No. 16-481

IN THE
Supreme Court of the United States

TV AZTECA, S.A.B. DE C.V., PATRICIA CHAPOY, AND PUBLIMAX, S.A. DE C.V.,
Petitioners,

v.

GLORIA DE LOS ANGELES TREVINO RUIZ, INDIVIDUALLY AND ON BEHALF OF A MINOR CHILD, A.G.J.T., AND ARMANDO ISMAEL GOMEZ MARTINEZ,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors who regularly teach and write about Texas and federal civil procedure.[2] *Amici* have no stake in the outcome of this case other than their academic interest in the logical and rational development of the law. Because this case implicates fundamental issues of civil procedure in Texas and elsewhere, *amici* believe that their perspective may assist the Court in resolving this case.

INTRODUCTION

As Petitioners demonstrate, the federal circuits and the state courts of last resort are deeply divided over the proper legal standard for determining when a defendant's purposeful contacts with a state are sufficiently related to the plaintiff's claims to support the exercise of specific personal jurisdiction under

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that she authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* also represents that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before it was due and that the parties have consented to the filing of this brief. Petitioners have filed with the Clerk a letter granting blanket consent to the filing of *amicus* briefs; respondents have informed counsel for *amici* in writing that they do not oppose the filing of this brief, and that written communication is being submitted contemporaneously with this brief.

[2] *Amici* are Elaine Grafton Carlson, The Stanley J. Krist Distinguished Professor of Texas Law at the South Texas College of Law Houston; Lonny Hoffman, Law Foundation Professor at the University of Houston Law Center; and Alexandra Wilson Albright, Senior Lecturer at the University of Texas School of Law (also counsel of record). Their titles and institutional affiliations are provided for identification purposes only.

the Due Process Clause of the United States Constitution (the "nexus requirement"). And while this Court recently addressed some of the issues presented in analyzing specific jurisdiction, it did not there address the nexus requirement. *See Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (addressing the contacts that the "defendant himself" creates with the "forum State itself").

In fact, the division among the courts is worse than the Petition shows. Petitioners divide the different approaches into two broad categories: those that require a causal relationship (of which there are two or perhaps three), and the minority "substantial connection" approach "that eschews any causation requirement and instead permits jurisdiction as long as the connection is sufficiently 'substantial.'" Pet. 17. Petitioners put Texas in the "substantial connection" category (understandably, because that is what the Texas Supreme Court calls it) and cite (at 17-18) opinions from seven other state courts of last resort and one federal circuit adopting the standard.

However, the Texas standard differs even from other states that have eschewed a causation-based analysis in favor of a "substantial connection" approach. In short, there is disarray even among courts applying the "substantial connection" test, reflecting the difficulty in applying such a vague and amorphous standard.

We explore here Texas's "substantial-connection-to-operative-facts" standard and compare it to other standards. Then we apply these disparate standards to a hypothetical Texas case to show that different standards can be outcome-determinative. And because of the lack of guidance from this Court, no one knows whether the Texas standard or one of the others is

"correct." But in Texas, because the Fifth Circuit and the Texas state courts apply different standards, the possibility of forum-shopping is real.

We urge this Court to grant certiorari in this case to resolve this irreconcilable conflict between the courts that has real effects upon litigants in Texas and elsewhere.

ARGUMENT

I. FRACTURED FUNDAMENTALS

A. The Causation Standards

A number of federal circuits and state courts of last resort have adopted a nexus standard that requires a causal connection between the defendant's forum-state activities and the plaintiff's claims.

