No.

In the Supreme Court of the United States

EXXON MOBIL CORPORATION, PETITIONER

v.

MAURA HEALEY,
ATTORNEY GENERAL OF MASSACHUSETTS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court may exercise personal jurisdiction over a nonresident corporation to compel its compliance with an investigatory document request where jurisdiction is based principally on third-party contacts that are unrelated to the subject matter being investigated.

CORPORATE DISCLOSURE STATEMENT

Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

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

PETITION FOR A WRIT OF CERTIORARI

Exxon Mobil Corporation respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court in this case.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court (App., *infra*, 1a-26a) is reported at 94 N.E.3d 786. The trial court's opinion (App., *infra*, 27a-43a) is unreported.

JURISDICTION

The judgment of the Massachusetts Supreme Judicial Court was entered on April 13, 2018. On May 31, 2018, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including September 10, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

STATEMENT

This case involves a breathtaking assertion of personal jurisdiction over a nonresident defendant. In the decision under review, the Massachusetts Supreme Judicial Court compelled compliance with sweeping investigatory requests by the State's attorney general for decades' worth of documents concerning petitioner's knowledge of, and the relationship of petitioner's products to, climate change. It justified that exercise of judicial power based principally on advertisements, despite the attorney general's admission that the ads at issue did not speak to the subject matter of the investigation and even though the corporation did not even create or approve the vast majority of the ads.

In so doing, the Massachusetts Supreme Judicial Court applied an approach to personal jurisdiction that is inconsistent with this Court's precedents and that flouts core notions of due process. In evaluating whether a proceeding arises out of or relates to the defendant's contacts with the State, the court asked only whether those contacts were a but-for cause of the claims (or, in this case, the investigation). That lax standard, which some other courts have also adopted, conflicts with the standards applied in other courts on a question that this Court has twice identified as unsettled. It also permits parties to be haled into court based on contacts that lack a "substantial" relationship to the underlying proceedings. See, *e.g.*, *Walden* v. *Fiore*, 571 U.S. 277, 284 (2014). That is precisely what happened here, and the exercise of judicial

power in these circumstances offends due process. See, *e.g.*, *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474-475 (1985).

In this case, the Court is presented with the opportunity both to resolve an entrenched and recognized conflict among the courts of appeals and state courts of last resort and to reaffirm the centrality of foreseeability to the due process analysis in the context of personal jurisdiction. The question presented is whether a court can exercise personal jurisdiction over a nonresident corporation to compel its compliance with an investigatory document request where jurisdiction is based principally on third-party contacts that are unrelated to the subject matter being investigated. It cannot be seriously disputed that the question is an exceptionally important and recurring one, and it arises in a factual context that is important in its own right. This Court should grant certiorari to review and reverse the Massachusetts Supreme Judicial Court's misguided decision.

1. At issue in this case is a state court's exercise of personal jurisdiction over a defendant. Because the exercise of personal jurisdiction "exposes [the defendant] to the State's coercive power," it has long been understood to be "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 918 (2011); see *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1878).

As the Court is well aware, there are two types of personal jurisdiction. General jurisdiction subjects a defendant to jurisdiction regardless of the claim at issue. *Goodyear*, 564 U.S. at 919. Specific jurisdiction, by contrast, subjects a defendant to jurisdiction only where the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Bristol-Myers Squibb Co.* v. *Superior Court of California*, 137 S. Ct. 1773, 1780 (2017) (internal

quotation marks, citation, and alteration omitted). Put another way, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Ibid.* (quoting *Goodyear*, 564 U.S. at 919). Accordingly, the Court has emphasized that there must not only be a "relationship" between the defendant's contacts with the forum and the "suit-related conduct," but the relationship must be "substantial." *Walden*, 571 U.S. at 284; see *Bristol-Myers*, 137 S. Ct. at 1781.

2. a. Here, a Massachusetts state court exercised specific jurisdiction over petitioner, a corporation registered in New Jersey and headquartered in Texas. While petitioner has operations in many States and countries, it does not own or operate a single retail service station in the Commonwealth of Massachusetts. Service stations in Massachusetts that sell under the Exxon or Mobil brand names are owned and operated by independent third parties. Specifically, petitioner and the third parties enter into standardized brand fee agreements, under which the third parties license petitioner's trademarks for a fee and thereby gain access to petitioner's business programs and suppliers.

The brand fee agreement provides that "the parties will carry on their respective business pursuant to this [a]greement as independent contractors in pursuit of their independent callings and not as partners, fiduciaries, agents, or in any other capacity." Mass. S.J.C. App. 1540.[1] The agreement makes clear that it is "not a product sales or supply agreement": the licensee is "solely responsible" for procuring an adequate supply of fuel, and it

[1] Petitioner submitted to the trial court a sample brand fee agreement between it and a company that owns, operates, or supplies more than a hundred Massachusetts service stations. See Mass. S.J.C. App. 1504-1505, 1543-1546.

maintains "full responsibility" for the "sourcing of motor fuel product" that it sells to customers. *Id.* at 1508, 1510, 1516.

