No. 15-1209

In The
Supreme Court of the United States

BARR PHARMACEUTICALS, LLC, ET AL.,
Petitioners,
v.
SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Superior Court of California, County of San Francisco

PETITIONERS' REPLY BRIEF

WILLIAM M. JAY
GOODWIN PROCTER LLP
901 NEW YORK AVE., N.W.
WASHINGTON, DC 20001
(202) 346-4000
wjay@goodwinprocter.com
Counsel for Teva Pharmaceuticals USA, Inc.

JEFFREY F. PECK
Counsel of Record
LINDA E. MAICHL
ULMER & BERNE LLP
600 VINE ST. SUITE 2800
CINCINNATI, OH 45202
(513) 698-5000
jpeck@ulmer.com
lmaichl@ulmer.com
Counsel for PLIVA, Inc., and Barr Pharmaceuticals, LLC

June 7, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

INTRODUCTION

Respondents' attempt to evade the legal question presented by portraying it as fact-bound is meritless. Personal jurisdiction determinations always turn on facts, but this Court has not hesitated to review such decisions to provide the legal guidance necessary to satisfy constitutional requirements. Here, the determinative "facts" involve the administration of state-court proceedings coordinating thousands of lawsuits before a single court vested with the power to decide issues in whatever order it deems the most efficient use of judicial resources. The question is whether it is consistent with due process for a state court to treat petitioners' inclusion in those compulsory coordination proceedings ("JCCP") as consent to the exercise of personal jurisdiction over them or a waiver of their jurisdictional defense in *all* cases joined in the JCCP. The question requires this Court's attention, as it is one recurring with more frequency with the ever-increasing use of state-court-coordinated proceedings.

Respondents cannot obscure the basic facts by which personal jurisdiction over petitioners was bootstrapped: Petitioners were hauled into California court by California residents (the *Elkins* case). That case, in turn, was used to initiate the JCCP, and petitioners' compulsory inclusion in the JCCP then was deemed a waiver of and consent to personal jurisdiction. Petitioners cannot be held to have consented to personal jurisdiction or to have waived their defenses in thousands of lawsuits having no connection to the forum in which petitioners never appeared based on their mandatory inclusion in the JCCP initiated by the *Elkins* plaintiffs. Inclusion in coordinated pro-

ceedings does not satisfy this Court's tests for waiver of fundamental liberty interests and constitutional due process rights. That is particularly so where the parties complied with court directives to address the court's subject matter jurisdiction and relied on the court's repeated assurances (and respondents' agreement) that defenses were not, and would not be, waived by following that direction. Respondents skirt the issue, never even addressing the applicable constitutional tests for consent or waiver.

The Court should grant this petition to clarify the proper application of this Court's tests for waiver of constitutional rights and declare that compulsory inclusion in state proceedings coordinating mass torts does not constitute consent to the exercise of personal jurisdiction over defendants in every coordinated case.

ARGUMENT

A. This Court Has Jurisdiction to Review the Question Presented

This Court has jurisdiction under 28 U.S.C. §1257(a) because the state court's decision denying petitioners' motion to quash is a "final ruling on the federal issue and is not subject to further review in the state courts." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1985). Respondents challenge this Court's jurisdiction ignoring the controlling precedent cited in the petition (at 5).

In *Calder v. Jones*, this Court reviewed a California appellate court decision denying a motion to

quash for lack of personal jurisdiction. 465 U.S. 783, 787-88 & n.8 (1985). The California Supreme Court denied discretionary review and "there ha[d] not yet been a trial on the merits." *Id.* But this Court explained that the decision of the California appellate court was "'plainly final'" on the federal due-process issue presented, and thus was final "within the meaning of [28 U.S.C.] §1257(a)." *Id.* at 788 n.8 (quoting *Cox*, 420 U.S. at 485) (brackets in original). In reaching that conclusion, the Court relied on decisions from "several past cases" in the same posture, including *Kulko v. Superior Court*, 436 U.S. 84 (1978), in which the Court exercised jurisdiction over the California Supreme Court's affirmance of a denial of a motion to quash for lack of personal jurisdiction, again prior to any trial. *Id.* at 88-89. There is no basis on which to distinguish *Calder* and *Kulko*, and it is telling that respondents do not try.

