No. 16-466

IN THE

Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
Respondents.

On Writ Of Certiorari to the California Supreme Court

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, respectfully submits this brief as *amicus curiae* in support of Respondents.

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits and personal injury actions. Throughout its history, AAJ has served as a leading advocate of the right to trial by jury, as well as for access to the courts and for the preservation of protections enjoyed by ordinary citizens that is afforded by the common law and state tort law.

In serving that purpose, AAJ represents its members and their clients in matters before the courts, Congress, and the Executive Branch. To that end, AAJ regularly files *amicus* briefs in cases that raise issues of vital concern to its members and their clients, including cases involving personal jurisdiction. *See, e.g., Daimler AG v. Bauman,* 134 S. Ct. 746 (2014); *J. McIntyre Mach., Ltd. v. Nicastro,* 564 U.S. 873 (2011).

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[1] This brief is filed pursuant to the blanket consent filed by all parties. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus,* its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

To force needlessly duplicative trials in venues outside of California, Bristol-Myers Squibb [hereinafter, "Bristol-Myers"] asks this Court to apply an atomistic view of personal jurisdiction divorced from the standards normally applied to due process and from this Court's relevant jurisprudence and unconnected to modern economic realities. In addition, the jurisdictional rubric proposed by Bristol-Myers would throw doubt, for the first time, on the constitutionality of numerous federal statutes that seek to adjudicate a wide range of matters efficiently and effectively, to all parties' benefit, by permitting courts to gather far-flung parties into a single venue to dispose common issues. The broad undesirable effect of the wooden approach being proposed underscores the extreme nature of the enterprise that Bristol-Myers urges upon this Court and would mark the unwelcome beginning of a return to the formalistic, purely mechanical geography-based jurisdictional formulation that was the hallmark of the long-interred *Pennoyer v. Neff*, 95 U.S. 714 (1877).

To the contrary, modern jurisprudence recognizes the far greater likelihood that defective products can injure significant numbers of people without much that distinguishes one claim from another, that the far more mobile nature of modern society must be recognized, and that revolutionary advances in modern communications technology changes the nature of the due-process inquiry at the heart of personal-jurisdiction jurisprudence. These factors, the implications the advocated approach would have for federal statutes aggregating claims to promote efficiency and avoid inconsistent results, and

the very idea that some plaintiffs would have to sue one defendant in California and another elsewhere in separate trials in this very case warrants affirmance of the decision below.

ARGUMENT

Today, as the "canonical opinion"[2] holds, due process, as applied to the exercise of specific personal jurisdiction, establishes a flexible, circumstance-driven standard: accordance with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Even when that standard was first articulated, a concurring member of this Court explained that the fair-play canon allows a "State to act if upon an estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business, we conclude it is reasonable to subject it to suit in a State where it is doing business." *Id.* at 324 (Black, J., concurring) (internal quotations omitted).

Justice Black's explanation fully fits the due-process requirements subsequently adopted by this Court. Inconvenience to both the plaintiff and the defendant remains a primary consideration, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 477 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980)), as are the "interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental

[2] *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011)).

substantive social policies." *Id.* (quoting *World-Wide Volkswagen,* 444 U.S. at 292).

Reasonableness is thus the touchstone of the inquiry, and longstanding federal statutory law demonstrates the reasonableness of permitting the claims at issue here to be aggregated.

I. A NUMBER OF FEDERAL STATUTES PERMIT JURISDICTION ON SIMILAR OR LESSER CONTACTS.

The exercise of personal jurisdiction, whether as a matter of federal or state law, must satisfy due process. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982). The jurisdictional limitations imposed by the Fifth Amendment's guarantee of due process, U.S. Const. amend. V ("No person shall … be deprived of life, liberty, or property, without due process of law") for federal statutory purposes and the limitations of the Fourteenth Amendment's guarantee, U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"), do not differ. Both incorporate *International Shoe's* "traditional notions of fair play and substantial justice" standard. 326 U.S. at 316. Due process requires a defendant be given adequate notice of the suit, *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 313-14 (1950), and that the exercise of jurisdiction not be so inconvenient to the parties so as to be unfair or unreasonable. *World-Wide Volkswagen Corp.,* 444 U.S. at 291-92.

The protections afforded by due process, at least for purposes of personal jurisdiction, do not differ on the basis of which constitutional amendment

applies. *Bauxites* clarified that due process's "personal jurisdiction requirement recognizes and protects an individual liberty interest." 456 U.S. at 702. Personal Jurisdiction is not a function of sovereignty or the scope of a sovereign's power. *Id*.; *see also Pardazi v. Cullman Medical Center,* 896 F.2d 1313, 1317 (11th Cir.1990) ("Unlike the rules of subject matter jurisdiction, the rules of personal jurisdiction protect an individual's rights, not a sovereign's rights.") (citing *Bauxites,* 456 U.S. at 702-03). For that reason, the personal-jurisdiction protections afforded by the Fifth and Fourteenth Amendments cannot differ.