Although the brand fee agreement provides petitioner with the "authority to review and approve" marketing by its Massachusetts licensees, Mass. S.J.C. App. 1525, there is no evidence of petitioner's actually exercising that right. The only advertisements directed to the Massachusetts market that petitioner has itself created since 2011 (the beginning of the undisputed limitations period for any claims the Attorney General could bring) are a small number of radio and print ads for engine-lubrication products. *Id.* at 935. None of these advertisements discuss the subject matter of the Attorney General's investigation. *Id.* at 950.[2]

b. Respondent is the Massachusetts Attorney General. This case arises from respondent's decision to investigate petitioner for its knowledge of the potential causes and effects of climate change. In 2016, respondent and other state attorneys general, who identified themselves as "AGs United for Clean Power," held a press conference in New York. There, respondent expressed her opinion that "there's nothing we need to worry about more than climate change," and she warned about "the human and the economic consequences" of the issue. She promised to

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[2] Petitioner has also produced national advertising that has reached the Massachusetts market through, for example, television and radio. But the court below did not rely on that advertising to find personal jurisdiction, and for good reason. It is settled law that specific jurisdiction cannot be established through national advertisements that happen also to appear in the forum State. Compare *Bristol-Myers*, 137 S. Ct. at 1778, with *id.* at 1784 (Sotomayor, J., dissenting); see *Boschetto* v. *Hansing*, 539 F.3d 1011, 1018 n.4 (9th Cir. 2008), cert. denied, 555 U.S. 1171 (2009); *Federated Rural Electric Insurance Corp.* v. *Kootenai Electric Cooperative*, 17 F.3d 1302, 1305 (10th Cir. 1994).

"speed our transition to a clean energy future" through "quick, aggressive action." Mass. S.J.C. App. 82-83.

Shortly after the press conference, respondent issued a civil investigative demand to petitioner, purporting to investigate "potential violations" of Massachusetts' consumer protection law, see Mass. Gen. Laws ch. 93A, § 2, through "the marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth of Massachusetts" and "the marketing and/or sale of securities * * * to investors in the Commonwealth." In the civil investigative demand, respondent sought all documents from 1976 to the present regarding petitioner's research related to climate change. Respondent also demanded documents relating to certain papers and reports, as well as petitioner's communications concerning climate change with twelve identified organizations, such as the American Enterprise Institute and the Heritage Foundation. And respondent requested materials concerning petitioner's securities, including its filings with the Securities and Exchange Commission and its efforts to address shareholder resolutions. Mass. S.J.C. App. 92, 103-104, 106-108, 110.

Although respondent sought documents pertaining to speeches that petitioner's executives made in Beijing and London and at shareholder meetings in Texas, she did not seek documents about any particular statements made by petitioner or its executives in Massachusetts (about climate change or about any other matter). Instead, respondent demanded just three categories of petitioner's communications with Massachusetts residents. One category was "[e]xemplars" of advertising by petitioner or its licensees to market Exxon- or Mobil-branded products in Massachusetts, without any reference to a connection to climate change. The other two categories were documents pertaining to any contracts between the State and

petitioner, and any complaints by Massachusetts residents regarding petitioner and climate change. Mass. S.J.C. App. 105-106, 109-111.[3]

3. Pursuant to Massachusetts law, Mass. Gen. Laws ch. 93A, § 6(7), petitioner sought to set aside the civil investigative demand in Massachusetts state court through a special appearance in which it asserted a lack of personal jurisdiction. Petitioner also challenged, *inter alia*, the breadth and scope of the civil investigative demand. Respondent cross-moved to compel compliance with the demand. Mass. S.J.C. App. 5, 47-60, 262; Pet. Mass. S.J.C. Br. 4.

The trial court denied petitioner's motion to set aside the civil investigative demand and granted respondent's cross-motion to compel. App., *infra*, 27a-43a. As is relevant here, the court determined that its exercise of specific personal jurisdiction was proper on the ground that the brand fee agreement provided petitioner with the "right to control" its licensees' advertising, which it described as the "specific policy or practice allegedly resulting in harm to Massachusetts customers." *Id.* at 33a-34a (internal quotation marks omitted).

Notably, the trial court did not make any findings about the content of the licensee's advertising; did not determine that petitioner had in fact exercised control over licensees' advertising; and did not find that petitioner was responsible for any advertisements concerning climate change. Indeed, the uncontroverted record established that none of the advertisements—either those created by

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[3] Another of the "AGs United for Clean Power," then-New York Attorney General Eric Schneiderman, served a similar subpoena on petitioner. Petitioner did not contest the existence of personal jurisdiction in New York; after disputing the scope of the subpoena, petitioner has produced documents in response. App., *infra*, 39a.

the licensees or those created by petitioner—said anything about climate change. See Mass. S.J.C. Oral Arg. Tr. 55:23-25 (respondent's counsel conceding that "[t]here's nothing in the record * * * that indicates a specific advertisement to consumers" concerning climate change). Nothing in the record established that petitioner had anything to do with advertisements created by the licensees; petitioner itself has created and run only a small number of ads in Massachusetts since 2011. See p. 5, *supra*. And none of those advertisements concerned fossil fuel itself, the product at the center of the debate on climate change.

4. Petitioner appealed to the Massachusetts Court of Appeals. The Massachusetts Supreme Judicial Court then transferred the case *sua sponte* to its own docket. In that court, respondent defended her pursuit of "documents and information relating to [petitioner's] knowledge of and activities related to climate change." See App., *infra*, 2a. She chose to focus on petitioner's statements, made outside Massachusetts, related to climate change and climate policy. See Resp. Mass. S.J.C. Br. 10-15. When pressed at oral argument for the most direct contact by petitioner with Massachusetts consumers, counsel for respondent acknowledged that petitioner's Massachusetts advertisements did not communicate directly or indirectly about climate change. Rather, according to counsel for respondent, the only way that petitioner could possibly have violated Massachusetts' consumer protection law was on the theory that, in unrelated advertising, petitioner somehow had an affirmative obligation to warn consumers about climate change. See Mass. S.J.C. Oral Arg. Tr. 54:14-56:4.

