No. 16-705

IN THE
Supreme Court of the United States

MONEYMUTUAL LLC,
Petitioner,

v.

SCOTT RILLEY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner MoneyMutual LLC ("MoneyMutual") filed its petition for writ of certiorari on November 22, 2016. On January 19, 2017, this Court granted review in No. 16-466, *Bristol-Myers Squibb Co. v. Superior Court of California*, which presents the question whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims – that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts.

At minimum, the instant petition should be held in abeyance pending the decision in No. 16-466. Alternatively, this Court may wish to grant the instant petition, because it would allow the Court to articulate *precisely what kind* of causal link between a defendant's forum contacts and the plaintiff's claim is required under specific jurisdiction. No. 16-466 presents the question whether a state court may exercise specific jurisdiction in the absence of *any* causal relationship whatsoever. The instant case would allow this Court to go further, and to make clear that in order for a plaintiff's claims to be sufficiently related to the defendant's forum contacts to establish specific jurisdiction, those contacts must be a *proximate cause* of the plaintiff's claim and the alleged harm suffered by the plaintiff.

The proximate-cause test protects a defendant's liberty interests by ensuring that he will not be haled into court and forced to incur the burden and cost of defending in a distant forum, when the plaintiff cannot even plead or offer facts showing that the forum contacts proximately caused the plaintiff's

injury. In other words, the test guarantees that a defendant will not face the prospect of extraterritorial jurisdiction in a potentially hostile forum when his forum-related conduct does not satisfy the traditional requirements for imposing liability in the first place. *See Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014).

Such a holding is necessary to fully resolve the conflict among the lower courts regarding specific jurisdiction. As noted in the Petition in this case (at 16-25), and as this Court no doubt recognized in granting review in No. 16-466, the lower courts have offered three principal answers to the question of what sort of ties must exist between a defendant's contacts with a forum and plaintiff's claims: some courts have adopted a "proximate-cause" standard, others a broader "but-for" standard, and still others a malleable "substantial connection" or sliding-scale test. Granting review in this case would allow the Court to fully resolve the conflict in the lower courts. The purposes of constitutional limits on personal jurisdiction are undermined not only by overbroad or unpredictable tests, but also by significant variance among the tests.

A. The Minnesota Decision Is "Final."

Respondents contend that the Minnesota Supreme Court's decision is not "final" for purposes of 28 U.S.C. § 1257. *See* BIO 8-12. That contention fails. Indeed, Respondents ultimately acknowledge in a footnote that this Court has interpreted the finality requirement to allow "review [of] some state-court decisions that permit the exercise of personal jurisdiction over out-of-state defendants." *Id.* at 11 n.1.

In *Shaffer v. Heitner*, 433 U.S. 186 (1977), this Court held that a state court's denial of a motion to dismiss on personal jurisdiction grounds is a final appealable judgment under § 1257:

> [I]f the judgment below were considered not to be an appealable final judgment, 28 U.S.C. § 1257(2), appellants would have the choice of suffering a default judgment or entering a general appearance and defending on the merits. This case is in the same posture as was *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). . . . Accordingly, "consistent with the pragmatic approach that we have followed in the past in determining finality," we conclude that the judgment below is final within the meaning of § 1257.

433 U.S. at 195 n.12. Precisely the same reasoning is applicable here.

This Court adhered to the same approach in *Calder v. Jones*, 465 U.S. 783 (1984), in reviewing a state court's denial of a motion to dismiss for lack of personal jurisdiction:

> Although there has not yet been a trial on the merits in this case, the judgment of the California appellate court "is plainly final on the federal issue and is not subject to further review in the state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). Accordingly, as in several past cases presenting jurisdictional issues in this posture, "we

> conclude that the judgment below is final within the meaning of [28 U.S.C.] § 1257." *Shaffer v. Heitner*, 433 U.S. 186, 195-96, n. 12 (1977). *See also Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978).