1. The "but-for" and "but-for-plus" standards

The standard that the Fifth Circuit has adopted and the federal district courts of Texas must apply is referred to as "but-for" causation. *See Trinity Indus., Inc. v. Myers & Assocs., Ltd.*, 41 F.3d 229, 231-32 (5th Cir. 1995) (applying "but-for" test). This test "is satisfied when the plaintiff's claim would not have arisen in the absence of the defendant's contacts." *Breathwit Marine Contractors, Ltd. v. Deloach Marine Servs., LLC*, 994 F. Supp. 2d 845, 851 (S.D. Tex. 2014) (quoting *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 319 (3d Cir. 2007)) (internal quotation marks omitted). In applying the "but for" standard, the court "considers 'jurisdictional contacts that occur over the entire course of events' of the relationship between the defendant, the forum and the litigation." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 580 (Tex. 2007) (discussing and quoting *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 384 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991)).

The Texas Supreme Court rejected the "but for" standard because it is "too broad and judicially unmoored to satisfy due process." *Id.* at 581.

One district court has suggested that the Fifth Circuit might join other circuits that have "tightened" the "broad scope" of the "but-for" standard to "but-for-plus," which includes "a concept of reciprocity between the 'benefits and protection' defendants receive from a forum and their corresponding jurisdictional obligations." *Breathwit*, 994 F. Supp. 2d at 852. This approach, adopted by the Third Circuit in *Sandy Lane*, 496 F.3d at 323, and by the Seventh Circuit in *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 430 (7th Cir. 2010), is consistent with this Court's signal that the scope of a state's regulatory power may be an important concern in determining specific jurisdiction. *See Walden*, 134 S. Ct. at 1121 n.6; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (stating that specific jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation").

2. The "proximate cause/substantive relevance" standard

The "but for" standard is contrasted with the "more structured" "proximate cause" or "substantive relevance" standard. *Moki Mac*, 221 S.W.3d at 581-82. The "proximate cause" version of the standard examines whether the defendant's contacts with the forum are the legal cause of the injury, adding foreseeability to the "but for" causation inquiry, while the "substantive relevance" version examines whether the contacts are "'relevant to the merits of the claim.'" *Breathwit*, 994 F. Supp. 2d at 851 (quoting *Sandy*

Lane, 496 F.3d at 319); *see* Pet. App. 38a-39a; *Moki Mac*, 221 S.W.3d at 582. The Texas Supreme Court rejected the "substantive relevance/proximate cause" standard because it is "too narrow" and requires "a court to delve into the merits" of the plaintiff's claim. *Moki Mac*, 221 S.W.3d at 583.

B. The "Substantial Connection" Standards

Several courts, including the Texas Supreme Court, have rejected these standards requiring a causal connection between the defendant's forum contacts and the plaintiff's claims and adopted something else, which they all call a "substantial connection" test. *See Walden*, 134 S. Ct. at 1121 (stating that, for specific jurisdiction, "the defendant's suit-related conduct must create a substantial connection with the forum State"); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 n.18 (1985) (stating that, "[s]o long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction"). In fact, there are two different strains of the "substantial connection" test.

1. The "sliding scale" standard

One strain is the sliding-scale version that California and the Second Circuit have adopted. *See Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998); *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 885 (Cal. 2016), *petition for cert. filed*, No. 16-466 (U.S. filed Oct. 7, 2016). Courts applying this test are concerned with "the intensity of forum contacts." *Bristol-Myers Squibb*, 377 P.3d at 885 (internal quotation marks omitted). As the defendant's contacts become "'more wide ranging,'" the court may "'more readily'" find the required connection with the claim. *Id.* at 887 (quoting *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1089 (Cal. 1996)).

The District of Columbia's "discernable relationship" approach is similar—the focus is on the defendant's forum contacts, flexibility, and fairness, rather than whether the defendant's forum activities cause or gave rise to the plaintiff's claim. *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 335 (D.C. 2000).

Like California and the District of Columbia, the Texas Supreme Court (as it stated in the decision below) "does not require proof that the plaintiff would have no claim 'but for' the contacts, or that the contacts were a 'proximate cause' of the liability." Pet. App. 38a. The "substantial connection" courts are unified in that core feature. However, unlike California and the District of Columbia, Texas law departs from a "sliding scale" analysis because it "conflates the fundamental distinction between general and specific jurisdiction that is firmly embedded in our jurisprudence." *Moki Mac*, 221 S.W.3d at 584; *see also Walden*, 134 S. Ct. at 1121 (stating that "the defendant's suit-related conduct must create a substantial connection with the forum State").

