exxon to specific jurisdiction in Massachusetts with respect to enforcing the Attorney General's civil investigative demand. That demand pertains to alleged "potential violations" of the Massachusetts Unfair Competition law (M.G.L. ch. 93A, § 2) in connection with the "marketing and/or sale of energy and other fossil fuel derived products" in Massachusetts and the "marketing and/or sale of securities . . . to investors in" Massachusetts. AG's Add. 15. Specifically, the Attorney General alleges that Exxon "made misleading statements to investors and consumers and/or failed to disclose information to investors and consumers with respect to its knowledge of climate change" and its impacts. AG Br. 1. In order to establish specific jurisdiction over Exxon with respect to the civil investigative demand, therefore, the Attorney General would need to demonstrate that Exxon engaged in purposeful securities marketing or sales activities in Massachusetts and that in the course of those

activities, it made specific statements (or omissions) that related to climate change and potentially violated Section 93A. *See Walden*, 134 S. Ct. at 1121.

The findings by the Superior Court say nothing about any such conduct by *Exxon itself* within Massachusetts, as opposed to independent, separately owned entities that license Exxon-branded products for sale here. The Superior Court found that Exxon has contractual control over its licensee service stations and wholesalers,[2] but Exxon persuasively explains why that finding is wrong—and why the court's reasoning would greatly and improperly expand the scope of states' personal jurisdiction over out-of-state businesses that happen to enter into franchise or licensing agreements with in-state entities. Opening Br. 18-19. Given that the service stations' and wholesalers' conduct cannot properly be attributed to Exxon, it was clearly erroneous for the Superior Court to hold that Exxon is subject to specific jurisdiction in Massachusetts based on their conduct. The Supreme

[2] The Superior Court made no findings at all that would connect the independent service stations and wholesalers to the sale of *securities* by Exxon in Massachusetts, making the Attorney General's securities-related claims an especially weak basis for specific jurisdiction here.

Court has made clear that in the absence of a control relationship, specific jurisdiction must be based on a defendant's *own* conduct, not that of third parties. *See, e.g.*, *Walden*, 134 S. Ct. at 1122 ("[T]he relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." (quoting *Burger King*, 471 U.S. at 475)).

In any event, the court made no findings that Exxon *or* its licensees made statements or omissions about climate change to Massachusetts consumers or investors in connection with those activities by its licensees that were potentially "unfair or deceptive" (M.G.L. ch. 93A, § 2), which is the conduct actually being investigated by the Attorney General.

This lack of any proven, "substantial" connection between the Attorney General's allegations and Exxon's contacts in Massachusetts (such as they are) precludes this Court or the Superior Court from taking any further action in the case. *See, e.g.*, *City Sanitation, LLC v. Beck*, 2010 WL 2102995, at *2 (Mass. Dist. Ct. Mar. 30, 2010) ("[P]ersonal jurisdiction over [the defendant] must be found for the suit to proceed in Massachusetts."). The Attorney General has

accordingly failed to carry her burden of establishing personal jurisdiction.[3]

CONCLUSION

The Superior Court's order should be reversed and the Superior Court should be directed to grant Exxon's motion to quash the civil investigative demand for lack of personal jurisdiction, and to deny the Attorney General's cross-motion to enforce. In the alternative, this Court should vacate the Superior Court's order and remand for application of the proper standard.

Respectfully submitted,

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[3] The Chamber agrees with appellant that the Attorney General's new theories in support of exercising personal jurisdiction involve facts outside the record that should not be considered in the first instance on appeal. *See* Reply Br. 9-17.

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Dated: November 20, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 16(a)(6) (pertinent findings or memorandum of decision);
Rule 16(e) (references to the record);
Rule 16(f) (reproduction of statutes, rules, regulations);
Rule 16(h) (length of briefs);
Rule 18 (appendix to the briefs); and
Rule 20 (typesize, margins, and form of briefs and appendices).

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CERTIFICATE OF SERVICE

I, Steven P. Lehotsky, hereby state under the penalties of perjury that on November 20, 2017, I caused to be served two copies of the foregoing Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Petitioner-Appellant, by first-class mail, on the following counsel of record:

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