Thus, personal jurisdiction under federal statutes should be subject to the same due-process considerations and limitations as state causes of action. Critically, it is important to remember that the "Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 429 (1982). Weighing these frequently opposing values requires a court to undertake a complex evaluation for the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (citations omitted). Unlike some legal principles, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id*. (citations omitted). Instead, the due-process guarantees "express[] the requirement of 'fundamental fairness,'" which mandates a court "first consider[] any relevant precedents and then . . . assess[] the several interests that are at stake." *Lassiter v. Dep't of Soc. Servs. of*

Durham Cnty., 452 U.S. 18, 24-25 (1981). Doing so in the instant matter decisively favors affirmance.

Bristol-Myers has proposed an analysis that contrasts with this Court's expressed understandings of due process and would suggest that a number of federal statutes whose personal jurisdictional reach has not been subject to serious question would actually violate due process. Because the limitations Bristol-Myers would have this Court impose would so cripple the efficacy of important federal laws and the ability of courts to resolve important matters, this Court should not adopt Petitioner's suggested program.

A. The Federal Interpleader Act Permits Far-Flung Claimants to Be Aggregated in a Single Jurisdiction to Resolve all Claims.

One of the federal statutes that permit claims to be heard in court on a basis that the test offered by Bristol-Myers would not permit is the Federal Interpleader Act, 28 U.S.C. § 1335. Congress enacted the current interpleader law in 1936, specifically to address the lack of personal jurisdiction in a single state court[3] over all the claimants at a time when personal jurisdiction was governed by the *Pennoyer*

[3] Interpleader actions under the statute nearly always involve state law-based claims. *See, e.g., Great Falls Transfer & Storage Co. v. Pan Am. Petroleum Corp.,* 353 F.2d 348, 350 (10th Cir. 1965) ("In determining those rights the federal court is, of course, bound by state law."); *Kerrigan's Estate v. Joseph E. Seagram & Sons, Inc.,* 199 F.2d 694, 697 (3d Cir. 1952) ("federal court applies state law").

standard. *See* Zechariah Chafee, Jr.,[4] *Interpleader in the United States Courts,* 41 Yale L.J. 1134, 1136 (1932); 7 Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 1701 (3d ed.). It has a low jurisdictional threshold of $500, 28 U.S.C. § 1335, requires only "minimal diversity," and broadly remedies the "problems posed by multiple claimants to a single fund." *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967). It further provides that an interpleader action "may be brought in the judicial district in which one or more of the claimants reside," 28 U.S.C. § 1397, thereby anticipating the exercise of personal jurisdiction over non-resident claimants.

To actualize that broad authorization of venue, the Act provides for nationwide service of process,[5] 28 U.S.C. § 2361, and establishes personal jurisdiction over a defendant *"even if she lacks minimum contacts"* with the forum state. *Mudd v. Yarbrough,* 786 F. Supp. 2d 1236, 1242-43 (E.D. Ky. 2011) (emphasis added). *See also Great Lakes Auto Ins. Grp. v. Shepherd,* 95 F. Supp. 1, 5 (W.D. Ark. 1951) ("court acquired jurisdiction of the defendants ... by virtue of the service on them in Illinois, at least for purposes of adjudicating their claim, if any, to the fund deposited

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[4] Professor Chafee was primarily responsible for the efforts that led to adoption of the current federal interpleader statute. 7 Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 1701 n.1 (3d ed.).

[5] When a federal statute provides for nationwide service of process, it becomes the statutory basis for personal jurisdiction. *See, e.g., Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,* 119 F.3d 935, 942 (11th Cir. 1997); *Lisak v. Mercantile Bancorp, Inc.,* 834 F.2d 668, 671 (7th Cir. 1987), *cert. denied,* 485 U.S. 1007 (1988).

in the court"); *Stitzel–Weller Distillery, Inc. v. Norman,* 39 F. Supp. 182, 188 (W.D. Ky. 1941) ("statute confers jurisdiction over all the defendants served, even those residing in Ohio and Florida").

The Federal Interpleader Act allows adjudication of disputes where claimants hail from multiple jurisdictions, none of which would meet the standard for personal jurisdiction for all claimants. To say that due process requires multiple trials in different jurisdictions to determine the various conflicting claims in the exercise of personal jurisdiction, as Bristol-Myers would have this Court do, would rob this 80-year-old statute of all utility, create a race to the courthouse by claimants attempting to establish their claim without the presentation of countervailing claims by others, and leave the acknowledged debtor in danger of having to pay multiple judgments in excess of the total debt as in *New York Life Ins. Co. v. Dunlevy,* 241 U.S. 518 (1916). In Dunlevy, this Court held that two different judgments, one obtained in Pennsylvania and one in California were both valid, forcing the insurer to pay twice. According to Federal Practice and Procedure, Congress passed the first federal interpleader statute, which only governed claims against insurance policies, *see* Federal Interpleader Act of 1917, 39 Stat. 929, to remedy the disagreeable result in *Dunlevy,* 7 Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 1701 (3d ed.).