Respondents also repeatedly rely on the flawed premise that the state-court decision is not final because the California Supreme Court denied discretionary review. (Brief in Opposition ("Opp."), pp. 16-18.) Yet, *Calder* was in the identical posture, 465 U.S. at 787, and it is well established that "the trial court's judgment becomes that of the highest court in which a decision could be had" when the state appellate courts decline discretionary review. S. Shapiro et al., SUPREME COURT PRACTICE 177 (10th ed. 2013) (collecting decisions).

Moreover, respondents' suggestion that petitioners could obtain review after final judgment is illusory. California law bars defendants from raising personal jurisdiction defenses on appeal from final

judgment, forcing defendants either to default or waive the defense by making a general appearance. *See State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 181 Cal. App. 4th 429, 437-44 (2010). When state law puts defendants to "the choice of suffering a default judgment or entering a general appearance and defending on the merits," this Court has held that a decision denying a motion to quash for lack of jurisdiction is "final." *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977). That principle controls here.

Respondents further argue that the petition raises only state-law issues (Opp., pp. 15-16), but that is incorrect. "The question of the waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law," *Brookhart v. Janis*, 384 U.S. 1, 4 (1966), as petitioners briefed below, *e.g.*, Pet. for Writ of Mandate, Mem. of P. & A., at 14 (stating court's approach deprives petitioners of due process). The federal question presented is whether the state court's decision departed from binding federal standards when it held that petitioners waived their federal due process right to contest personal jurisdiction in thousands of out-of-state cases because they were included in mandatory coordination proceedings. This Court has jurisdiction to review that question.

B. The Issue Presented Is a Substantial Issue of Federal Constitutional Law

Respondents argue the petition does not present an issue that "implicates any of the considerations…in Supreme Court Rule 10." (Opp., p. 18.) To the contrary, the issue falls squarely within Rule

10(c) as it involves a decision that "has decided an important federal question in a way that conflicts with relevant decisions of this Court." The due-process standards for the exercise of personal jurisdiction are *not* merely factual. Multiple decisions from this Court cited in the petition (pages 23, 25-27)—none of which respondents address—set the legal requirements for determining waiver and consent, and the JCCP Court's decision conflicts with those decisions.

C. The JCCP Court Did Not Conduct the Due Process Analysis that This Court's Decisions Require

Respondents contend the JCCP Court "answered only elementary questions of civil procedure rules concerning consent and waiver," which they claim are "straightforward, time-tested, and unremarkable." (Opp., p. 20.) That contention spotlights the problem: The court did not apply this Court's express requirements for consent or waiver necessary to satisfy constitutional demands and its decision to subject petitioners to the court's jurisdiction in thousands of lawsuits with no connection to the forum is contrary to established due process principles.

1. "Constructive Consent" Does Not Satisfy Due Process

Respondents' argument that the JCCP Court correctly found petitioners consented to its jurisdiction is twofold. First, respondents point to a provision titled "Jurisdiction" in the court's first case management order ("CMO1") and assert that the trial court

"relied" on that provision in proceeding with its organization and conduct of the JCCP. Not only is that a constructive consent argument that does not pass constitutional muster, but also it attempts to rewrite the facts. Second, respondents rely on a non-existent category of personal jurisdiction—"jurisdiction by estoppel."

The JCCP includes manufacturers of the brand-name drug ("Brand Defendants") as well as the Generic Defendants, including petitioners. CMO1 applies to *all* defendants. If it constitutes consent to the court's exercise of personal jurisdiction, it constitutes consent by the Brand Defendants as well. Yet, the court's third case management order ("CMO3"), which applies only to the Brand Defendants (proceedings as to Generic Defendants remained stayed), expressly provided that the filing of a master answer to the master complaint would not constitute a general appearance. That CMO3 preserved the Brand Defendants' personal jurisdiction defenses belies any contention that CMO1's "Jurisdiction" provision, which was equally applicable to the Brand Defendants, constituted constructive consent to the court's exercise of personal jurisdiction over any defendant in every lawsuit. CMO1 cannot have different meanings when applied to different defendants.

Properly understood, CMO1 does not implicate personal jurisdiction at all. It addresses organizational issues in the conduct of the JCCP and includes a standard provision to preclude continued action in cases pending their transfer to the JCCP and recognizing litigation in other forums involving similar issues. That order was in place when the challenges

based on *PLIVA v. Mensing*, 131 S. Ct. 2567 (2011) (the "*Mensing* challenges") were discussed. Even so, the court's order lifting the stay to permit *Mensing* challenges stated they "are without prejudice to and do not constitute a waiver of the right to file motions on any issue not related to the impact of the *Mensing* decision after further order of the Court." (App. 65.) The order did not state "except for personal jurisdiction," and the court never stated, implied, or referenced its supposed "reliance" on the "Jurisdiction" provision in deciding to proceed with *Mensing* challenges and the determination of its subject matter jurisdiction.