The Massachusetts Supreme Judicial Court nevertheless affirmed. App., *infra*, 1a-26a. As a preliminary matter, the Supreme Judicial Court stated that the exercise

of general personal jurisdiction would be inappropriate because petitioner is not resident in Massachusetts and does not maintain sufficiently general contacts with Massachusetts. *Id.* at 3a. As is relevant here, however, the Supreme Judicial Court held that the trial court could exercise specific personal jurisdiction over petitioner. *Id.* at 4a-17a.

The Supreme Judicial Court first determined that the exercise of personal jurisdiction over ExxonMobil was lawful under Massachusetts's long-arm statute, Mass. Gen. Laws ch. 223A, § 3. App., *infra*, 7a-12a. Acknowledging that the issue whether the civil investigative demand "arises from" the network of service stations was a "more difficult question," the court looked to the terms of the brand fee agreement. *Id.* at 9a (alteration omitted). The court reasoned that, because Section 15(a) of the brand fee agreement gives petitioner "the right to control the advertising of its fossil fuel products to Massachusetts consumers," the civil investigative demand "arises from the [brand fee agreement] and [petitioner's] network of branded fuel stations in Massachusetts." *Id.* at 10a-11a (internal quotation marks, citation, and alteration omitted). In response to petitioner's argument that its licensees' conduct was not connected to the subject matter under investigation regarding climate change, the court explained that, "[i]n order to determine whether [petitioner] engaged in deceptive advertising at its franchisee stations, by either giving a misleading impression or failing to disclose material information about climate change, [respondent] must first ascertain what [petitioner] knew about that topic." *Id.* at 12a.

The Supreme Judicial Court then turned to the question of whether the exercise of personal jurisdiction over petitioner comported with due process. App., *infra*, 12a-17a. The court concluded that petitioner had purposefully

availed itself of the privilege of conducting business in Massachusetts based on its status as the licensor of service stations throughout Massachusetts, as well as through its contract governing that relationship. *Id.* at 13a-14a, 15a.[4] The court also relied on petitioner's few Massachusetts-specific advertisements, which, as discussed above, related only to engine-lubrication products and in no way referenced climate change. *Id.* at 14a; see p. 5, *supra*.

As to the requirement that the subject matter of the investigation arise out of or relate to petitioner's forum contacts, the Supreme Judicial Court relied on its earlier decision in *Tatro* v. *Manor Care, Inc.*, 625 N.E.2d 549 (1994), which had established a but-for test for determining relatedness. App., *infra*, 15a. The court proceeded to identify two grounds for how the civil investigative demand arose from petitioner's forum contacts. The first was that respondent possessed the ability to investigate "deceptive advertising to consumers," seemingly referring to the unspecified advertisements by the licensees on which the court had focused in its discussion of Massachusetts' long-arm statute. *Ibid.*; see *id.* at 12a. The second was that the statute under which respondent was proceeding "also requires honest disclosures in transactions between businesses." *Id.* at 15a. Although it did not identify

[4] The court noted in passing that petitioner operates a website that is accessible in Massachusetts (and around the country) through which visitors can locate the closest Exxon- or Mobil-branded service station. App., *infra*, 14a. But similar to national advertisements, see p. 5 n.2, *supra*, such a website does not specifically target Massachusetts residents and is therefore irrelevant to the specific-jurisdiction analysis. See *NexLearn, LLC* v. *Allen Interactions, Inc.*, 859 F.3d 1371, 1379 (Fed. Cir. 2017); *Jennings* v. *AC Hydraulic A/S*, 383 F.3d 546, 549 (7th Cir. 2004); *Toys 'R' Us, Inc.* v. *Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003).

any misrepresentations, the court suggested that respondent could investigate "[p]ossible misrepresentations or omissions about the threat that climate change poses to [petitioner's] business model." *Id.* at 16a. The court reasoned that any such statements would be "highly relevant to [petitioner's] contracts with" its licensees. *Ibid.* Notably, the court did not identify any requests in the civil investigative demand that would target communications between petitioner and its licensees, nor had respondent ever justified her investigation on that basis.[5]

REASONS FOR GRANTING THE PETITION

This case presents a foundational question regarding the constitutional limitations on courts' exercise of personal jurisdiction—a question that has divided the lower courts since this Court identified it as an open one in *Helicopteros Nacionales de Columbia, S.A.* v. *Hall*, 466 U.S. 408 (1984), and *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991). That question is what type of relationship is required between a plaintiff's claims and a defendant's forum contacts in order to satisfy the constitutional requirement that the claims arise out of or relate to the contacts. This case presents an ideal opportunity to resolve the question and simultaneously to address a subsidiary question that is vexing the lower courts: specifically, whether an unexercised contractual power to be involved in another party's potential contact with a forum State has any relevance to the specific-jurisdiction inquiry (and, if so, in what way).

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[5] The court disclaimed any reliance on the Attorney General's asserted interest in investigating whether petitioner made misrepresentations to purchasers of its securities, noting that "very few of the [civil investigative demand's] requests even mention investors or securities" and that those requests could be deemed to relate to "the Attorney General's consumer deception theory." App., *infra*, 17a n.9.

