Nos. 125020, 125021

IN THE
SUPREME COURT OF ILLINOIS

NICHOLE HAMBY ET AL., *Plaintiffs-Appellees* v. **BAYER CORPORATION ET AL.,** *Defendants-Appellants,* and **DOES 1–10,** *Defendants.*	On Appeal from the Appellate Court of Illinois, Fifth District, No. 5-18-0279 There on Interlocutory Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 16-L-1617 The Hon. William A. Mudge Judge Presiding
CHRISTINE RIOS ET AL. *Plaintiffs-Appellees* v. **BAYER CORPORATION ET AL.,** *Defendants-Appellants,* and **DOES 1–10,** *Defendants.*	On Appeal from the Appellate Court of Illinois, Fifth District, No. 5-18-0278 There on Interlocutory Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 16-L-1046 The Hon. Denis R. Ruth Judge Presiding

REPLY BRIEF OF DEFENDANTS-APPELLANTS BAYER CORPORATION ET AL.

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INTRODUCTION

Plaintiffs do not argue that there is any connection—must less a constitutionally adequate one—between Illinois and the *specific* "conduct giving rise to the nonresidents' claims." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1782 (2017). Instead, Plaintiffs claim (*e.g.*, at 1, 3, 6, 19, 21) specific personal jurisdiction in this State based on Bayer's generalized "Essure-related contacts with Illinois," and contend that there is "no law on specific jurisdiction" requiring a "connection between the forum and ... the non-residents' specific claims." *See* Pls. Br. 15–16. *Bristol-Myers* squarely rejects Plaintiffs' theory, holding that there must be an "adequate link between the State and the *nonresidents' claims*." 137 S. Ct. at 1781 (emphasis added). And, as in *Bristol-Myers*, that link is lacking here. The "Essure-related" clinical trial, marketing, and training activities in Illinois that Plaintiffs rely on are spread nationwide. *See, e.g.*, Bayer Br. 23–29. The unconstitutionally lax jurisdictional analysis advanced by Plaintiffs—which would permit virtually any national corporation to be sued in virtually any state for alleged injuries occurring anywhere in the world—would gut the standard the Supreme Court set forth in *Bristol-Myers* and render its distinction between specific and general jurisdiction meaningless.

Plaintiffs ask the Court to look past *Bristol-Myers* and other controlling authority on the ground that specific personal jurisdiction must be assessed on "the facts and circumstances of each individual case." *See, e.g.*, Pls. Br. 11. But that is precisely the point: *Bristol-Myers* makes perfectly clear that the "facts and circumstances" of this case do not permit the exercise of specific personal jurisdiction over the Non-Illinois Plaintiffs' claims. Indeed, Plaintiffs do not identify a single fact that would distinguish the holding in *Bristol-Myers* from this case, and further entirely ignore a series of

decisions holding, on *identical* or highly similar "facts and circumstances," that specific personal jurisdiction was lacking. *See* Bayer Br. 14–16. Plaintiffs cannot justify departing from those well-reasoned decisions or offer any persuasive argument supporting the Illinois courts' exercise of specific personal jurisdiction over claims by out-of-state Plaintiffs against out-of-state Defendants concerning out-of-state injuries.

Plaintiffs dispute that the Court of Appeals found jurisdiction based on a mere but-for connection between the forum and the Plaintiffs' claims, but then argue there is a sufficient connection between their claims and Illinois simply because "*absent Bayer's contacts with Illinois* ... the Essure contraceptive device would not have" come to market. *See* Pls. Br. 20–21. This is precisely the type of but-for analysis that Plaintiffs, other decisions of the Illinois Courts of Appeals, the Seventh Circuit (among other federal courts of appeals), and the supreme courts of other states have all recognized is insufficient to create a constitutionally adequate basis for *specific* personal jurisdiction. *See* Bayer Br. 18–22 (citing cases). Plaintiffs do not even attempt to show that Bayer's in-state activities were the "*legal cause*" of the non-Illinois Plaintiffs' injuries, *see Keller v. Henderson*, 359 Ill. App. 3d 605, 617 (2d Dist. 2005), nor did either of the decisions below conclude as much. This Court should therefore hold that Plaintiffs' "but for" causation theories are too attenuated to support specific personal jurisdiction.

