NO. 16-1171

In the

Supreme Court of the United States

GLAXOSMITHKLINE LLC

PETITIONER,

v.

M.M. EX REL. MEYERS, *et al.*,

RESPONDENTS.

On Petition for a Writ of Certiorari to the Illinois Appellate Court

REPLY BRIEF OF PETITIONER

JEFFREY S. BUCHOLTZ
Counsel of Record
ETHAN P. DAVIS
DAVID P. MATTERN
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500
jbucholtz@kslaw.com

Counsel for GlaxoSmithKline LLC

June 15, 2017

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The brief in opposition offers no meaningful response to the reasons why it is important for the Court to decide the question presented by this case, either in *BMS* or by granting this petition. On the deep divisions in the lower courts, respondents hypothesize that the courts applying a but-for test might reconsider in light of this Court's decisions in *Goodyear v. Brown* and *Daimler AG v. Bauman*. But this Court rejected that argument by granting certiorari in *BMS*, and correctly so: nothing suggests that the lower courts are changing their approach. Respondents further reargue the *BMS* grant in contending that the different approaches in the lower courts simply reflect different state long-arm statutes, and that contention is false anyway: *all* the decisions composing the split interpreted the Due Process Clause.

Respondents also conjure a host of imaginary vehicle problems. They claim, for instance, that the question presented and the body of the petition are inconsistent. But the question presented asks whether a "meaningful causal link" is required, Pet. i, and the petition explains that "what distinguishes but-for from proximate causation is that proximate causes must be meaningful, while but-for causes often are not," Pet. 27. Respondents' assertion that the decision below answered the question presented in the affirmative is more wishful thinking. While the court below found *some* link between GSK's Illinois contacts and respondents' claims, it did not purport to find a *meaningful* one. Likewise, respondents' claim that the connection between

GSK's Illinois activities and their claims would satisfy even a rigorous proximate-cause standard would drain all meaning from proximate causation.

Respondents muster only a faint defense of the decision below. Like the court below and the California Supreme Court in *BMS*, respondents recite the number of GSK's employees in Illinois. BIO 3. But those facts say nothing about specific jurisdiction, and they are exactly the kind of facts that this Court held were not enough for general jurisdiction in *Goodyear* and *Daimler*—a conclusion the Court reaffirmed just last month in *BNSF v. Tyrrell*. Respondents' reliance on them confirms that the decision below recycles the old, rejected standard for general jurisdiction as the new standard for specific jurisdiction.

Perhaps most bizarrely, respondents invoke federalism to argue that the split is not certworthy because different states are *entitled* to take different approaches to personal jurisdiction. But federalism hardly authorizes states to adopt conflicting interpretations of the Due Process Clause.

I. The Lower Courts Are Divided Over The Arising-From Requirement for Specific Jurisdiction.

This Court granted certiorari in *BMS* to resolve one side of an acknowledged three-way split over the arising-from prong of specific jurisdiction. Some courts apply a but-for test, others a proximate-cause standard, and others (like the California Supreme Court in *BMS*) a non-causal approach. *See* Pet. 13–19. In *BMS*, this Court will decide, at a minimum,

whether some type of causation is required. The Court may well go further and decide in *BMS* whether the required type of causation is but-for or proximate, but if not, this petition is an excellent vehicle to resolve that follow-up question.

Respondents theorize that the split will go away on its own because the cases adopting a but-for causation standard predate this Court's decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *See* BIO 13–15. But the same could have been said in opposition to certiorari in *BMS*, and in any event there is no sign that courts in the but-for jurisdictions are re-examining their approach. The Washington Supreme Court continues to apply the but-for test adopted by *Shute v. Carnival Cruise Lines*, 783 P.2d 78 (Wash. 1989).[1] The Ninth Circuit's precedent adopting a but-for standard is alive and well.[2] And Massachusetts courts are likewise applying *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549 (Mass. 1994), without any hint that reconsideration looms.[3]

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[1] *See, e.g., Failla v. FixtureOne Corp.*, 336 P.3d 1112, 1118 (Wash. 2014), as amended (Nov. 25, 2014) (en banc).