The disarray in the lower courts provides reason enough for further review. What is more, the Massachusetts Supreme Judicial Court's decision is difficult to reconcile with this Court's decisions setting out the requirements for specific jurisdiction. If the decision below is allowed to stand, it will establish a high-water mark for the exercise of specific personal jurisdiction. Because this case satisfies all of criteria for this Court's review, the petition for a writ of certiorari should be granted.

A. The Decision Under Review Squarely Implicates A Conflict Among The Courts Of Appeals And State Courts of Last Resort

In *Helicopteros*, *supra*, this Court explained that specific personal jurisdiction exists only when a controversy "is related to or 'arises out of' a defendant's contacts with the forum." 466 U.S. at 414. At the same time, however, the Court "decline[d] to reach" the question of "what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists." *Id.* at 415 n.10. Seven years later, in *Carnival Cruise Lines*, *supra*, the Court observed that the lower court had applied a "but for" standard for determining whether the claims were sufficiently related to the defendant's contacts with the forum, but determined that it did not need to address the personal-jurisdiction question because an alternative ground was dispositive. See 499 U.S. at 588-589.

In the absence of further guidance from this Court, subsequent decisions from the lower courts have "lack[ed] any consensus" on this important issue. *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 318 (3d Cir. 2007). As then-Judge Gorsuch observed, "[s]ome courts have interpreted the phrase 'arise out of' as endorsing a theory of 'but-for' causation, while other courts have required

proximate cause to support the exercise of specific jurisdiction." *Dudnikov* v. *Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) (citations omitted). The decision below squarely implicates the conflict in the lower courts, and this Court should grant review to resolve it.

1. a. Like the Massachusetts Supreme Judicial Court, the Ninth Circuit and the Washington Supreme Court have applied a but-for test to determine the sufficiency of the nexus between the plaintiff's claims and the defendant's contacts with the forum. Under that test, the necessary relationship exists if the defendant's contacts could be "considered the first step in a train of events that results in the [plaintiff's] injury" such that, "[b]ut for" the defendant's contacts, "the plaintiff would not have been injured." *Tatro* v. *Manor Care, Inc.*, 625 N.E.2d 549, 553-554 (Mass. 1994); see *Menken* v. *Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007); *Shute* v. *Carnival Cruise Lines*, 783 P.2d 78, 81-82 (Wash. 1989).

Those courts have reasoned that the but-for test "preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum" without imposing "unnecessar[y] limits" on the notion of relatedness. *Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), rev'd on other grounds, 499 U.S. 585 (1991). In those jurisdictions, "any event in the causal chain leading to the plaintiff's injury is sufficiently related to the claim to support the exercise of specific jurisdiction." *Dudnikov*, 514 F.3d at 1078.

b. Other courts, however, have criticized the but-for standard as being "vastly overinclusive." *O'Connor*, 496 F.3d at 322. In the words of one such court, the but-for approach to relatedness has "no limiting principle"; it "embraces every event that hindsight can logically iden-

tify in the causative chain." *Nowak* v. *Tak How Investments, Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996), cert. denied, 520 U.S. 1155 (1997). As another court put it, "[t]he consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond." *O'Connor*, 496 F.3d at 322 n.12 (quoting William L. Prosser, *The Law of Torts* 236 (4th ed. 1971)).

For those reasons, the First, Third, Sixth, Seventh, and Eleventh Circuits, as well as the Oregon Supreme Court, have taken the position that "more than mere but-for causation is required to support a finding of personal jurisdiction." *Beydoun* v. *Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 507-508 (6th Cir. 2014); see *Nowak*, 94 F.3d at 715; *O'Connor*, 496 F.3d at 322; *uBID, Inc.* v. *GoDaddy Group, Inc.*, 623 F.3d 421, 430 (7th Cir. 2010); *Oldfield* v. *Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1223-1224 (11th Cir. 2009); *Robinson* v. *Harley-Davidson Motor Co.*, 316 P.3d 287, 300 (Or. 2013). Under that standard, a but-for causal connection between the plaintiff's claim and the defendant's contacts is insufficient; instead, the claim should be a foreseeable consequence of the contacts. As one court put it, "the plaintiff's cause of action must be proximately caused by the defendant's contacts with the forum [S]tate." *Beydoun*, 768 F.3d at 507-508.

The courts that have adopted that stricter standard have explained that it "better comports with the relatedness [requirement]" because foreseeability is a "significant component of the jurisdictional inquiry." *Nowak*, 94 F.3d at 715. After all, "[t]he animating principle behind the relatedness requirement is the notion of a tacit quid pro quo that makes litigation in the forum reasonably foreseeable." *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." *Ibid.* (quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945)).

The First Circuit's application of the standard is emblematic of the courts that have incorporated proximate cause and foreseeability in the personal-jurisdiction inquiry. That court requires that "[t]he evidence produced * * * show that the cause of action either arises directly out of, or is related to, the defendant's forum-based contacts." *Harlow* v. *Children's Hospital*, 432 F.3d 50, 60-61 (1st Cir. 2005). In other words, "the defendant's in-state conduct must form an important, or at least material, element of proof in the plaintiff's case." *Id.* at 61 (internal quotation marks, citation, and alterations omitted).

c. The conflict concerning the standard for relatedness is entrenched and has repeatedly been acknowledged by federal and state courts alike. See, *e.g.*, *Myers* v. *Casino Queen*, 689 F.3d 904, 912-913 (8th Cir. 2012); *Dudnikov*, 514 F.3d at 1078; *Chew* v. *Dietrich*, 143 F.3d 24, 29 (2d Cir.), cert. denied, 525 U.S. 948 (1998); *Shoppers Food Warehouse* v. *Moreno*, 746 A.2d 320, 333-336 (D.C.) (en banc), cert. denied, 530 U.S. 1270 (2000). As the Texas Supreme Court observed over a decade ago, the lingering conflict stems in part from the "relatively little guidance" this Court has provided on the question. *Moki Mac River Expeditions* v. *Drugg*, 221 S.W.3d 569, 579-580 (2007).