Finally, Plaintiffs offer little response to Bayer's showing that jurisdiction in Illinois is unreasonable. This Court should reject Plaintiffs' efforts to make Madison County a magnet for nationwide mass tort suits that have nothing to do with the State, and reverse the decision of the appellate court.

ARGUMENT

I. THE FIFTH DISTRICT'S RULING IS CONTRARY TO *BRISTOL-MYERS* AND ITS PROGENY.

A. *Bristol-Myers* Requires An Adequate Link Between Bayer's Illinois-Related Contacts and the Non-Illinois Plaintiffs' Specific Claims.

Plaintiffs disregard the actual language in *Bristol-Myers* when they contend that the decision below "legally supports specific personal jurisdiction over Bayer." Pls. Br. 15–16.

First, Plaintiffs argue that *Bristol-Myers* "obviously" requires no "connection between the forum and ... *the non-residents' specific claims*." Pls. Br. 15 (emphasis in original). The plain text of the opinion refutes this contention, squarely holding that there must be an "adequate link between the State *and the nonresidents' claims*." *Bristol-Myers*, 137 S. Ct. at 1781 (emphasis added); *see also id.* (rejecting Plaintiffs' approach as "danger[ous]"). The critical consideration, the *Bristol-Myers* Court held, is whether there exists "a connection between the forum and *the specific claims at issue*." *Id.* (emphasis added).[1] Finding such a connection lacking, the Supreme Court dismissed the claims of the non-resident plaintiffs in that case. *See id.* at 1782. As even the lone dissenter in that case recognized, "the upshot of [*Bristol-Myers*] is that plaintiffs cannot join their claims together and sue a defendant in a State in which only some of them have been injured"

[1] Plaintiffs seem to argue that the phrase "specific claims at issue" refers only to the cause of action and does not refer to "the nonresidents' specific claims." Pls. Br. 16. But *Bristol-Myers*, like this case, concerned only a jurisdictional challenge to the claims of non-resident plaintiffs. *See* 137 S. Ct. at 1777 (decision concerned "specific jurisdiction to entertain the nonresidents' claims"); 1782 ("The relevant plaintiffs are not California residents ...."). Thus, *Bristol-Myers* expressly holds that specific personal jurisdiction requires an "adequate link between the State *and the nonresidents' claims*." *Id.* at 1781.

when this adequate link between the non-residents' claims and the state cannot be established. *Id.* at 1788–89 (Sotomayor, J., dissenting).

Second, Plaintiffs argue that personal jurisdiction turns on the actions of the defendant, and that consideration of the Plaintiffs' specific claims is therefore improper. *E.g.*, Pls. Br. 11, 15–16. But *Bristol-Myers* holds that "a defendant's *general* connections with the forum are *not* enough" to establish *specific* personal jurisdiction. 137 S. Ct. at 1781 (emphasis added). Rather, "[w]hat is needed ... is a connection between the forum and the *specific claims at issue*." *Id.* (emphasis added). This means that specific personal jurisdiction arises based on the defendant's contacts *with the plaintiffs or the plaintiffs' injuries* in the forum state. For those Plaintiffs here who reside in and allege injury in another state, there is no such connection.

Thus, Plaintiffs' argument that it is sufficient to allege "Essure-related contacts with Illinois" because their claims are "related to Bayer's Essure device" is plainly contrary to *Bristol-Myers*. There, significant links existed between the product (Plavix) and the forum (California), including "substantial operations" involving "250 sales representatives" in the state, the California sale of "almost 187 million Plavix pills" with "revenue of almost $918 million," plus a contract with a California company to act as the nationwide distributor of Plavix. *Bristol-Myers*, 377 P.3d 874, 879 (Cal. 2016); *see* 137 S. Ct. at 1778. And all plaintiffs there brought claims "for injuries allegedly arising out of their use of Plavix." *Bristol-Myers*, 377 P.3d at 878. Yet the Supreme Court held that these "[Plavix]-related contacts with [California]," *cf.* Pls. Br. 3, were insufficient to provide personal jurisdiction over the non-residents' claims, because "the conduct giving rise to the nonresidents' claims occurred elsewhere." 137 S. Ct. at 1782.