465 U.S. at 788 n.8. Indeed, this Court granted review in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), even though only two of the four defendants had sought review in this Court, and the case was therefore simultaneously pending in the state trial court against two of the four defendants. *Id.* at 288. The case's simultaneous pendency in the trial court did not pose a finality problem.

Respondents are incorrect in suggesting (BIO 12 n.1) that this settled precedent is no longer good law. For example, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), arose in the same procedural posture as this case: a state court's denial of a motion to dismiss for lack of personal jurisdiction, affirmed by the state appellate courts, and certiorari review by this Court.

B. Subsequent Removal Does Not Bar This Court's Review.

After the certiorari petition was filed in this case, Respondents added federal claims and new parties to their complaint, creating federal subject-matter and diversity jurisdiction and prompting removal of the Minnesota action to federal court. BIO 7-8. Respondents argue that removal affects the finality of the Minnesota Supreme Court's judgment. *Id.* at 9-11.

But removal does not change this case from the situation addressed in *Calder v. Jones:* "the judgment of the [state] appellate court 'is plainly final on the federal issue and is not subject to further review *in the state courts*.'" 465 U.S. at 788 n.8 (quoting *Cox Broadcasting*, 420 U.S. at 485; emphasis added).

As matters stand, the Minnesota Supreme Court decision is a conclusive judgment on the federal question of whether exercising specific personal jurisdiction over MoneyMutual comports with due process requirements.

Respondents note that, post-removal, MoneyMutual has urged the federal district court not to adhere to the state-court decision. BIO 9. But Respondents fail to acknowledge that MoneyMutual's brief in the federal court explained that "the doctrine of law of the case normally would bar MoneyMutual from relitigating this issue." Defs.' Amended Mem. of Law in Support of Motion to Dismiss 3 n.2 (Dist. Ct. Doc. 32) (cited at BIO 9). In the now-removed case, MoneyMutual seeks to invoke *exceptions* to the law-of-the-case doctrine – meaning that the Minnesota Supreme Court decision will be controlling unless and until a court concludes otherwise. The danger that the state-court judgment could pose an obstacle to further proceedings is a reason for this Court to vacate it, not to deny review. *Cf. Camreta v. Greene*, 563 U.S. 692, 713 (2011) ("Vacatur then rightly 'strips the decision below of its binding effect,' and 'clears the path for future relitigation.'") (citation omitted).

Respondents' argument suffers from a further defect: A plaintiff should not be able to put a defendant to the choice between securing a federal forum to which it is entitled (via removal) and seeking

review of a state-court decision in this Court. *Shaffer* opined that a defendant should not be forced to choose between "suffering a default judgment or entering a general appearance and defending on the merits." 433 U.S. at 195 n.12. Respondents seek to put MoneyMutual to an equally impermissible choice.

C. The Question Presented Is Outcome-Determinative.

1. Respondents argue that MoneyMutual's email contacts supposedly would meet the proximate-cause standard. BIO 12-16. That argument relies on a tendentious reading of the factual record and in any event does not preclude this Court's review of the *legal question*: whether the proximate-cause test is constitutionally required. If this Court holds that such a test is required, that decision would be outcome-determinative in the sense that it would require reversal of the Minnesota Supreme Court's judgment, because the state court did not apply a proximate-cause standard. At most, Respondents have simply identified a fact-specific issue to be resolved by the courts below, not a reason to deny review.

The Minnesota Supreme Court did not opine that the emails in this case "would have met even the most stringent causal nexus requirement urged by MoneyMutual." BIO 13. Rather, the Minnesota Supreme Court noted "the three major approaches" to the relatedness requirement: "a strict 'proximate cause' standard; a 'but for' standard; and a more lenient 'substantial connection' standard." Pet. App. 28a (citation omitted). The state court adopted the last alternative and asked whether the emails "establish a '*substantial connection*' between the

defendant, the forum, and the litigation." *Id*. at 18a (emphasis added). And the court applied the same "substantial connection" standard (rather than a proximate-cause test) to the Google "AdWords" campaign, making clear its view that the "specific" personal jurisdiction test "does not require proof that the litigation was strictly caused by or '[arose] out of' the defendant's contacts; rather, it is sufficient to show that the contacts are 'substantially connected' or 'related to' the litigation." *Id.* at 28a. The court opined that a jurisdictional contact is relevant even in the absence of any evidence that it "actually *caused* any of the claims," so long as that contact is "sufficiently *related*" to the plaintiff's claims. *Id.* at 29a (emphasis in original).