Notably, in its recent decision in *Bristol-Myers Squibb Co.* v. *Superior Court of California*, 137 S. Ct. 1773 (2017), the Court largely sidestepped the question of the appropriate standard for relatedness. To be sure, the Court rejected the California Supreme Court's idiosyncratic "sliding scale" approach to relatedness, under which the requisite nexus between a plaintiff's claims and a defendant's contacts varied depending on how "wide ranging" the de-

fendant's contacts were (even if the contacts were unrelated to the suit). See *id.* at 1778, 1781. But the Court stopped short of "address[ing] exactly how a defendant's activities must be tied to the forum for a court to properly exercise specific personal jurisdiction." *SPV Osus Ltd.* v. *UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018). Because the Court did not address "the other sufficient minimum-contacts tests that different circuits employ," *Lawson* v. *Simmons Sporting Goods, Inc.*, Civ. No. 16-83, 2018 WL 2710708, at *6 (Ark. Ct. App. June 6, 2018) (Murphy, J., dissenting), the lower courts that had previously weighed in on the conflict have continued to apply the same standards after *Bristol-Myers*. See, *e.g.*, *Estate of Thompson ex rel. Thompson* v. *Phillips*, No. 16-4123, 2018 WL 3387218, at *4 (3d Cir. July 11, 2018); *Matus* v. *Premium Nutraceuticals, LLC*, 715 Fed. Appx. 662, 663 (9th Cir. 2018).

2. The decision below squarely implicates the conflict among the lower courts. When considering whether there is specific jurisdiction to compel compliance with an investigatory document request, a court focuses on the nexus between the document request or subject matter of the investigation and the defendant's forum contacts. See *Gucci America, Inc.* v. *Weixing Li*, 768 F.3d 122, 141-142 (2d Cir. 2014); see also App., *infra*, 4a. In holding that there was a sufficient connection between the civil investigative demand and petitioner's contacts with Massachusetts to comport with due process, the Supreme Judicial Court relied on its earlier decision in *Tatro*, which had adopted the but-for test for relatedness. See *id.* at 15a. Notably, the court rejected petitioner's contention that it should revisit the appropriate standard in light of this Court's decision in *Bristol-Myers*. See *id.* at 13a n.8.

The Supreme Judicial Court proceeded to engage in an analysis, and reached a result, that could be justified

only under its "more 'liberal approach'" to the relatedness inquiry. Resp. Mass. S.J.C. Br. 28 n.28. Respondent's civil investigative demand sought documents relating to petitioner's knowledge of climate change and the relationship between petitioner's products and climate change. See, *e.g.*, *id.* at 1; Mass. S.J.C. Oral Arg. Tr. 39:1-4. But the Supreme Judicial Court did not seriously consider the relationship between those topics and any of petitioner's actual contacts with Massachusetts, despite petitioner's arguments that such a relationship was lacking. Instead, the court summarily (and erroneously) concluded that the requirements of due process were satisfied. Compare Pet. Mass. S.J.C. Br. 22-30 with App., *infra*, 15a-16a.

In its brief analysis, the Supreme Judicial Court focused principally on potential "deceptive advertising to consumers." App., *infra*, 15a; see *id.* at 9a-12a. But counsel for respondent had been refreshingly candid on that score, acknowledging that there was "nothing in the record * * * that indicates a specific advertisement to consumers" concerning climate change, and thus nothing in the advertisements at issue that was itself deceptive. Mass. S.J.C. Oral Arg. Tr. 54:14-55:4, 55:23-25. Nor was there any contrary evidence in the record. Although petitioner's licensees are presumed to have created ads of their own, those ads are not in the record. And as for the limited Massachusetts-specific ads created by petitioner since 2011, those ads concerned engine-lubrication products (*i.e.*, motor oil) and did not in any way address climate change. See p. 5, *supra*.

The Supreme Judicial Court's other asserted basis for specific personal jurisdiction—the existence of "[p]ossible misrepresentations or omissions" made by petitioner to its licensees, App., *infra*, 15a-16a—is even further afield. Not only did the court fail to identify any such misrepresentations, but it failed to acknowledge either that the

civil investigative demand did not contain a single request targeting communications between petitioner and its licensees or that respondent never justified her investigation on that basis. *Ibid.*; see Mass. S.J.C. App. 103-112.

If the Supreme Judicial Court had applied the more stringent proximate-cause standard for relatedness, there can be no doubt that the outcome would have been different, because the identified contacts could not possibly have been sufficient to establish specific jurisdiction.[6] Under the proximate-cause standard, the defendant's "in-state conduct must form an important, or at least material, element of proof in the plaintiff's case." *Harlow*, 432 F.3d at 61 (internal quotation marks, citation, and alterations omitted). Because the identified contacts between petitioner and Massachusetts did not concern climate change, they could not have been either "important" or "material" to the subject matter of the civil investigative demand.