Plaintiffs' attempt to distinguish *Bristol-Myers* on the facts also fails. They argue that *Bristol-Myers* "differ[s] drastically" from this case, pointing to a statement in the opinion's background section that "BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not ... work on the regulatory approval of the product in California." Pls. Br. 18–19. They argue that it was based on "those jurisdictional facts [that] the Supreme Court concluded that 'all the conduct giving rise to the nonresidents' claims occurred elsewhere.'" *Id.* Again, the decision itself demonstrates that this argument is erroneous. In concluding that "the conduct giving rise to the nonresidents' claims occurred elsewhere," the Court made no reference to that sentence or any of the facts recited therein. Instead, the Court identified the facts relevant to its holding: the "relevant plaintiffs are not California residents ..., do not claim to have suffered harm in that State," "were not prescribed Plavix in California, did not purchase Plavix in California, [and] did not ingest Plavix in California." 137 S. Ct. at 1781–82.[2] All of those jurisdictionally relevant facts are true here as well.

Finally, Plaintiffs attempt to minimize *Bristol-Myers* on the ground that it applied "settled principles regarding specific jurisdiction." Pls. Br. 15. The Supreme Court held, however, that lower courts had failed to follow those "settled principles," reversing the decision of the California Supreme Court. The courts below likewise did not follow these settled principles here. As was true in *Bristol-Myers*, "all the conduct giving rise to the nonresidents' claims occurred elsewhere," 137 S. Ct. at 1782: The non-Illinois

[2] As explained in Bayer's opening brief (at 14), numerous other decisions have rejected the argument that this factual recitation should be converted into "a blueprint for establishing personal jurisdiction." *Dyson v. Bayer Corp.*, No. 4:17cv2584 SNLJ, 2018 WL 534375, at *4 (E.D. Mo. Jan. 24, 2018); *see also, e.g.*, *Jordan v. Bayer Corp.*, No. 4:17-cv-00865-AGF, 2018 WL 837700, at *4 (E.D. Mo. Feb. 13, 2018).

Plaintiffs "were not prescribed [Essure] in [Illinois], did not purchase [Essure] in [Illinois], did not ingest [Essure] in [Illinois], and were not injured by [Essure] in [Illinois]." *Id.* at 1781. The court therefore lacks specific jurisdiction over their claims.

B. Following *Bristol-Myers*, Courts in Illinois and Elsewhere Have Rejected Personal Jurisdiction on Indistinguishable Facts.

As noted, Plaintiffs argue repeatedly that personal jurisdiction depends upon "the facts and circumstances of each individual case." Pls. Br. 11; *see also, e.g., id.* at 12–14, 20–21, 25, 27–29. But they fail to address seriously the groundswell of recent decisions applying *Bristol-Myers* to virtually identical facts and holding that personal jurisdiction is lacking.

1. Numerous Courts, Including in Illinois, Have Rejected Specific Personal Jurisdiction on Identical Theories and Even Identical Facts.