[2] *See, e.g., j2 Cloud Servs., Inc. v. Fax87*, No. 13-05353 DDP, 2017 WL 1535083, at *7 (C.D. Cal. Apr. 27, 2017); *Hawthorne v. Mid-Continent Cas. Co.*, No. C16-1948RSL, 2017 WL 1233116, at *4 (W.D. Wash. Apr. 4, 2017) (same).

[3] *See, e.g., In re Civil Investigative Demand No. 2016–EPD–36*, No. SUCV20161888F, 2017 WL 627305, at *2 (Mass. Super. Jan. 11, 2017) (applying a "'but for' test").

Respondents attempt to downplay the split by claiming that the Ninth Circuit's test "appears to be indistinguishable with proximate cause." BIO 15. That ignores the Ninth Circuit's explicit *rejection* of "the proximate cause approach" on the ground that it "unnecessarily limits the ordinary meaning of the 'arising out of' language." *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *overruled on other grounds by Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

Similarly, respondents tell the Court that Massachusetts does not really adhere to a but-for standard but rather applies "a form of but-for plus test, with exceptions." BIO 15. No Massachusetts decision says anything like that. Instead, like the Ninth Circuit, Massachusetts has explicitly rejected proximate cause in favor of a but-for test. *Tatro*, 625 N.E.2d at 553–54. Respondents suggest (BIO 15) that Massachusetts now "leavens" its but-for test with the "lessons" of *"Automatic" Sprinkler Corp. of Am. v. Seneca Foods Corp.*, 280 N.E.2d 423 (Mass. 1972). But *"Automatic" Sprinkler* addressed purposeful availment, not the arising-from requirement. *Id.* at 426. The case respondents cite (BIO 15) confirms as much. *See Rolivia, Inc. v. Emporium Nostrum, Inc.*, 2013 Mass. App. Div. 145, 148 (Mass. Dist. App. Div. 2013) (invoking *"Automatic" Sprinkler*'s holding that "the present defendant did not 'purposefully . . . [avail] itself of the privilege of conducting activities within the forum State'").

Respondents ultimately dismiss the differences among the lower courts as "properly reflect[ing]

choices made by a state in devising the scope of its long-arm statute." BIO 7. But the decisions that compose the split interpret *the Due Process Clause*, and a state has no authority to make "choices" about what that Clause means.

Respondents' invocation of "Our Federalism" to dispute the split between the Illinois courts and the Seventh Circuit is equally difficult to understand. *See* BIO 18. Respondents appear to argue that the Seventh Circuit cannot be in conflict with the Illinois courts because the Seventh Circuit applies Illinois' "jurisdictional statute" when sitting in diversity in Illinois cases. *Id.* But those courts *are* in conflict, as the Seventh Circuit has explicitly rejected the but-for standard. *See* Pet. 22. This conflict between courts across the street from each other is a powerful reason to grant certiorari.

II. This Case Is An Excellent Vehicle To Resolve The But-For Versus Proximate Cause Side Of The Split.

After describing the arising-from test as "lenient" and "flexible," the court below found what it called "specific" jurisdiction based on a tiny sliver of a worldwide clinical trial program that occurred in Illinois. Even if that sliver could be viewed as part of the historical chain, it cannot plausibly be considered a proximate cause of respondents' alleged injuries. *See* BIO 21–22.

The court below did not suggest that respondents would satisfy a proximate-cause standard. Nor did it say it was applying a proximate-cause standard; to the contrary, it rejected GSK's argument that a

"meaningful link" was required. Pet. App. 25. It is thus not surprising that respondents' conclusory assertions that the tiny Illinois portions of the tiny sliver of clinical trials that had an Illinois portion proximately caused respondents' injuries are not accompanied by any cites to the record. *See* BIO 21.

This case would have come out differently under a proximate-cause standard. The vast majority of GSK's clinical trial program for Paxil had no connection at all to Illinois, as 95 percent of the trials had not even a single Illinois study site. Pet. App. 146. Respondents misleadingly refer to the 17 trials that had an Illinois site as "Illinois trials," *see, e.g.*, BIO 9, 21, but the truth is that only three percent of the sites and two percent of the participants in those trials were in Illinois; the rest were scattered across 44 other states and many countries. Pet. App. 129–46. If the 0.15 percent (five percent times three percent) of GSK's clinical trial program that occurred in Illinois can be said to have proximately caused respondents' alleged injuries, then the same could be said about GSK's conduct in all the other states and countries involved in the program. The notion that there is a proximate causal relationship between respondents' claims and GSK's conduct in each of 45 different states plus nine foreign countries is self-refuting. The whole point of proximate causation is to identify the events with the most direct and significant relationship with a result: "Every event has many causes . . . and only some of them are proximate, as the law uses that term." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014).