The civil investigative demand itself proves as much. In the demand, respondent sought documents regarding all aspects of petitioner's knowledge or research regarding climate change issues dating back forty years. Respondent specifically sought communications with think tanks and policy groups and documents pertaining to speeches made around the world. Advertisements for engine-lubrication products and local service stations—ads that do not address climate change—self-evidently do not fall within, or materially relate to, either those requests or the subject matter of the investigation. And the same is true for hypothetical misrepresentations or omissions to petitioner's licensees, especially given respondent's fail-

[6] Indeed, petitioner maintains that the identified contacts were insufficient under any standard.

ure even to request any communications that could contain such misstatements. Under the more stringent proximate-cause standard, therefore, it would be impossible to conclude that the subject matter of the civil investigative demand is sufficiently related to petitioner's limited Massachusetts contacts.

3. The conflict concerning the standard for relatedness is particularly significant here because the Massachusetts Supreme Judicial Court and the First Circuit have taken opposite sides of the conflict. Compare App., *infra*, 15a, and *Tatro*, 625 N.E.2d at 553-554, with *Harlow*, 432 F.3d at 60-61. Without this Court's intervention, nonresident defendants in Massachusetts will be subject to substantively different standards for personal jurisdiction, depending on the availability of a federal forum. In most cases, a savvy plaintiff will seek to hale a nonresident defendant into Massachusetts state court, where the standard is less demanding.[7] The "discouragement" of such forum-shopping has been a concern of this Court at least as far back as *Erie Railway Co.* v. *Tompkins*, 304 U.S. 64 (1938). See, *e.g.*, *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965). And the risk of such forum-shopping underscores why this Court's review is so urgently needed.

B. The Decision Under Review Also Deepens Confusion Among The Courts Of Appeals And State Courts of Last Resort

This case warrants the Court's review for an additional reason. In considering which contacts could serve as a basis for specific jurisdiction, the Supreme Judicial Court focused on the fact that petitioner had a contractual

[7] The same problem exists in inverse form in Oregon, where federal courts apply the but-for standard but state courts apply the more rigorous proximate-cause standard. See pp. 13-14, *supra*.

right to review and approve advertising by its Massachusetts licensees, thereby allowing the court to take the licensees' advertising into account. App., *infra*, 15a; see *id.* at 9a-11a. But the record contains no evidence that petitioner actually exercised that right. And the question whether the existence of such a contractual right, without evidence that the right was acted upon, can support specific jurisdiction has itself created confusion in the lower courts. Above and beyond the conflict on the standard for relatedness, therefore, this case presents the Court with an opportunity to clarify whether an unexercised contractual right regarding a third-party's in-forum behavior constitutes a contact for purposes of the specific-jurisdiction inquiry.

1. The Ninth Circuit, as well as the courts of last resort of Alabama and the District of Columbia, has suggested that the bare right to control the in-forum activity of a third party, without more, could be sufficient to attribute the third party's conduct to the controlling party for purposes of personal jurisdiction. In *Williams* v. *Yamaha Motor Co.*, 851 F.3d 1015 (2017), the Ninth Circuit held that consumers failed to establish specific jurisdiction over a Japanese manufacturer based on the activities of its American subsidiary. See *id.* at 1024-1025. Relying on this Court's observation that "[a]gency relationships * * * may be relevant to the existence of *specific* jurisdiction," *Daimler AG* v. *Bauman*, 571 U.S. 117, 135 & n.13 (2014), the Ninth Circuit stated that, "under any standard for finding an agency relationship, the parent company must have the right to substantially control its subsidiary's activities." 851 F.3d at 1024-1025. The court ultimately concluded, however, that the substantial-control standard had not been met. See *id.* at 1025.

The circumstances in *Jackson* v. *Loews Washington Cinemas, Inc.*, 944 A.2d 1088 (D.C. 2008), and *Worthy* v.

Cyberworks Technologies, Inc., 835 So. 2d 972 (Ala. 2002), were similar. In *Jackson*, the District of Columbia Court of Appeals affirmed a lower court's holding that it lacked specific jurisdiction over a movie theater operator. See 944 A.2d at 1091. The court rejected the plaintiff's contention that advertisements placed by the operator's parent established contacts sufficient to create jurisdiction over the operator. See *id.* at 1094. The court observed that "the right to control, rather than its actual exercise, is usually dispositive of whether there is an agency relationship," but it ultimately concluded that evidence of the existence of such a right was lacking. *Id.* at 1097 (citation omitted). Similarly, in *Worthy*, the Alabama Supreme Court determined that a lower court had lacked personal jurisdiction over a nonresident defendant because the plaintiffs had "failed to produce substantial evidence that [the defendant] had a right of control" over the alleged in-state agents. 835 So. 2d at 981.

2. By contrast, the Fifth and Federal Circuits, as well as the Iowa and Tennessee Supreme Courts, have seemingly adopted the rule that a defendant must actually exercise control over an in-state actor for its actions to be imputed to the defendant for personal-jurisdiction purposes. For example, in *Celgard, LLC* v. *SK Innovation Co.*, 792 F.3d 1373 (2015), the Federal Circuit held that a patentee had failed to make a prima facie showing of personal jurisdiction in North Carolina over its competitor battery-part manufacturer. See *id.* at 1380. Although the court recognized that the contacts of a third party may be imputed to a defendant under an agency theory, it observed that, "in order to establish jurisdiction under the agency theory, the plaintiff must show that the defendant *exercises control* over the activities of the third-party." *Id.* at 1379 (emphasis added). Because the record did not

show any attempt by the defendant "purposefully [to] direct or control the activities of the dealers in North Carolina," the court held that the plaintiff had "not shown the requisite control for jurisdiction to be premised on the acts of agents." *Ibid.* Similarly, in *In re Chinese-Manufactured Drywall Product Liability Litigation*, 753 F.3d 521 (2014), the Fifth Circuit held that a lower court had properly exercised personal jurisdiction over a foreign parent company given proof of control over a domestic subsidiary. See *id.* at 530-532, 534.