Seven recent decisions of the Eastern District of Missouri considered the same "facts and circumstances" as this case, and held that there was no personal jurisdiction over the claims of nonresident plaintiffs. *See* Bayer Br. 14, 16.[3] Plaintiffs do not engage with these decisions, except to speculate that those courts "presumably looked to the unique Missouri facts before them." Pls. Br. 29.[4] But even a cursory review of the

[3] *See Moore v Bayer Corp.*, No. 4:18-cv-262, 2018 WL 4144795 (E.D. Mo. Aug. 29, 2018); *Hinton v. Bayer Corp.*, No. 4:16CV1679 HEA, 2018 WL 3725776, at *3–4 (E.D. Mo. July 27, 2018); *Dyson v. Bayer Corp.*, No. 4:17CV2584 SNLJ, 2018 WL 534375, at *5 (E.D. Mo. Jan. 24, 2018); *Jordan v. Bayer Corp.*, No. 4:17-cv-00865-AGF, 2018 WL 837700, at *4 (E.D. Mo. Feb. 13, 2018); *McClain v. Bayer Corp.*, No. 4:17-CV-01534-JCH, 2018 WL 3725777 (E.D. Mo. Feb. 20, 2018); *Schaffer v. Bayer Corp.*, No. 4:17-CV-01973 JAR, 2018 WL 999980, at *4 (E.D. Mo. Feb. 21, 2018); *Johnson v. Bayer Corp.*, No. 4:17-CV-02774-JAR, 2018 WL 999972, at *4 (E.D. Mo. Feb. 21, 2018).

[4] Plaintiffs' only other response is that these decisions are from "another jurisdiction." Pls. Br. 29. But personal jurisdiction is an issue of federal constitutional law. *Presley v. P & S Grain Co.*, 289 Ill. App. 3d 453, 461 (5th Dist. 1997); *Russell v. SNFA*, 2013 IL 113909, ¶ 30. The Eastern District of Missouri rulings are highly persuasive—

decisions makes clear that the facts were not "unique" or Missouri-specific; the plaintiffs in those cases were relying on the same alleged forum contacts regarding the Essure device as alleged by Plaintiffs here and making identical arguments about their jurisdictional significance. For instance:

- The appellate court relied on Plaintiffs' allegation that Bayer "conducted clinic trials in Illinois [and] contracted with Illinois physicians and facilities," Pls Br. 3 (quoting A14, A25). Pls. Br. 8. Plaintiffs in the Eastern District of Missouri cases likewise argued that personal jurisdiction existed because there were "pre-market clinical trials" for Essure in Missouri conducted at "Missouri hospitals" by "Missouri physicians." *Dyson*, 2018 WL 534375, at *2; *see also, e.g., Jordan*, 2018 WL 837700, at *4 (same).
- Plaintiffs here allege that Bayer developed a marketing strategy in Illinois that "eventually spread nationwide." *E.g.*, Pls. Br. 7, 19. Plaintiffs in the Missouri cases argued that that state was "ground zero for [Bayer's] national [marketing] campaign." *Jordan*, 2018 WL 837700, at *4; *see also, e.g., Moore*, 2018 WL 4144795, at *2 (similar).

In each case, the courts found that the supposed bases for jurisdiction—the same bases alleged here—were "simply too attenuated" from the claims of the nonresident plaintiffs to "serve as an 'adequate link' between Missouri and nonresidents' claims that their individual device injured them in another state." *Dyson*, 2018 WL 534375, at *5; *see also Carney v. Guerbet, LLC*, No. 4:18-CV-1494 CAS, 2018 WL 6524003, at *4 (E.D.

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particularly since, as Plaintiffs repeat, personal jurisdiction requires an application of federal law to the specific facts of the case which are virtually identical to those here.

Mo. Dec. 12, 2018) ("[A]llegations a non-resident pharmaceutical company researches, designs, tests, formulates, inspects, markets, or promotes a drug within the forum state are not enough to establish specific personal jurisdiction."). The same analysis holds true here.