The Act and its purpose have particular salience for the issue before this Court. The non-California plaintiffs unquestionably have claims against McKesson Corporation, a California-based national distributor of Plavix for Bristol-Myers. Their claims will be able to proceed efficiently in California,

along with the other cases filed there without difficulty. Bristol-Myers, subject to trial over the same claims and same evidence in California, seeks separate trials in other jurisdictions for the non-California residents, raising the specter that McKesson might be held liable by one jury while a second may not find Bristol-Myers liable, even though, by any measure, it is the more culpable of the two.

Trying the two separately in different jurisdictions raises serious due-process issues for a plaintiff by virtue of the door it opens to the "empty-chair" defense. The defense is often invoked in multiple defendant personal injury cases to blame absent defendants for all or most of the liability. *See McDermott, Inc. v. AmClyde,* 511 U.S. 202, 217 (1994). The absent defendants, who will have the best information about either their lack of liability or the minuteness of their responsibility, are not bound by any apportionment made in a case in which they are not a party, much like the result in *Dunlevy*. The result of the two trials could well be that juries in both jurisdictions find each defendant liable but apportion most of the fault to the absent defendant. Thus, a successful plaintiff may end up collecting meager compensation due to malapportioned liability.

On the other hand, highly favorable decisions could be rendered in both separate trials, resulting in a windfall to the plaintiff, permitting the collection of more than 100 percent of the damages. Thus, separating out the trials can engender perverse results from the perspective of either party.

In the end, however, the empty-chair defense, which Bristol-Myers's approach would authorize,

"arbitrarily prejudices plaintiffs by requiring them to exonerate [or minimize the liability of] nonparties," in order to obtain a remedy for the defendants' misconduct. *Newville v. State, Dep't of Family Servs.,* 883 P.2d 793, 802 (Mont. 1994) (analyzing due process implications of the empty-chair defense). Instead, the California Supreme Court logically and properly asserted jurisdiction over all appropriate claims, much as the interpleader statute authorizes, and should be affirmed.

B. The Hatch-Waxman Act, Utilized by Companies like Bristol-Myers, Would Also Run Afoul of Its Proposed Personal Jurisdiction Rule.

Another federal statute with an expansive approach to personal jurisdiction that Bristol-Myers would treat as violative of due process is the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98–417, 98 Stat. 1585, as amended, commonly known as the Hatch–Waxman Act. It created a regulatory framework for the development and timely approval of generic drugs. At the same time, it granted the patent owner for the name-brand drug the right to exclude others from making or selling its drugs during the life of the patent. 35 U.S.C. § 154(a)(1).

Even so, after a name-brand drug receives approval from the Food and Drug Administration (FDA), "another company may seek permission to market a generic version" by filing "an abbreviated new drug application (ANDA)," showing "the generic drug has the same active ingredients as, and is biologically equivalent to, the brand-name drug." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S,* 566

U.S. 399, 404-05 (2012). The FDA, lacking expertise and authority to review patent claims, defers to the courts to determine any patent disputes between the name-brand and generic manufacturers. *Id*. at 406-07 (citing 68 Fed. Reg. 36683 (2003)).

To enable the resolution of patent disputes between the two manufacturers, Hatch-Waxman made the act of filing an ANDA by a generic-drug manufacturer a technical act of patent infringement, 35 U.S.C. § 271(e)(2), so that any dispute between the name-brand and generic manufacturer would be resolved before the generic drug actually reached the market. Ellen J. Flannery & Peter Barton Hutt, *Balancing Competition and Patent Protection in the Drug Industry: The Drug Price Competition and Patent Term Restoration Act of 1984,* 40 Food Drug Cosm. L.J. 269, 285 (1985).

The personal-jurisdiction question arises because the ANDA establishes an *intention* to manufacture a biochemical equivalent of a patent owner's drug without taking steps to market it. Because an intent to infringe comprises the gist of the action, no jurisdiction stands as the logical venue to bring an action. Moreover, the Federal Circuit has held that Maryland, where the FDA is located, is not a proper jurisdiction for such a lawsuit even though patent infringement of filing constitutes a tort that apparently takes place there. *Zeneca Ltd. v. Mylan Pharms., Inc.,* 173 F.3d 829, 832, 836 (Fed. Cir. 1999).

Facing the issue recently, the Federal Circuit held that Mylan Pharmaceuticals, an ANDA applicant incorporated in and with a principal place of business in West Virginia, could be sued by patent owners in the U.S. District Court of Delaware. *Acorda*

Therapeutics Inc. v. Mylan Pharm. Inc., 817 F.3d 755 (Fed. Cir. 2016), *cert. denied,* 137 S. Ct. 625 (2017). Mylan resisted personal jurisdiction in Delaware because its only contacts were that it had registered to do business, appointed an agent to accept service, and eventually intended to sell its drugs directly in the state. *Id.* at 758. Nonetheless, the Circuit reasoned that "Mylan has taken the costly, significant step of applying to the FDA for approval to engage in future activities—including the marketing of its generic drugs—that will be purposefully directed at Delaware (and, it is undisputed, elsewhere)." *Id.* at 759. It concluded that "the minimum-contacts standard is satisfied by the particular actions Mylan has already taken—its ANDA filings—for the purpose of engaging in that injury-causing and allegedly wrongful marketing conduct in Delaware," *id.*, even though sales of the infringing drugs had not, and may never, take place. The Federal Circuit, then, held that the infringement action could be brought in any federal district court throughout the country because "Mylan seeks approval to sell its generic drugs throughout the United States." *Id.* at 763.