The Tennessee and Iowa Supreme Courts have engaged in similar analyses. In *Gordon* v. *Greenview Hospital, Inc.*, 300 S.W.3d 635 (2009), the Tennessee Supreme Court determined that an agency analysis "hinges on the right to control the agent's actions, and, ultimately, the fact of actual control over the agent." *Id.* at 653 (citation omitted). It therefore declined to impute the activities of two parent companies to a subsidiary for personal-jurisdiction purposes where the plaintiff did not present evidence "regarding the extent to which [the parents] exercised control over the day-to-day operation of [the subsidiary]." *Id.* at 653-654. Likewise, in *Ross* v. *First Savings Bank*, 675 N.W.2d 812 (2004), the Iowa Supreme Court explained that, "for jurisdictional purposes, the agent must act in the forum state under the control of the nonresident principal." *Id.* at 819. The court determined that, in that case, the in-state actor had "tremendous discretion" to act as it wished, rendering the exercise of personal jurisdiction over the nonresident defendant inappropriate. *Ibid.*

3. The Supreme Judicial Court based personal jurisdiction principally on the ground that petitioner retained the right to review and approve licensee advertising. App., *infra*, 15a; see *id.* at 9a-11a. The court did not discuss whether petitioner actually exercised such control

over the licensees' ads, much less over ads relating to climate change. Accordingly, the Supreme Judicial Court's decision is inconsistent with the decisions requiring the actual exercise of control over a third party for purposes of determining whether the contacts of that party can properly be imputed to the defendant. Indeed, the Supreme Judicial Court's decision goes further than any of the foregoing decisions, insofar as it *upholds* the exercise of personal jurisdiction based on a mere right to control.

This case presents an excellent opportunity for the Court to resolve the resulting confusion. In answering the question presented, the Court should make clear that an unexercised contractual right regarding a third-party's in-forum behavior does not constitute a contact for purposes of the specific-jurisdiction inquiry.

C. The Decision Under Review Is Erroneous

The Massachusetts Supreme Judicial Court's reasoning is profoundly flawed and inconsistent with settled due process limitations on a court's exercise of personal jurisdiction. Further review is warranted for that reason as well.

1. a. In *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), this Court first identified the broad contours of the doctrine of specific personal jurisdiction—specifically, that the defendant must have "certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316 (internal quotation marks and citation omitted). To establish the existence of minimum contacts, a plaintiff must show, first, that the defendant has purposefully directed his activities toward the forum, and, second, that the litigation arises out of or relates to those activities. See, *e.g.*, *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985).

The second of those two requirements, the relatedness requirement, can be traced back to *International Shoe* itself. There, the Court observed that personal jurisdiction may be exercised over a defendant when its activities in a State "give rise to the liabilities sued on," but not when the "causes of action [are] unconnected with the activities" in the State. 326 U.S. at 317. Accordingly, ever since *International Shoe*, "the relationship among the defendant, the forum, and the litigation * * * became the central concern of the inquiry into [specific] personal jurisdiction." *Daimler*, 571 U.S. at 126.

b. While this Court has not articulated a definitive test for relatedness, it has sought to "ensure[] that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Burger King*, 471 U.S. at 475 (internal quotation marks and citations omitted). Rather, "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *Id.* at 474 (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980)). Such "foreseeability," moreover, is "critical to due process analysis." *Ibid.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297). In the context of the purposeful-availment requirement, the Court has explained that "[j]urisdiction is proper * * * where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum State." *Id.* at 475 (internal quotation marks, citation, and emphasis omitted).

In its most recent personal-jurisdiction cases, the Court has emphasized the need to delineate appropriate exercises of specific jurisdiction from those that are "loose and spurious form[s] of general jurisdiction." *Bristol-Myers*, 137 S. Ct. at 1781. Accordingly, it has increasingly

focused on the necessity of an "affiliation between the forum and the underlying controversy." *Goodyear*, 564 U.S. at 919 (citation and alteration omitted). The Court has observed that "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Ibid.* (internal quotation marks and citation omitted). That is, not only must there be a "connection" between the defendant's suit-related conduct and the forum State, but that "connection" must itself be "substantial." *Walden*, 571 U.S. at 284. The Court has emphasized that a defendant foreign to a State is "not answerable in that State with respect to * * * matters unrelated to the forum connections." *Goodyear*, 564 U.S. at 923.

c. The but-for standard for relatedness applied by the Supreme Judicial Court and other courts cannot be reconciled with the due process limitations on the exercise of personal jurisdiction. A but-for standard can be satisfied by the loosest of connections between a plaintiff's claims and a defendant's forum contacts, and it thus lacks the element of foreseeability that is "critical to due process analysis." *Burger King*, 471 U.S. at 474 (internal quotation marks and citation omitted). Instead, the but-for standard amounts to an impermissible "mechanical or quantitative" approach, *International Shoe*, 326 U.S. at 317, under which a State can subject a foreign corporation to the jurisdiction of its courts based on contacts that are irrelevant to the suit or investigation as long as they form a part in the "train of events that results in the [plaintiff's] injury." *Tatro*, 625 N.E.2d at 553.