Further, the appellate court's ruling conflicts with Illinois federal district court decisions relating to the prescription drug Xarelto. Plaintiffs argue these decisions are irrelevant because the court held that "under these facts—in regard to non-Illinois plaintiffs' allegations—there is no connection between Illinois and the underlying Xarelto controversy." Pls. Br. 28 (emphasis omitted) (quoting *Roland v. Janssen Research & Dev. LLC*, No. 3:17-cv-00757-DRH, 2017 WL 4224037, at *5 (S.D. Ill. Sept. 22, 2017). But Plaintiffs do not point to any relevant differences between the facts alleged in those cases and the facts alleged here—and there are none. Indeed, the plaintiffs there made virtually identical arguments that personal jurisdiction existed because the manufacturer "purposefully targeted Illinois as the location for multiple clinical trials which formed the foundation for defendants' Xarelto Food and Drug Administration application," *Roland,* 2017 WL 4224037, at *4, and "gav[e] rise to [all] Plaintiffs' claims" because they "led to FDA approval of Xarelto and resulted in inadequate warnings" and "misrepresentations made by Defendants," Pltfs' Opp. to Mot. to Dismiss, *Berousse v. Janssen Research & Dev., LLC*, No. 3:17-cv-00716-DRH, 2017 WL 7805815 (S.D. Ill. Sept. 13, 2017); *accord, e.g.*, *In re Xarelto Cases*, No. BC599573, 2018 WL 809633 (Cal. Super. Ct. Feb, 6, 2018); *see also* Bayer Br. 17 n.6. As those cases correctly held, such allegations fail to

show any constitutionally adequate connection between Illinois and the nonresident plaintiffs' claims.[5] The same conclusion applies here.

2. Plaintiffs Rely on Outdated, Superseded, and Factually Distinguishable Non-Controlling Authority.

Plaintiffs contend the court should follow *M.M. ex rel. Meyers v. GlaxoSmithKline LLC*, 2016 IL App (1st) 151909 ¶ 75. *See* Pls. Br. 22–25. As Bayer explained in its opening brief, however, *M.M.* is no longer good law in light of *Bristol-Myers* and distinguishable in any event—that case alleged fraud in the Illinois clinical trials, which Plaintiffs do not (and by law cannot) allege here. *See* Bayer Br. 15–16, 25. Indeed, despite their insistence on the importance of the "facts and circumstances of each individual case," *supra* page 6, Plaintiffs offer no response to Bayer's showing that *M.M.* is factually distinguishable. Plaintiffs state only that "[l]ittle need be said to counter" Bayer's showing, and then fail to address the significant differences between the cases. Pls. Br. 25.

Plaintiffs further contend that Bayer "improperly ignores *M.M.*'s procedural history," Pls. Br. 24, even though Bayer directly explained why that procedural history is irrelevant. *See* Bayer Br. 16 n.8. According to Plaintiffs, this Court's denial of leave to take an interlocutory appeal and the U.S. Supreme Court's denial of *certiorari* indicates approval of *M.M.*'s reasoning. *See* Pls. Br. 24–25. But both Courts are clear that denial

[5] Plaintiffs also argue that a separate decision by the same judge reached a different conclusion. *See* Pls. Br. 27 (citing *In re Syngenta Mass Tort Actions*, No. 3:16-cv-00255, 2017 WL 2117728 (S.D. Ill. May 15, 2017)). Critically—and contrary to what Plaintiffs indicate (at 25–27)—that decision predates *Bristol-Myers*. It is also much further afield factually than the Xarelto decisions, involving alleged contamination of corn supplies by genetically modified seed. *Id.* The Xarelto decisions, by contrast, were decided after (and expressly rely on) *Bristol-Myers*, and involve nearly identical jurisdictional allegations regarding clinical trials for a medical product.

of discretionary review "imports no expression of opinion upon the merits of a case." *House v. Mayo*, 324 U.S. 42, 48 (1945); *Mattis v. State Univs. Ret. Sys.*, 212 Ill. 2d 58, 75 (2004) ("The denial of a petition for leave to appeal has no precedential effect and in no way amounts to a consideration of the merits of the case.") (alteration and quotations omitted).[6] *M.M.* is a decision of a lower court on different facts that predates the controlling authority on the relevant issue.