By comparison, Mylan's connections to Delaware are far more tenuous than the Bristol-Myers connections to California. Bristol-Myers maintains four drug research facilities and employs 414 employees in the state, including 250 sales representatives. Pet. App. 5a, 29a; J.A. 82. It operates a total of five offices, including a government affairs office in the state. J.A. 82. It has marketed and advertised Plavix throughout the state. Pet. App. 24a.

Moreover, regardless of the outcome of this case, Bristol-Myers will defend identical actions by users of its drug in California, relying heavily on

identical evidence to defend materially identical allegations.[6] If a Hatch-Waxman ANDA infringement action comports with due process when brought anywhere in the United States, then the maintenance of this action in California easily passes constitutional muster.

C. Personal Jurisdiction under the RICO Statute Would Be Adversely Affected by Bristol-Myers Proposed Limits.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 to 1968, creates a private right of action with nationwide service[7] for damages against violators who engage in

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[6] Amicus Curiae GlaxoSmithKline LLC (GSK) argues that permitting California to maintain jurisdiction over this matter creates practical difficulties in deposing and putting a plaintiff's personal physician on the stand to determine if better warnings would have caused the doctor to prescribe a different medication. *See* GSK Am. Br. 15-17. The argument should have no effect on the outcome of this case. No one doubts that plaintiffs from any state could have brought their actions, without raising any possible personal jurisdiction objection in Delaware, where Bristol-Myers is incorporated, or in New York, where it is headquartered. Both venues would have created the same difficulties GSK cites to deposing or calling as a witness the plaintiffs' treating physicians. Because those considerations do not oust courts in those states from asserting personal jurisdiction, there is no reason why the same considerations ought not oust California from asserting personal jurisdiction.

[7] To utilize the authorization for nationwide service under 18 U.S.C. § 1965(b), "the court must have personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy and the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators." *Butcher's*

prohibited activities and permits such actions to "be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a). As the Ninth Circuit has recognized, Congress intended RICO's broad reach "to enable plaintiffs to bring all members of a nationwide RICO conspiracy before a court in a single trial." *Butcher's Union,* 788 F.2d at 539.

A leading case from the Fourth Circuit illustrates the way personal jurisdiction applies to civil RICO actions. In *ESAB Grp., Inc. v. Centricut, Inc.,* 126 F.3d 617, 621 (4th Cir. 1997), *cert. denied,* 523 U.S. 1048 (1998), a Delaware corporation located in South Carolina instituted a RICO action against a New Hampshire corporation in the federal district court in South Carolina. The record established that the New Hampshire defendant had no offices or sales representatives, no property, and no phone listings in South Carolina. It paid no South Carolina taxes, and no employee had ever traveled to the state "for any purpose." *Id.* at 621. It did have 26 mail-order customers in the state, "constituting 1% of all of its customers and representing .079% of its gross annual sales." *Id.* at 621, 624. The defendant, on just one occasion, purchased $10,000 to $20,000 "worth of parts from a South Carolina supplier." *Id.* at 621. No evidence showed the company ever "targeted formal advertising at South Carolina, having only once published formal advertising in a trade journal of national circulation." *Id.*

Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 539 (9th Cir. 1986).

The Fourth Circuit concluded that these contacts were inadequate to convey specific jurisdiction under South Carolina's long-arm statute, *id*. at 626, yet personal jurisdiction could still be asserted under RICO. The court first noted that RICO authorized nationwide service of process, "evidencing Congress' desire that '[p]rovision [be] made for nationwide venue and service of process.'" *Id*. (citing 18 U.S.C. § 1965(d) and quoting H.R. Rep. No. 91–1549, 91St Cong., 2d Sess. at 4 (Sept. 30, 1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4010) (brackets in original). Applying a due-process analysis to whether personal jurisdiction may be had in South Carolina, the Court held that there was "no evidence … of such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy of allowing the assertion of in personam jurisdiction in South Carolina," as well as supplemental jurisdiction of state-law claims. *Id*. at 627, 628.

The Eleventh Circuit follows the same approach, *see Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,* 119 F.3d 935 (11th Cir. 1997), while the Second, Seventh, Ninth, and Tenth Circuits hold, perhaps even more broadly, that RICO "extends personal jurisdiction into 'any judicial district of the United States' if necessary to satisfy 'the ends of justice.'" *Cory v. Aztec Steel Bldg., Inc.,* 468 F.3d 1226, 1229 (10th Cir. 2006) (quoting 18 U.S.C. § 1965(b)).