Respondents argue consent to jurisdiction, including personal jurisdiction, should be implied at a time when consistent with concerns expressed by the JCCP Court, Generic Defendants' demurrer challenged the predicate of subject matter jurisdiction over the claims against them. Respondents' assertion that CMO1 constitutes consent to personal jurisdiction under controlling due process standards is belied by Generic Defendants' repeated reservation of personal jurisdiction challenges, as well as the court's repeated assurances (and respondents' repeated agreement) that personal jurisdiction would be addressed at a later time. (App. 31, 60, 63, 76, 78, 79, 81, 83, 85.) In truth, respondents' and the court's purported "reliance" on the "Jurisdiction" provision came well after the fact.

Respondents' "jurisdiction by estoppel" argument must be rejected out-of-hand. Estoppel principles have no applicability to personal jurisdiction. "Estoppel" does not equal "consent," much less the explicit

consent necessary to subject a party to a court's personal jurisdiction.

If estoppel has any application, it is to respondents. Petitioners raised personal jurisdiction at the first instance the court entertained substantive issues. The first *Mensing* challenge was filed in *Elkins*, a case filed by California residents. When directed to demur to the master complaints, Generic Defendants' liaison counsel preserved personal jurisdiction in each filing. (App. 31, 60, 63.) Repeatedly, the JCCP Court assured petitioners that personal jurisdiction challenges would not be waived and respondents acknowledged that fact. (App. 76, 78, 79, 81, 83, 85.) Then, petitioners' right to challenge personal jurisdiction was stripped from them.

Respondents' assertion that they "reasonably relied on Petitioners' actions by paying…fees and costs, making their preliminary disclosures, opposing their *Mensing* demurrer and motion to strike and putting possible dismissals of their cases on the line, and forgoing filing their cases in other jurisdictions while their cases were being actively litigated in this jurisdiction" (Opp., pp. 21-22) is baseless. Respondents strategically decided to file multi-plaintiff complaints (some including hundreds of plaintiffs in one case) in California courts hoping to avoid individual case filing fee structures in existing mass tort proceedings in New Jersey and Pennsylvania. The strategy did not work, and respondents were required to pay individual filing fees. California rules and statutes imposed that requirement—not petitioners' actions. Respondents' lawsuits against the Brand Defendants proceeded during the *Mensing* challenges requiring

preliminary disclosures—not petitioners' actions. The JCCP Court directed the filing of the *Mensing* challenges and the form they should take—not petitioners. And, there was no obstacle to respondents filing their lawsuits in states where personal jurisdiction over petitioners existed—that choice was a voluntary, conscious one by respondents, not petitioners.

Respondents' final estoppel argument, i.e., that the JCCP Court relied on petitioners' actions and spent considerable time and resources "in managing the thousands of cases" and deciding the *Mensing* demurrer also is contrary to fact. Respondents falsely imply the claims against Generic Defendants were actively litigated on issues other than *Mensing*, which simply is not so. A stay was put in place when the plaintiffs in *Elkins* sought coordination and remains in place as to the Generic Defendants to this day. It has been lifted only twice, once for the *Mensing* challenges and again to address personal jurisdiction. Otherwise, all proceedings in the JCCP involved only respondents and the Brand Defendants. All "petitioners' actions" have been challenges to the JCCP Court "managing the thousands of cases" against Generic Defendants.

2. Following a Court's Direction Is Not an Intentional Relinquishment or Abandonment of Fundamental Liberty Interests and Due Process Rights

Respondents ignore this Court's test for waiver of constitutional rights and instead improperly rely on California rules and law relating to individual ac-

tions to argue petitioners waived their right to challenge personal jurisdiction. Respondents argue the wrong test because they cannot satisfy the correct one.