2. The BIO refers to "1,000" MoneyMutual emails following inquiries or applications sent by Minnesota residents to MoneyMutual's out-of-state office, supposedly soliciting consumers to apply for loans. BIO 13. Respondents conflate different types of emails at issue. In fact, the Minnesota Supreme Court described three categories of emails rather than the single category described by Respondents. Pet. App. 11a-12a. With respect to the solicitation emails cited by Respondents, the Minnesota Supreme Court noted no evidence (and Respondents adduced none) showing that any person had applied for and obtained a loan based upon them. Respondents do not allege that any of them, or any other Minnesota resident, (1) received a reminder email (after failing to complete their information on the MoneyMutual website), completed the application and thereafter obtained an illegal loan; or (2) after having submitted their information on the website, later received an email soliciting a new loan application, again submitted information in

response to the solicitation, and entered into an illegal loan. The emails thus were not themselves the legal cause of the actual harm upon which Respondents based their claims: loan transactions whose terms allegedly violate Minnesota law. Such transactions were the result of the borrower's own, independent decision to enter into the loan agreement. *See Exxon Co., U.S.A. v. Sofec, Inc*., 517 U.S. 830, 837 (1996) (superseding cause). If electronic contacts (which are not themselves the proximate cause of any alleged harm to Respondents) may nevertheless serve as the source of personal jurisdiction wherever the users are located, few businesses or individuals using email or interactive websites could structure their conduct to avoid nationwide jurisdiction.

3. Respondents contend that MoneyMutual "surely foresaw that consumers who received its emails would in fact consummate loans with matched lenders." BIO 13. But the undisputed evidence below showed that MoneyMutual had no knowledge of the terms of loan agreements or even whether consumers consummated agreements with lenders. Pet. App. 62a-63a. There was no reason to foresee that the terms of any consummated loans might be illegal. In any event, foreseeability alone is not the standard for specific jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (explaining that this Court has "consistently held" that the "foreseeability of causing injury in another State" does not establish "'sufficient benchmark'" for personal jurisdiction) (quoting *World-Wide Volkswagen*, 444 U.S. at 296); *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014).

4. Respondents maintain that MoneyMutual did not argue for a proximate-cause standard in the Minnesota Supreme Court. BIO 14. Even if that argument were true, it would be irrelevant, because the Minnesota Supreme Court "passed upon" the proper legal standard for specific jurisdiction and did not adopt a proximate-cause test. *See Cohen v. Cowles Media Co*., 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided").

But in any event, Respondents are wrong in contending that MoneyMutual did not press its argument below. The Minnesota Supreme Court understood MoneyMutual as arguing that its emails were "irrelevant" (Pet. App. 12a) under this Court's decision in *Walden*, 134 S. Ct. at 1115, which established that the contacts upon which specific jurisdiction is based must be "suit-related" (*id*. at 1121) and that contacts having nothing to do with the "underlying controversy" in the litigation are irrelevant to specific jurisdiction. *Id*. at 1121 n.6. In its briefs in the Minnesota Supreme Court, MoneyMutual contended that the emails lacked the requisite nexus with Respondents' injury. *See* Appellant's Br. 19 ("jurisdiction [must] be founded upon a defendant's own substantial, litigation-related contacts with the forum state"); *id.* at 32 (defendant's forum contacts must be "directly related to the subject matter of the suit"); *id.* ("[T]he relationship as ostensibly defined by Respondents and the Court of Appeals between anything done by MoneyMutual and the gravamen of Respondents' Complaint – the alleged illegality of loans to which MoneyMutual was not a party and the terms of which it was not even

knowledgeable – is *de minimis*."); Appellant's Reply Br. 20 ("Given the absence of any evidence or allegations that follow-up emails actually resulted in any loan transactions, such allegations are also irrelevant, as they are not related to Respondents' claims. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984).").