Because personal jurisdiction under RICO extends anywhere in the United States on the basis of a fleeting contact under 18 U.S.C. § 1965(b) without offending due process, the much more substantial contacts Bristol-Myers had related to developing, marketing and selling its drugs in California likewise

does not transgress the limitations imposed by due process.

D. The Clayton Act Similarly Extends Personal Jurisdiction Beyond What Bristol-Myers Contends Due Process Permits.

Section 12 of the Clayton Act authorizes a similarly broad exercise of personal jurisdiction. Section 12 states:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22. Section 12 establishes both venue and personal jurisdiction in cases with corporate defendants.[8] The section's first clause sets venue broadly, even on the basis of a non-material transaction of business, while the second clause provides for nationwide (even, worldwide) service of process and therefore nationwide personal jurisdiction. *KM Enterprises, Inc. v. Glob. Traffic Techs., Inc.,* 725 F.3d 718, 725 (7th Cir. 2013); *Medical Mut. of Ohio v. deSoto,* 245 F.3d 561, 566-67 (6th Cir. 2001) (due to nationwide service of process, personal jurisdiction exists whenever the defendant has

[8] For non-corporate defendants, Section 4 of the Act allows suit "in the district in which the defendant resides or is found or has an agent." 15 U.S.C. § 15.

'sufficient minimum contacts with the United States' to satisfy the due process requirements under the Fifth Amendment.") (citation omitted).

While the circuits are split on whether these two clauses must be read together or separately, *see KM Enterprises,* 725 F.3d at 726, either reading supports personal jurisdiction beyond the limits that Bristol-Myers would impose as a matter of due process. Either permitting service "wherever [the corporate defendant] may be found" or wherever venue can be established, which is where the corporate defendant can "be found or transacts business," establishes personal jurisdiction on the most minimal of contacts.

As with the Federal Interpleader Act, Congress enacted the Clayton Act and this approach to personal jurisdiction at a time when *Pennoyer* governed the issue. Service of process, like personal jurisdiction, was viewed restrictively. Under the prevalent jurisprudence, corporations existed only in their state of incorporation so that service on the chief officer of a corporation could only be made there and not when traveling outside the state. 4 Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 1066 (4th ed.).

Congress – and the courts in their enforcement of this approach to personal jurisdiction – made the entirely proper judgment that the type of fundamental fairness that due process requires, *see Lassiter,* 452 U.S. at 24 (due process "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty"), is satisfied by a broad approach to personal judgment in the service of justice in the Clayton Act,

as well as the other federal acts sketched here. The more restrained and carefully considered approach adopted in this case by the California courts as compared to these statutes cannot deny due process and ought to be sustained.

E. Bankruptcy Jurisdiction Would Also Be Implicated by the Due-Process Rule Bristol-Myers Proposes.

Similarly, the due-process concerns raised here would have a devastating effect on the broad jurisdiction granted bankruptcy courts through nationwide service. Fed. R. Bankr. P. 7004(d); *In re Int'l Elec., Inc.,* 557 B.R. 204, 211 (Bankr. D. Kan. 2016). Personal jurisdiction in bankruptcy is thus not measured by "minimum contacts with Kansas; rather, it is whether [parties] have minimum contacts with the United States." *Id.*; *see also Johnson Creative Arts, Inc. v. Wool Masters, Inc.,* 743 F.2d 947, 950 (1st Cir. 1984).

As a result, a court hearing a bankruptcy proceeding has jurisdiction over every cause of action "related to" the underlying bankruptcy, including those based on state law. *Celotex Corp. v. Edwards,* 514 U.S. 300, 308 (1995). This Court has treated the "related to" language in bankruptcy, *see* 28 U.S.C. § 157(a), as a "choice of words [that] suggests a grant of some breadth." *Celotex Corp.,* 514 U.S. at 307-08. That same etymological assumption that use of "related to" broadens jurisdictional reach ought to inform this Court's approach to personal jurisdiction's "arise out of or relate to" requirement.

II. THE MODERN ECONOMY AND EASE OF TRAVEL AND COMMUNICATION ALSO MILITATE TOWARD A FLEXIBLE APPROACH THAT CONSIDERS FACTORS LIKE THOSE RELIED UPON BY CALIFORNIA.

A. A Balancing of the Inconveniences, in Light of the Corporation's Unquestioned Ability to Litigate in California, Favors Affirmance.

On more than one occasion, this Court has recognized that "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, led to an 'inevitable relaxation of the strict limits on state jurisdiction' over nonresident individuals and corporations." *Burnham v. Superior Court,* 495 U.S. 604, 617 (1990) (quoting *Hanson v. Denckla,* 357 U.S. 235, 260 (1958) (Black, J., dissenting)).[9] In fact, "'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'" *Burger King,* 471 U.S. at 474

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[9] In their landmark law review article relied upon repeatedly by this Court, *see, e.g., Goodyear,* 564 U.S. at 919, von Mehren and Trautman recognize the "growing mobility and complexity of modern life" and the fact that "commercial and economic life [is] increasingly dominated by corporations." Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv. L. Rev. 1121, 1146-47 (1966). In considering the balancing of inconveniences and biases that inform the jurisdictional inquiry, they conclude that biases that favor corporate defendants over ordinary plaintiffs are "harder to justify" given the unequal economic power and legal sophistication between the two. *Id.* at 1147.