Plaintiffs also direct the Court to "post-*BMS* decisions" that are supposedly in accord with the decisions below. Pls. Br. 25–27. One, *In re Syngenta*, actually pre-dates *Bristol-Myers* and is easily distinguishable on both the facts and the law. *See supra* note 5. The remaining authorities Plaintiffs cite are two companion cases from California. But as described in the next section, *see infra* pp. 15–16, those decisions rest on a jurisdictional theory that has been consistently rejected by Illinois courts and disclaimed by Plaintiffs here, are distinguishable on the facts, and are inconsistent with other, more recent decisions from California holding that the connection between in-state clinical trials and out-of-state defendants' claims "is too attenuated to support the exercise of specific jurisdiction." *In re Pradaxa Cases*, No. CJC-16-004863, 2019 WL 1177510, at *3 (Cal. Super. Ct. Jan. 31, 2019). These cases do not offer any reason to depart from the line of cases in Missouri on identical facts and law or the line of cases from the Southern District of Illinois on highly similar facts and identical legal issues

[6] Plaintiffs say the rule should be different here because the U.S. Supreme Court "cho[se] not to utilize its GVR power," Pls. Br. 24–25, but the "G" in GVR stands for "grant"—the Court could have granted *certiorari* but chose not to. The decision to grant or not to grant *certiorari*, the Supreme Court has admonished "again and again ... does not remotely imply approval or disapproval of" the lower court's decision. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari).

The decision below is contrary to *Bristol-Myers*, as a host of decisions following *Bristol-Myers* persuasively demonstrates. This Court should reverse.

II. THE FIFTH DISTRICT ERRONEOUSLY AUTHORIZED THE EXERCISE OF SPECIFIC PERSONAL JURISDICTION OVER CLAIMS WITOUT ANY SUBSTANTIAL CONNECTION TO ILLINOIS.

As detailed in Bayer's opening brief, the U.S. Supreme Court has required "a substantial connection" between the forum state and "the defendant's suit-related conduct" before a state court may exercise specific personal jurisdiction. *See Walden v. Fiore*, 571 U.S. 277, 284 (2014). Applying that requirement both before and since *Bristol-Myers*, courts in Illinois and nationwide have recognized that the specific claims "must directly arise out of the defendant's specific contacts with the forum," *Keller*, 359 Ill. App. 3d at 616–17, or be "*directly related* to … the claims asserted," *Brook v. McCormley*, 873 F.3d 549, 552 (7th Cir. 2017); *accord, e.g.*, *Hitz Entm't Corp. v. Mosley*, No. 16 C 1199, 2017 WL 444073, at *5 (N.D. Ill. Feb. 1, 2017); *see also* Bayer Br. 18, 20–23 (citing decisions from numerous circuits and state supreme courts requiring a heightened showing of causation). This means that, for a defendant to be subject to specific personal jurisdiction in a state, its contacts with that state must be the "*legal cause*" of the plaintiff's alleged injuries. *See Keller*, 359 Ill. App. 3d at 617; *see also J. I. Case Co. v. Indus. Comm'n*, 36 Ill. 2d 386, 388 (1966) ("arising out of" standard requires the defendant's actions to be "a *contributing proximate cause*" to the alleged injury) (emphasis added).

Neither court below found that Bayer's Illinois conduct was the "legal cause" of the non-Illinois Plaintiffs' claims. In their brief, Plaintiffs do not respond to the numerous cases from Illinois and elsewhere holding that but-for causation is insufficient to give rise to specific personal jurisdiction, and they make no effort to defend their

proposed but-for requirement. Instead, Plaintiffs assert that "the [appellate] court's legal rationale was not confined solely to 'but for' causation." Pls. Br. 20. *But see* A14 (basing its analysis on "relat[ions]" or "connect[ions]" between Illinois and "the Essure product"); *but see also* A32 ("[B]ut for[] Bayer's activities in Illinois, Plaintiffs' [sic] would not have suffered their alleged injuries."); A40 (same). Yet, after repeating a series of allegations that have nothing to do with their specific claims, all Plaintiffs can marshal is a naked but-for syllogism: there is a "'sufficient link' to Plaintiffs' claims" because "absent Bayer's contacts with Illinois ..., the Essure contraceptive device would not have been researched, developed and investigated, marketed, sold, purchased, and implanted in Plaintiffs." Pls. Br. 21.[7] Plaintiffs' arguments are textbook examples of "but-for" causation. *See Keller*, 359 Ill. App. 3d at 617.