For similar reasons, respondents' claim that investigators at the Illinois sites had some "input into and control over the study design protocol," BIO 21, only underscores the absence of proximate cause. Taking respondents' claim at face value, *every* investigator in *every* state and *every* country in *every* one of the 361 trials could just as well be said to have had some "input" or "control." To say that respondents' claims bear a "proximate" causal relationship to the conduct of each of the untold thousands of investigators at trial sites around the world is to abuse the English language. And a theory of "specific" jurisdiction that would permit respondents to sue in any of the 45 states that hosted a trial site needs another name.[4]

Respondents are also wrong to contend that the question presented and the body of the petition are

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[4] In any event, respondents' claim that "evidence established that the clinical trial investigators in Illinois had input into and control over the study design protocol used at study sites located in Illinois and elsewhere [and] analysis of the aggregate data collected from study sites in Illinois and elsewhere," BIO 21, is nonsense. What the declaration at issue actually said is: "When a clinical trial is a multicenter study, GSK will contract with individual investigat[ors] at the various sites. Those investigators are responsible for recruiting study subjects and collecting data from the study participants at their respective site. However, the study site investigators have little or no input into or control over the study design protocol or analysis of the aggregate data collected from all study sites." Pet. App. 129. As PhRMA's amicus brief explains, "[i]ndividual sites that participate in multicenter clinical trials do not design their own research; instead, each is contractually bound to follow a single and detailed trial protocol." PhRMA Br. 2; *see also id.* at 9–14.

inconsistent. *See* BIO 1, 7. The question presented asks whether a "meaningful causal link between the defendant's forum-state contacts and the plaintiff's claim" is required. Pet. i. The petition repeatedly explains that a *meaningful* causal link is a *proximate* causal link. "[W]hat distinguishes but-for from proximate causation is that proximate causes must be meaningful, while but-for causes often are not." Pet. 27; *accord, e.g.,* Pet. 5–6 ("many things can be but-for causes without thereby being *meaningful* causes"); Pet. 23.

Nor did the court below answer the question presented in the affirmative. *See* BIO 8. Respondents say the court "determined that GSK's forum contacts in the form of clinical trials contributed to the plaintiffs' claims," BIO 10, but that ignores the word "meaningful" in the question presented. Similarly, respondents' vague assertion that the court "applied causal criteria," BIO 8 (capitalization omitted), begs the question whether the correct causal criterion is mere but-for or rather proximate causation.

Respondents also tell the Court that "GSK advocated a but-for standard" below and thus cannot argue now that proximate causation is required. BIO 7. Respondents are either sowing or suffering from confusion. GSK advocated a proximate-cause test *in addition* to but-for causation; GSK urged the court below to require *both* "cause in fact" *and* "legal cause." GSK Opening Br. 17, 21–22 (citing *Keller v. Henderson*, 834 N.E.2d 930, 939 (Ill. App. 2d Dist. 2005)).

If respondents believe that "legal cause" means "but-for cause," they are mistaken. "The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause." *Burrage v. United States*, 134 S. Ct. 881, 887 (2014). An "actual cause" is a cause in fact, while "the 'legal' cause [is] often called the 'proximate cause.'" *Id.* (citation omitted). This Court thus has treated the terms "proximate cause" and "legal cause" interchangeably. *See, e.g.*, *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 832 (1996) (referring to "the requirement of legal or 'proximate' causation"). Respondents' assertion that "GSK advocated a but-for standard below" is thus true only in the sense that but-for causation is a lesser-included element of proximate causation: something cannot be a proximate cause of a result if it is not a cause in fact in the first place. And respondents' carefully-worded assertion that GSK never "argue[d] that the court needed to apply a proximate-cause standard, rather than a but-for test," BIO 11, is highly misleading.