(quoting *McGee v. Int'l Life Ins. Co.,* 355 U.S. 220, 223 (1957)). It therefore "usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." *Id.* In fact, even a "lesser showing" of minimum contacts can be overcome with a strong demonstration of fairness, shifting the burden to the defendant to make a "compelling case" that the exercise of personal jurisdiction would be unfair. *Id.* at 477-78.

Here, however, a substantial showing of minimum contacts and purposeful availment was established. *International Shoe* itself recognized that when a non-forum defendant conducts extensive in-forum activities, the "estimate of the inconveniences" of litigation in the forum is sharply curtailed. 326 U.S. at 317-18. Today, it is even less inconvenient than in 1957, when the Court first made that statement about modern conveniences, with the modern advent of online research, face-to-face communications, and ubiquitous travel options. In fact, only in highly unusual cases will that inconvenience rise to a level of constitutional concern. *See Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 116 (1987) (Brennan, J., concurring in part and concurring in the judgment).

Yet, while the business world enjoys the advances that permit that kind of reach, individuals are decreasingly mobile, even more so when burdensome health issues arise, such as is the case when drugs have adverse effects. Studies show that our once increasingly mobile society has seen a steady decline of individual mobility since the 1950s, with the largest average annual declines among populations in their 20s and those aged 65 and older. Douglas A. Wolf and Charles F. Longino, Jr., *Our "Increasingly Mobile Society"? The Curious Persistence of a False Belief,* 45

The Gerontologist 5, 8 (Feb. 2005), available at https://academic.oup.com/gerontologist/article-lookup/doi/10.1093/geront/45.1.5 (last visited Apr. 4, 2017). One exception to that general trend is the continued probability that people will move once they retire. *Id*. at 8. After that move, however, people are likely to stay put.

Those modern facts demonstrate why considerations of inconvenience, an important factor in our personal jurisdiction jurisprudence, favors permitting plaintiffs to hold corporate tortfeasors with large in-state footprints, already subject to similar lawsuits in that state, accountable in the most convenient locale.

An exemplar of that issue of the retiree massively inconvenienced by being forced to file his action in a former place of residence is now pending in the Eleventh Circuit.[10] In *Waite v. AII Acquisition Corp.,* No. 16-15569 (11th Cir. 2016), the defendant, Union Carbide, is engaged in similar activities in Florida to what it does in Massachusetts, where the plaintiff was first exposed to its asbestos. He later moved to Florida, where he is now retired, but worked for a time and suffered further asbestos exposure from other employers. His current diagnosis of the inevitably fatal mesothelioma is based on his continuing exposure and manifests itself only after a long latency period. A person who contracts an asbestos disease generally may not bring an action until it manifests itself. *Eagle-Picher Indus., Inc. v.*

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[10] That fact pattern also demonstrates why the GSK amicus brief's contention that the location of plaintiffs' treating physician favors an inflexible rule that should limit specific jurisdiction to the place of injury cannot be correct. *See* GSK Am. Br. 15-17, *supra* n.6.

Cox, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985), *rev. denied*, 492 So. 2d 1331 (Fla. 1986); *cf. Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432 (1997) (collecting cases). In Florida, that requirement is codified in the Asbestos and Silica Compensation Fairness Act, which requires actual physical impairment and specifies the necessary diagnosis before suit may be brought. Fla. Stat. § 774.201 *et seq*. Nonetheless, after Mr. Waite manifested the disease and sued in Florida (where Union Carbide defends countless asbestos suits), Union Carbide asserted a lack of personal jurisdiction. The facts are illuminating and so discussed at length.

Union Carbide could only be named a defendant at this point by Mr. Waite, and splitting his claims against Union Carbide from the companies exposing him to asbestos in Florida would require that he split his actions. Meanwhile, it is clear that Union Carbide has a substantial related presence in Florida. Union Carbide "has been registered to do business in Florida and maintained a registered agent to receive service of process in Florida since 1949." *Waite v. AII Acquisition Corp.* ("Waite I"), No. 15-cv-62359-BLOOM/Valle, 2015 WL 9595222, at *4 (S.D. Fla. Dec. 29, 2015). It grew to be the largest supplier of asbestos for drywall compound and targeted the Florida market for its product and continues to have "dozens of Florida customers who purchased its asbestos." *Id*. Union Carbide owned and operated a plant in Brevard County, Florida until 1987. *Id*. Its shipping terminal in Tampa has now become an environmental Superfund site. *Id*.