2. Texas's "substantial connection to operative facts" standard

In *Moki Mac*, the Texas Supreme Court sought "a middle ground, more flexible than substantive relevance but more structured than but-for relatedness," 221 S.W.3d at 584, and adopted its own "substantial-connection-to-operative-facts" standard that is not concerned with the relative strength of the defendant's forum contacts. Instead, the Texas test considers "what the claim is 'principally concerned with,' whether the contacts will be 'the focus of the trial' and 'consume most if not all of the litigation's attention,' and whether the contacts are 'related to the

operative facts' of the claim." Pet. App. 38a (citations omitted).

Moki Mac was a Utah-based river-rafting outfitter that had purposeful contacts with Texas, including advertising in Texas that included representations about the safety of its Grand Canyon trips. *Moki Mac*, 221 S.W.3d at 573. The plaintiffs were Texas parents of a teenager who had died on one of Moki Mac's Grand Canyon trips, and they sued Moki Mac for negligence and for intentional and negligent misrepresentation. *Id.* Despite the plaintiffs' alleged reliance upon Moki Mac's representations, the court concluded that the "operative facts" of the litigation were Moki Mac's negligent activities in the Grand Canyon in Arizona, not the representations in Texas. *Id.* at 585. As the court later explained, "[i]n *Moki Mac*, the actionable conduct occurred and caused harm outside of the forum state, so the defendant's liability arose from conduct outside of the forum state, not its additional conduct within the state." Pet. App. 40a. Because there was no substantial connection between the representations in Texas and the operative facts in Arizona, the court rejected specific jurisdiction. *See id.*

The Texas approach is meaningfully different from the other "substantial connection" tests. Rather than considering the intensity of the defendant's forum contacts, the focus is on whether the defendant's actionable conduct and the harm occurred in Texas. "When the defendant's contacts are merely peripheral to a cause of action, specific jurisdiction is lacking." *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 90 (Tex. 2016).

Importantly, "the actionable conduct within Texas must be conduct through which [the defendants]

purposefully had contact with Texas and sought some benefit, advantage, or profit by availing itself of the jurisdiction." Pet. App. 41a (internal quotation marks and citations omitted). The court below, however, concluded that the broadcasts claimed to be libelous constituted purposeful Texas contacts only because of "additional conduct" (promotional activities) in Texas, unrelated to the plaintiffs' libel claims. *Id.* at 26a, 35a-36a. Nevertheless, the court found a "substantial connection" because the libelous broadcasts (not themselves purposeful contacts) "occurred and caused harm in Texas." *Id.* at 42a. Thus, it is not clear that the court applied its own test correctly.[3]

II. ROTATING RESULTS

The lack of clarity resulting from the presence of these many legal standards is itself problematic. But the real menace is the differing results that this lack of clarity brings. Granting certiorari is especially important in this case because the Texas standard leads to conflicting results with other courts in a broad range of commonly occurring cases.

Consider the following recurring factual scenario: A Texas resident suffers injuries while vacationing at a resort away from Texas. The plaintiff alleges that the defendant, who owned the resort, was negligent, and that negligence caused the plaintiff's injuries. The defendant is not "at home" in Texas because it is not incorporated in Texas and its principal place of business is not located there.[4] But the defendant has

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[3] *See also Beydoun v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507 (6th Cir. 2014) (acknowledging confusion among Sixth Circuit opinions applying the "substantial connection" test).

[4] *See Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014); *Goodyear*, 564 U.S. at 919.

significant contacts with Texas—the defendant has a marketing office in Texas, directs advertising to Texans, and the plaintiff booked the vacation from Texas as a direct result of these marketing efforts in Texas.