III. The Decision Below is Wrong.

The BIO confirms that the decision below is a dressed-up version of the California Supreme Court's *BMS* decision that would reinstate the standard for general jurisdiction this Court rejected in *Goodyear* and *Daimler*. Like the California Supreme Court, respondents—and the Illinois Appellate Court—seem to think it matters that GSK has employees in Illinois and does business there. *Compare* BIO 3 (noting that "GSK has 217 employees in Illinois") *and* Pet. App. 8 (stating that this fact "was revealed" in jurisdictional discovery) *with Bristol-Myers Squibb*

Co. v. Superior Court, 377 P.3d 874, 878–79 (Cal. 2016). But those facts are insufficient for general jurisdiction and irrelevant to specific jurisdiction unless respondents' claims arise out of those forum-state contacts—an assertion not even respondents make. In *Goodyear*, this Court criticized another state court for "[c]onfusing or blending general and specific jurisdictional inquiries." *Goodyear*, 564 U.S. at 919–20. That is what the Illinois Appellate Court did here.

Respondents bizarrely invoke federalism to reject "nationally uniform criteria to personal jurisdiction." BIO 17. This effort to make lemonade from the federalism lemon fails. States are of course "free to adopt an individualized jurisdictional standard" up to the limits of due process, *id.*, but this petition, and the split it asks the Court to resolve, has nothing to do with differences among state long-arm statutes. *See supra* at 1, 5. And states are obviously not free to adopt their own "individualized" standard for the meaning of the Due Process Clause; on that federal constitutional issue, this Court sets the "nationally uniform criteria."

To make matters worse, respondents get it exactly backwards in contending that "we tolerate different approaches to jurisdiction because the Constitution recognizes each state's sovereignty." BIO 20. To the contrary, the due process limits on states' ability to hale out-of-state defendants into court are rooted in federalism. "The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister states." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293

(1980). When a state reaches out to decide a claim to which it lacks a meaningful connection, it intrudes on the right of the state or states with a legitimate interest in adjudicating that claim.

Finally, and strikingly, respondents make no effort to defend the malleable but-for standard. As the petition explains, the proximate-cause standard promotes fairness, predictability, and federalism. Pet. 25–28. A mere but-for test, on the other hand, "pursue[s] every human act to its most remote consequences" and exposes defendants to suits with no meaningful connection to their forum-state activities. *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring).

IV. The Petition Presents A Recurring Question of Substantial National Importance.

Respondents do not respond to any of the points in the petition about the importance of the issue. *See* Pet. 30–34.

As the amicus briefs supporting the petition explain, the forum-shopping exemplified by this case imposes real costs on defendants, witnesses, and courts. *See* Chamber of Commerce Br. 19. The "constitutionally intolerable unfairness and uncertainty" of what amounts to universal general jurisdiction for large companies with nationwide activities would impose particularly heavy costs on pharmaceutical companies "that play a critical role in drug development and public health." PhRMA Amicus Br. 9. In fact, plaintiffs are already seizing on the Illinois Appellate Court's clinical trial rationale to argue for personal jurisdiction in other

favored jurisdictions. *See, e.g.*, Pl. Opp. to Mot. to Dismiss, *DuBose v. BMS*, No. 17-cv-00244 (N.D. Cal. May 8, 2017).

The split between courts requiring only but-for causation and courts requiring proximate causation is just as real, and just as important, as the split between courts requiring some form of causation and courts requiring no causation at all. If the Court in *BMS* does not reach the question whether a proximate causal link is required, the Court should grant this petition to decide that question. The decision below "constitutes a set of pleading instructions for thousands of out-of-state plaintiffs . . . who seek to circumvent the due process limits on general jurisdiction through a limitless application of specific jurisdiction." PhRMA Br. 18. It would accomplish little to reverse the California Supreme Court's openly non-causal approach only to leave the lower courts free to continue to evade *Goodyear* and *Daimler* via a "lenient" and "flexible" approach (Pet. App. 22) that purports to require a causal link but does not require a meaningful one.

CONCLUSION

The Court should hold this petition pending its decision in *BMS* and then should either grant, vacate, and remand for further consideration in light of *BMS* or grant this petition for plenary consideration.

Respectfully submitted.

JEFFREY S. BUCHOLTZ
Counsel of Record
ETHAN P. DAVIS
DAVID P. MATTERN
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500
jbucholtz@kslaw.com

Counsel for GlaxoSmithKline LLC

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