In addition, Union Carbide is also no stranger to asbestos litigation in Florida. As the District Court detailed:

> Union Carbide has been a defendant in numerous, recent cases litigated in Florida, including asbestos cases involving exposures to its "Calidria" brand asbestos, as implicated here. *See, e.g., Union Carbide Corp. v. Kavanaugh,* 879 So. 2d 42 (Fla. 4th Dist. Ct. App. 2004); *McConnell v. Union Carbide Corp.,* 937 So. 2d 148 (Fla. 4th Dist. Ct. App. 2006). Indeed, the Florida Supreme Court recently affirmed the lower court's decision finding liablity [sic] for Union Carbide for the very same conduct alleged in the present case. *See Aubin v. Union Carbide Corp.,* 2015 WL 6513924, at *17-18 (Fla. Oct. 29, 2015).

Id. at *5.

This wide array of connections to the State of Florida, related to Mr. Waite's litigation, satisfies the "constitutional touchstone" of purposefully established minimum contacts by the defendant in the forum State. *Burger King,* 471 U.S. at 474. Unquestionably, Union Carbide "purposefully directed" its activities into Florida. *Cf. Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774 (1984). Union Carbide has "purposefully 'reach[ed] out beyond' [its] State and into another by, for example, entering a contractual relationship that 'envisioned continuing and wide-reaching contacts' in the forum State," or by distributing its product to "'deliberately exploi[t]' a market in the forum State." *Walden v. Fiore,* 134 S. Ct. 1115, 1122 (2014) (citations omitted). Jurisdiction, based on these contacts, does not constitute the type of "random, fortuitous, or attenuated" contacts made with other persons

affiliated with the State that has proven fatal in other cases. *See Burger King,* 471 U.S. at 475. A balancing of the inconveniences between Mr. Waite being forced to go to Massachusetts to sue Union Carbide while maintaining an action in Florida against other defendants, or forcing Union Carbide to defend itself in Florida in one consolidated action, plainly favors the latter.

Moreover, defendants in both this case and *Waite* seek the splitting of a cause of action between two jurisdictions because there are multiple defendants with differing jurisdictional bases. To permit that argument to succeed creates an enhanced danger that corporations, engaged in profitmaking interstate activities, will "escape having to account … for consequences that arise proximately from such activities." *Id*. at 473-74.

Instead, both cases constitute the type of purposeful availment that seeks the "privilege of conducting activities within the forum . . ., thus invoking the benefits and protections of its laws." *Hanson,* 357 U.S. at 253. As in the instant case with the extensive California presence of like activities that Bristol-Myers has, the minimum contacts requirement for Union Carbide to satisfy due process is established. Because both corporations are involved in similar activities in the state of suit, where they are prepared to, and actually must, defend themselves against in-state plaintiffs, the litigation should be viewed as resulting from alleged injuries that "arise out of or relate to" those activities. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 (1984). This requirement assures that a defendant's "conduct and connection with the forum ... are such that he should reasonably anticipate being

haled into court there." *World-Wide Volkswagen Corp,* 444 U.S. at 297.

This Court has never defined the difference between arising out of and related to, *see Helicopteros,* 466 U.S. at 415 n.10, and has warned against using "mechanical or quantitative" tests. *International Shoe,* 326 U.S. at 319. *See also Kulko v. Superior Court,* 436 U.S. 84, 92 (1978) ("Like any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."). California's approach to that issue in this case followed those directions.

B. Contemporary Norms Disfavor the Proximate-Cause Test Proposed by Bristol-Myers.

Bristol-Myers urges this Court to adopt a rigid *Pennoyer*-like geographic-based proximate cause test that would deny specific jurisdiction if a plaintiff's injury did not directly arise from a defendant's actions within the forum. Pet. Br. 37-38. Such an approach would constitute the kind of "mechanical" test that *International Shoe* rejected. 326 U.S. at 319. It is also inconsistent with this Court's recognition that a plaintiff's "lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." *Keeton,* 465 U.S. at 780.

Significantly, in every case where relatedness was at issue, this Court has consistently found that a corporation's purposeful presence in a state is sufficient to satisfy specific jurisdiction's relatedness

requirement. It has done so precisely because relatedness can connect a defendant's general interstate economic activities to an injury. For example, in *Burger King,* the Court held specific jurisdiction existed because the company's general "economic activities" in the state assured that it would not be "unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." 471 U.S. at 474 (quoting *McGee,* 355 U.S. at 223 (internal quotations omitted)). The Court further held that

> where individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; *the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed*.

Id. (emphasis added).

Where this Court has denied jurisdiction, the common denominator is highly attenuated connections to the forum state. For example, in *Daimler AG v. Bauman,* 134 S. Ct. 746 (2014), the case involved Argentinian plaintiffs who sued Daimler for actions taken by Daimler's Argentine subsidiary by asserting the California presence of the German company's independently incorporated, indirect U.S. subsidiary. The "Rube Goldberg" approach to connecting a U.S. company to an Argentine one through a German parent was what doomed the enterprise. On the contrary, this Court has not found

constitutional concerns to predominate where the defendant has decades of substantial and ongoing operations in the state, including actions identical to the tortious conduct for which they are being sued in the case at bar.