Indeed, it appears that the appellate court in this case applied a standard even *looser* standard than the but-for standard. It required only that Bayer's in-state activities be "connected to" or "relate[d] to" "the product at issue." *See* A13–14, A24–25. The appellate court asserted only that (1) Bayer "marketed in Illinois, conducted clinical trials in Illinois, contracted with Illinois physicians and facilities, and established a physician accreditation program in Illinois"; (2) Plaintiffs' claims "relate[] to the testing, development, and marketing of the Essure product"; and therefore (3) there is a sufficient connection between Bayer's conduct and Plaintiffs' claims. A14, A25. Yet the Court never analyzed what that connection is or whether that connection actually gave rise to

[7] *See also id.* at 19 ("Without Bayer's Illinois connections and contacts, Plaintiffs would not have had their Essure contraceptive devices implanted."); A87 (Plaintiffs' motion to dismiss opposition arguing that, "[b]ut for Bayer's conduct in Illinois, Plaintiffs would not have been harmed.").

"the nonresidents' claims" and the "specific claims at issue," *Bristol-Myers*, 137 S. Ct. at 1781. That is what *Bristol-Myers* requires, and it is absent here.

At most, and as Plaintiffs' own brief demonstrates, the First Amended Complaint alleges an attenuated but-for link between Bayer's alleged actions in Illinois and the injuries the non-Illinois Plaintiffs allegedly suffered.[8] *See* Bayer Br. 23–29. The appellate court identified three categories of in-state activity as supporting the exercise of specific personal jurisdiction in Illinois: (1) clinical trials that took place, in part, in Illinois; (2) marketing activity that took place, in part, in Illinois; and (3) a physician training program that was developed, in part, in Illinois. *See* A13–14, A24–25. Bayer's brief shows in detail why none of those activities is a legal cause of the non-Illinois Plaintiffs' injuries. Bayer Br. 24–29. Plaintiffs fail to respond to this analysis, which only further confirms that they cannot meet the "legal cause" standard."[9]

In fact, the same Plaintiffs' counsel involved in this case has raised these exact arguments in Missouri, contending that state—not Illinois—was the locus of Essure's

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[8] And in fact, the Plaintiffs probably fail to meet even a but-for standard. For example, Plaintiffs allege that Bayer created marketing materials in Illinois, but they never allege that they viewed or relied on those specific materials in making the decision to undergo the Essure procedure. Similarly, Plaintiffs allege that Bayer developed a physician training program in Illinois, but the First Amended Complaint does not allege where or when Plaintiffs' physicians underwent the training program or how alleged deficiencies in the training program cause their injuries.

[9] Plaintiffs address only the clinical trial allegations with any degree of specificity. *See* Pls. Br. 21. Yet the facts Plaintiffs' rely on—the location of one of the (several) principal investigators in one of the (several) studies and allegedly inadequate post-study monitoring—have at best a highly attenuated but-for connection to the specific claims in issue in this appeal. Plaintiffs do not argue that they were injured in a clinical trial. Moreover, this collateral attack on the clinical trials themselves appears nowhere in the First Amended Complaint and is plainly precluded by federal law. *See* Bayer Br. 24 n.10.

nationwide marketing, testing, and training. For instance, in this brief, Plaintiffs' counsel argues that the nationwide Essure marketing and advertising strategy was "developed exclusively in Illinois," Pls. Br. 21, and rolled out nationwide. *See also, e.g.*, Pls. Br. 2, 7, 8, 13, 19. In Missouri, the same Plaintiffs' counsel argues that same nationwide marketing strategy was, in fact, "created *in Missouri*" and then rolled out nationwide. *See* Opp'n to Mot. to Dismiss at 20, *Johnson v. Bayer Corp.*, No. 1622-CC01049-01 (Mo. Cir. Ct. Mar. 13, 2018) (emphasis added); *see People v. Mosley*, 2015 IL 115872 ¶ 16 n.6 ("[W]e may take judicial notice of briefs filed in another case.").