The circumstances surrounding Generic Defendants' filing of the *Mensing* challenges do not satisfy this Court's test for waiver, which requires an "intentional relinquishment or abandonment of a known right or privilege." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Petitioners cannot be said to have intentionally and knowingly abandoned rights they repeatedly invoked and were repeatedly assured were preserved.[1]

The same is true of respondents' suggestion that petitioners waived personal jurisdiction in pursuing appellate review in the California courts. Following

[1] In attempting to evade the due process issue, respondents distort state law. Their assertion that *Mensing* challenges constituted a "general appearance" is contrary to the rules governing JCCPs. Those rules vest the court with the power to "[o]rder any issue or defense be tried separately and before the trial of the remaining issues when it appears the disposition of any of the coordinated actions might be expedited thereby." Cal. R. Ct. 3.541(b)(3). The Judicial Council's rules prevail over conflicting provisions applicable to civil actions generally. Cal. Civ. P. Code §404.7; Cal. R. Ct. 3.504(b). In short, the JCCP Court was authorized to defer the personal jurisdiction question while it entertained the *Mensing* challenges and resolved its concerns about subject matter jurisdiction. *See McGhan Med. Corp. v. Superior Court*, 11 Cal. App. 4th 804, 812, 814 (1992) (noting coordination judge has authority to address issues in order most likely to ease logjam of cases through judicial system and permit uniform and centralized resolution on appeal).

its denial of the demurrer, the trial court continued to express reservations about subject matter jurisdiction and encouraged immediate appellate review of its decision. Respondents attempt to conjure waiver out of petitioner's listing of all plaintiffs in the appeal. (Opp., p. 25.) California writ procedures, however, require parties to identify the plaintiffs in the underlying lawsuit. The rule required petitioners to list every plaintiff who filed a lawsuit coordinated into the JCCP.

Respondents also assert that the JCCP Court was not informed of an intention to challenge personal jurisdiction until February 2014, (Opp., p. 6), and that the *Mensing* challenges were lodged without informing any court of later-intended challenges to personal jurisdiction (*id.*, p. 19). Those accusations are demonstrably wrong. The *Mensing* challenges were addressed to a master complaint devoid of information as to individual plaintiffs and filed at the direction of the court. The court limited the lifting of the stay to permit only *Mensing* challenges while expressly preserving all other issues, including personal jurisdiction. (App. 64-65.) In each *Mensing* challenge, the first of which was filed in September 2011, Generic Defendants specifically and expressly preserved personal jurisdiction defenses. (App. 31, 60, 63.) The real significance of February 2014 is that on February 11, the JCCP Court again confirmed that personal jurisdiction had not been waived and specifically reminded the parties that "in personam jurisdiction, that's going to be later." (App. 85.)

In addition, before the first *Mensing* challenge was filed in *Elkins*, the JCCP Court was apprised of

the personal jurisdiction issues. As respondents point out, PLIVA's counsel, Rex Littrell, filed a declaration in the trial court documenting discussions that took place during a "cookie lunch"[2] held by the JCCP Court in July 2011, during which the personal jurisdiction issue was raised with the court. Notably, while respondents criticize that declaration claiming "[t]here is no record verifying this assertion" (Opp., p. 8, n.2), respondents had ample opportunity to submit a declaration in the trial court disputing Mr. Littrell's statements and none of the multiple counsel representing respondents attending the cookie lunch did so providing important context for their innuendo and accusations.

It similarly is incorrect for respondents to argue that petitioners "invoked the forum court's jurisdiction to decide a substantive issue." (Opp., p. 25.) Again, after expressing concern about its subject matter jurisdiction over claims against the Generic Defendants, the JCCP Court directed Generic Defendants to file a demurrer to respondents' master complaints. They did so under California Code of Civil Procedure §430.10(a), which is a direct challenge to the court's subject matter jurisdiction. Respondents' attempt to contort the JCCP Court's decision to address subject matter jurisdiction over resident and non-resident cases against Generic Defendants before addressing case-specific issues of personal jurisdiction into a waiver of personal jurisdiction defenses is contrary to fact and light years away from conduct this Court has found to constitute a waiver of consti-

[2] The trial court was fond of holding off-the-record conferences with the parties which it called "cookie lunches."

tutional rights. Generic Defendants followed the court's direction and relied on repeated assurances that personal jurisdiction would be addressed later. Petitioners cannot be punished for complying with the court's directives and relying on the court's assurances.

This Court should grant this petition to make clear that it violates due process to strip a party of its constitutionally protected rights and subject it to a court's jurisdiction based on "waiver" for following state court procedures or a judge's direction in mandatory coordination proceedings.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Jeffrey F. Peck
Counsel of Record
Linda E. Maichl
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202
jpeck@ulmer.com
lmaichl@ulmer.com
Tel: 513-698-5000
Counsel for Petitioners PLIVA, Inc., and Barr Pharmaceuticals, LLC

William M. Jay
Goodwin Procter LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
Tel: 202-346-4000
Counsel for Petitioner Teva Pharmaceuticals USA, Inc.