Because the defendant is not "at home" in Texas, the plaintiff must rely on specific jurisdiction to successfully sue the defendant in Texas.[5] And whether the plaintiff may sue in Texas will depend upon which nexus standard is applied, and ultimately whether the case ends up in the Texas state courts or the federal courts in Texas.

The Texas state court will apply Texas's "substantial-relationship-to operative-facts" test, and, because the facts are intentionally similar to those in *Moki Mac*, the court is fairly certain to find that the exercise of specific jurisdiction violates due process. As the court below explained, "[i]n *Moki Mac*, the actionable conduct occurred and caused harm outside of the forum state, so the defendant's liability arose from conduct outside of the forum state, not its additional conduct within the state." Pet. App. 40a. And, should the plaintiff plead that the injuries were the result of misrepresentations in the marketing materials about

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[5] Before this Court's opinions in *Bauman* and *Goodyear*, some courts may have found the defendant here subject to the court's general jurisdiction. *See Schlobohm v. Schapiro*, 784 S.W.2d 355, 359 (Tex. 1990); *Thomason v. Chemical Bank*, 661 A.2d 595, 605 (Conn. 1995) (both relying on defendant's "continuous and systematic" but limited business in the state to find general jurisdiction). *See also Bauman*, 134 S. Ct. at 758 (noting that Daimler did not object to plaintiff's assertion that Daimler's subsidiary, MBUSA, was amenable to all-purpose jurisdiction in California); *Goodyear*, 564 U.S. at 921 (noting that Goodyear USA did not contest the North Carolina court's exercise of general jurisdiction).

safety, the result would not change. *See Searcy*, 496 S.W.3d at 90-92 (noting that plaintiff's "artful pleading" in *Moki Mac* did not change the result).

But the federal court in Texas will apply the "but-for" or possibly the "but-for-plus" test, and it is likely to find that the exercise of specific jurisdiction satisfies due process because the plaintiff would not have visited the defendant's resort and been injured there "but-for" the defendant's marketing in Texas. *See Breathwit*, 994 F. Supp. 2d at 852 (predicting a finding of jurisdiction under similar facts).[6]

Texas litigants suing in Texas need not concern themselves with the other standards. But, as the Texas Supreme Court noted in *Moki Mac*, a court applying the "substantive relevance/proximate cause" test is likely not to find a sufficient connection between the Texas marketing and the out-of-state negligence and injury. 221 S.W.3d at 584.[7] However, if the pleadings also include a misrepresentation claim, the court might find jurisdiction over that claim alone because the misrepresentation in Texas would become substantively relevant. And a court applying a "sliding scale" approach would certainly find a sufficient connection between the defendant's Texas activities and the plaintiff's claim because the defendant's contacts with Texas are so strong. *See*

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[6] The district court examined opinions of other courts applying these tests to similar facts, including *Sandy Lane*, 496 F.3d at 323-24, and *Colvin v. Van Wormer Resorts, Inc.*, 417 F. App'x 183, 187 (3d Cir. 2011). *See Breathwit*, 994 F. Supp. 2d at 852.

[7] The Texas Supreme Court examined several decisions applying the test to similar facts, including *Marino v. Hyatt Corp.*, 793 F.2d 427, 420 (1st Cir. 1986); *Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1259-60 (1st Cir. 1990); and *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir. 1964).

Shoppers Food Warehouse, 746 A.2d at 335; *Bristol-Myers Squibb*, 377 P.3d at 888.

Thus, only in Texas state courts would the exercise of specific jurisdiction in this hypothetical clearly violate due process. Specific jurisdiction would be permitted in the Texas federal courts and other jurisdictions applying the "but-for" or "sliding scale" tests. Specific jurisdiction would be uncertain, depending upon the pleadings, in jurisdictions applying the "substantive relevance/proximate cause" test. And if the defendant's contacts with the forum state are weak, as in this case, the analysis gets more complicated and less predictable.

These different results reflect the current disharmony. The courts are in need of guidance on this important constitutional issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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