5. Respondents also contend that the emails would satisfy the proximate-cause standard under a Minnesota statute (Minn. Stat. §47.601, subd. 1(e)) supposedly classifying "any entity that arranges a payday loan as itself a short-term consumer lender in the state." BIO 15. The Minnesota Supreme Court did not reach this argument, and there is no reason for this Court to do so, either. Respondents should pursue their argument (if at all) on remand, after this Court addresses the proper legal standard for "relatedness" under specific jurisdiction. Certainly, the Minnesota Department of Commerce has never determined, that MoneyMutual must obtain licenses or comply with statutory disclosure or other requirements under state statutes, and Plaintiffs never offered evidence on the issue. MoneyMutual is a third-party lead generator, not a loan "arranger." Respondents do not allege that MoneyMutual makes the loans, is paid for the loans, receives any payments from consumers on loans, has any actual knowledge of or participates in any way in the loans or any loan terms so as to be able to make disclosures, knows that loans are consummated, or in any respect at all acts like and has knowledge equivalent to the lenders *who actually make the loans*. The emails were not a material element of the claim, even as the BIO describes it.

D. Respondents' Attempts To Distinguish *Bristol-Myers* Fail.

Respondents argue that this case is not sufficiently related to *Bristol-Myers*, No. 16-466, to warrant a "hold." BIO 16-17. That argument is wrong. Both the Minnesota Supreme Court and the *Bristol-Myers* California court applied the same "'substantial connection' test." *Bristol-Myers Squibb Co. v. Superior Court*, 1 Cal.5th 783, 800 (Cal. 2016). The California court also opined that "defendant's activities in the forum state need not be either the proximate cause or the 'but for' cause of the plaintiff's injuries," *id.*, and that "'[a] claim need not arise directly from the defendant's forum contacts.'" *Id.* at 802 (citation omitted). Because the courts applied the same legal test, if this Court reverses the judgment in *Bristol-Myers*, it should do so here as well.

Respondents propose factual distinctions between the cases (*e.g.*, that *Bristol-Myers* involves out-of-state residents as plaintiffs while this case does not), but under *Walden,* it is not the *plaintiff's* connection to the forum which matters, but the defendant's relationship to the forum. 134 S. Ct. at 1125. The issue in both cases, therefore, is the requisite causal nexus between a *defendant's* forum contacts and a plaintiff's claim. Respondents are wrong in supposing that MoneyMutual cannot argue that the "claims would be exactly the same even if the defendant had no forum contacts" (BIO 17); MoneyMutual's point is that the claims would be the same because its forum contacts did not proximately cause Respondents' injuries.

E. The Online Jurisdictional Contacts Involved In This Case Makes This Court's Review Even More Appropriate.

Respondents acknowledge that the Minnesota Supreme Court "suggested a split of authority" regarding how online electronic jurisdictional contacts should be considered in the minimum-contacts analysis, and there are "differences in outcomes among appellate court cases." BIO 17; *see also id.* at 20 n.2 ("The Eighth Circuit's case law in this regard is far from clear."). Respondents do not deny that members of this Court have already expressed interest in the issue. Petition at 27-28.

Respondents insist there is no circuit conflict. Leaving aside whether that statement is true, MoneyMutual has not proposed a second question presented regarding Internet contacts. Rather, it has argued that the divergent approaches in the lower courts and the importance of electronic contacts in the Internet age makes imperative this Court's review of the "relatedness" question presented.

CONCLUSION

The petition for writ of certiorari should be granted. At minimum, the instant petition should be held in abeyance pending the decision in No. 16-466.

Respectfully submitted,

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