The decision under review neatly illustrates the problem. Respondent has never explained how advertisements in Massachusetts that indisputably do not address climate change are connected to expansive requests for all documents about climate change stretching back forty

years. See Mass. S.J.C. Oral Arg. Tr. 55:16-25 (acknowledging the lack of references to climate change in the ads at issue). Nor has respondent explained why those ads have any relation to statements made to international audiences about the issue of climate change. And the same is true for the Supreme Judicial Court's additional notion that petitioner's communications with its licensees could form relevant contacts: any such communications cannot be a substantial or material basis for the civil investigative demand, for the simple reason that the demand does not request any documents relating to them.

2. In addition, the Supreme Judicial Court's apparent reliance on petitioner's unexercised right to review and approve ads that petitioner played no role in creating similarly runs afoul of the longstanding principle, based in due process, that the personal-jurisdiction inquiry focuses on "actions by the defendant [*it*]*self*." *Burger King*, 471 U.S. at 475; accord *Walden*, 571 U.S. at 284. A corollary of that principle is that "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Walden*, 571 U.S. at 286.

The mere existence of contractual relations between a foreign defendant and an in-state third party thus cannot be a basis for personal jurisdiction. See *Bristol-Myers*, 137 S. Ct. at 1783; *Burger King*, 471 U.S. at 478. That is because a contract, in and of itself, is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Burger King*, 471 U.S. at 479 (citation omitted).

To be sure, how a foreign corporation *acts* on its contractual rights is often of great significance to whether personal jurisdiction is appropriate. As the Court recently noted, "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take

action there." *Daimler*, 571 U.S. at 135 n.13. But personal jurisdiction cannot be based on contractual rights that are never exercised—here, petitioner's right to review and approve advertising by its Massachusetts licensees.

By failing to analyze petitioner's actual conduct, the Supreme Judicial Court effectively relied on the mere existence of the contract between petitioner and its licensees, which this Court has indicated is impermissible. Without any showing that petitioner actually exercised control over the advertisements of its licensees, it cannot be said that petitioner had suit-related contacts with Massachusetts that satisfied the relatedness requirement. Like the but-for standard, a standard that considers only the existence of contractual rights and not their actual exercise is impermissibly "mechanical or quantitative," *International Shoe*, 326 U.S. at 317; *Burger King*, 471 U.S. at 478-479, and could easily lead to a defendant's being haled into a forum that it could not reasonably anticipate, see *Burger King*, 471 U.S. at 474. In that respect, too, the Massachusetts Supreme Judicial Court's reasoning conflicts with this Court's due process jurisprudence. Further review is warranted to correct that reasoning.

D. The Question Presented Is An Important One, And This Case Is An Ideal Vehicle To Address It

1. The question presented is an exceptionally important one that warrants the Court's immediate review. This Court has established due process limits on the circumstances in which defendants can be subject to specific jurisdiction. By upholding the exercise of personal jurisdiction based on an insufficient connection between the suit-related conduct and the defendant's in-state activities, the decision below eviscerates the fairness and certainty that those limits are meant to provide.

The fundamental premise of the specific-jurisdiction inquiry is that specific jurisdiction is a "limited form of submission to a State's authority," subjecting a nonresident defendant to the State's judicial power only "to the extent that power is exercised in connection with the defendant's activities touching on the State." *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion). Put another way, "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." *Ibid.*

Those due process concerns are only heightened in the particular context in which this case arises—a government investigation that seeks to coopt the power of the state courts. As has been demonstrated by the New York Attorney General's subpoena for similar materials, a State can compel the production of millions of pages of documents regarding conduct dating back decades, in the name of investigating potential claims under state law. See App., *infra*, 39a (noting that 1.4 million pages of documents had already been produced to the New York Attorney General as of December 2016). Such investigations can disrupt company operations and cost tens of millions of dollars.

A State can accomplish all of this without any independent judicial oversight of the merits of the inquiry and with only minimal oversight of the scope of its document requests. Indeed, in many cases (as here), the statute under which the State is proceeding does not pose significant limits, whether geographic or otherwise, on the investigation's reach. Accordingly, it is especially important for this Court to enforce the few constitutional protections afforded to a subject of such an investigation—here, the protections of the Due Process Clause that are implicated

when a State foreign to the relevant conduct seeks to invoke the judicial power to enforce its investigative demands.

2. This case is an ideal vehicle to address the question presented. Because the Supreme Judicial Court determined that petitioner was not subject to general jurisdiction in Massachusetts, the existence of specific jurisdiction is outcome-determinative. App., *infra*, 3a-4a. And the Supreme Judicial Court's decision starkly presents the choice between the but-for and proximate-cause standards for relatedness. Relying on the more lenient but-for standard, the Supreme Judicial Court affirmed an order compelling petitioner to produce materials to a Massachusetts state official despite the thinnest of connections between petitioner and Massachusetts and the utter irrelevance of those connections to the subject matter of the investigation. There can be no serious doubt that, under any form of proximate-cause standard, the identified contacts—advertisements that do not discuss climate change and theoretical misrepresentations or omissions to licensees—could not provide the requisite connection to requests for decades' worth of documents regarding climate change.

In light of the clean factual record, the decision under review gives the Court an ideal opportunity to answer the question it posed in *Helicopteros* as to "what sort of tie between a cause of action and a defendant's contacts with a forum is necessary" in order to establish specific personal jurisdiction. 466 U.S. at 415 n.10. The Court should grant review, and answer that question, in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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