Here, there is no unfairness in subjecting Bristol Myers to potential liability in California, where it will litigate the same precise liability to other plaintiffs in that forum. Allowing California to assume jurisdiction here does not comprise an instance of haling a defendant into a forum that it is neither prepared to litigate in nor lacked expectation of litigation exposure. For that reason, rather than require a causal relationship of the type Bristol-Myers propounds, the proper inquiry at this stage is a relatedness question. Here, that question, based on the facts, must be answered affirmatively.

Moreover, this Court sketched out four elements that ought to be the centerpieces of the inquiry: (1) the burden imposed on the defendant by requiring it to litigate in a foreign forum; (2) the forum state's interest in resolving the dispute; (3) the plaintiff's interest in obtaining relief; and (4) the interests of the other affected forums in the efficient judicial resolution of the dispute and advancement of substantive social policies. *Asahi,* 480 U.S. at 113.

The answers to those questions, which the California Supreme Court undertook itself, inexorably favors affirmance. California has an indisputable interest in resolving litigation involving its own citizens as plaintiffs and defendant (McKesson), grounds for its resolving it and affording appropriate relief, and the lack of any other forum with a similarly predominant interest. The burden to Bristol-Myers of

defending all the cases, resident and non-resident, is minimal, while yielding a desirable efficiency and furthering an important public policy in proper warnings shared by the states. In fact, as the California Supreme Court observed, the burden of litigating the claims of the nonresident plaintiffs "in a scattershot manner" in "up to 34 different states ... would seem to be a far more burdensome distribution of BMS's resources in defending these cases than defending them in a single, focused forum." Pet. App. 37a-38a.

Nothing in the California Supreme Court's decision below undermines this Court's holding that a common connection links the defendant, the forum, and the litigation. For example, in *Walden,* this Court did not limit its specific jurisdiction inquiry to whether the defendant purposely availed itself of the forum and whether the claim related to those specific contacts. The *Walden* Court, instead, engaged in a reasonableness inquiry that examined the defendant's relationship to the forum, the plaintiff's relationship to the defendant and the forum, and *the relationship of the claim to the litigation.* 134 S.Ct. at 1122. The emphasis, then, is not on injury-related conduct, but on whether "the defendant's suit-related conduct … create[d] a substantial connection with the forum." *Id.* at 1121. Where the defendant in Walden lacked contact with Nevada in any meaningful way, the same cannot be said of Bristol-Myers and California.

Under this analysis, just as the California Supreme Court undertook utilizing the *Asahi* factors, the connections are self-evident. Bristol-Myers has a significant relationship to the forum and will litigate the issues in this matter there. The nonresident plaintiffs have a cognizable cause of action against

Bristol-Myers's national distributor, McKesson, there and are properly before the California courts. Finally, the claim made by the nonresidents is identical to the claim made in the litigation by resident plaintiffs, providing a cogent relationship between the claim and the litigation. *Cf. Goodyear,* 564 U.S. at 919 ("specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'") (citation omitted).

Interestingly, Bristol-Myers sees no jurisdictional issue in plaintiffs filing "in federal court and participat[ing] in the multidistrict litigation process, rather than structure their complaints to avoid federal subject matter jurisdiction [and pursue their claims in state court]." Pet. Br. 14. The statement signals that it would consent to jurisdiction before a multidistrict panel. Yet, no viable legal distinction exists that would justify submitting to personal jurisdiction to adjudicate the matter before a federal court and submission to jurisdiction before a state court that unquestionably has jurisdiction to adjudicate the dispute for all plaintiffs and at least one defendant.

In essence, Bristol-Myers asks this court to accord lesser stature to state courts than it does to federal courts, but this Court has repeatedly recognized that it should be guided by "expedition and sensitivity to state courts' coequal stature." *See, e.g., Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 584-88 (1999). After all, "[i]n determining whether a nonresident defendant is subject to its jurisdiction, a federal court exercising diversity jurisdiction is the functional equivalent of a state court sitting in the forum state." *Daynard v. Ness, Motley, Loadholt,*

Richardson & Poole, P.A., 290 F.3d 42, 51 (1st Cir. 2002) (citation omitted).

Finally, recognizing personal jurisdiction in the circumstances presented here has distinct advantages that serve the interests of both parties and of justice. It provides a unitary forum in which a uniform adjudication of shared facts among similarly situated plaintiffs can be established, particularly, as here, where Bristol-Myers' suggested approach would force non-California residents to adjudicate their cases for redress against McKesson, the distributor, in California and their identical case against Bristol-Myers elsewhere. Recognizing jurisdiction in California avoids duplicative separate actions that unquestionably exhaust resources from both parties and thus invariably favors the deeper-pocket party. Further, it reduces the risk that similarly situated claimants will end up with widely disparate relief.

CONCLUSION

For the foregoing reasons, the Court should affirm the California Supreme Court.

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Respectfully submitted,

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