Similarly, in this case Plaintiffs' counsel argues that the "Essure Accreditation Program" for "physician training" was "founded ... in Illinois" and "implemented across the country," *e.g.*, Pls. Br. 17, 21; in Missouri, Plaintiffs' counsel argues that Bayer partnered with Missouri-based companies to "creat[e] the Essure Accreditation Program" in Missouri, *Johnson* Opp. to Mot. to Dismiss 20. And while Plaintiffs' Counsel here stress that one of the locations for "the pivotal clinical trials for Essure was Chicago, Illinois," and allege that Bayer "contracted with Illinois physicians and key opinion leaders to conduct the clinical trials for Essure," Pls Br. 7, in Missouri, Plaintiffs' Counsel asserts that Bayer actually "conducted the pivotal clinical trials for Essure in Missouri" and "contracted with Missouri doctors and facilities to help conduct the clinical trials," *Johnson* Opp. to Mot. to Dismiss 7. These examples and several others, *see* Bayer Br. 7 & n.3 (identifying similar arguments raised in Pennsylvania, Indiana, and New Mexico), demonstrate that there is nothing *specific* about Plaintiffs' theory of specific personal jurisdiction – and that there is no adequate link between these allegations and Plaintiffs' claims. If this type of general allegation were sufficient,

companies operating nationwide would effectively be subject to nationwide general jurisdiction, a result directly contrary to the Supreme Court's holding rejecting general jurisdiction over companies in states in which they "engage[] in a substantial, continuous, and systematic course of business." *Daimler AG v. Baumann*, 134 S. Ct. 746, 749 (2014).

Plaintiffs also rely on two companion decisions from a California court as requiring only general connections between the forum state and the subject matter of the lawsuit. *See* Pls. Br. 25–26 (citing *Cortina v. Bristol-Myers Squibb Co.*, No. 17-cv-00247-JST, 2017 WL 2793808, at *4 (N.D. Cal. June 27, 2017) (Tigar, J.), and *Dubose v. Bristol-Myers Squibb Co.*, No. 17-cv-00244-JST, 2017 WL 2775034, at *4 (N.D. Cal. June 27, 2017) (Tigar, J.). State judges in California have found those decisions "not persuasive in light of the holding in *BMS* and the cases applying it," *In re Xarelto*, 2018 WL 809633, at *12, and ruled that clinical trial activity is "too attenuated to support the exercise of specific jurisdiction" over claims brought by out-of-state plaintiffs against out-of-state defendants. *See In re Pradaxa Cases*, 2019 WL 1177510, at *3; *accord, e.g.*, *In re Xarelto Cases*, 2018 WL 809633, at *10–11 (similar). Moreover, *DuBose* and *Cortina* contain the same flaw as Plaintiffs' argument here: they find personal jurisdiction on the ground that "*but for* the [defendant's conduct] within the State of California, the drugs would not have been sold and marketed throughout the U.S. nor ingested by Plaintiff." Pls. Br. 26 (quoting *Cortina*, 2017 WL 2793808, at *4).[10] In *Keller*, the

[10] Moreover, in those cases, the court noted that "nearly every pivotal clinical trial" took place in the forum state. *See* Pls. Br. at 26 (quoting *Cortina*, 2017 WL 2793808, at *4). Here, by contrast, Plaintiffs allege only that Illinois was "[o]ne of the locations [where] Bayer chose to conduct the pivotal clinical trials for Essure." *Id.* at 7; *see also* Bayer Br. 25–26 (describing the size and geographic scope of the Essure clinical trials).

Illinois Court of Appeals noted that California federal courts had applied this "but-for" standard, but declined to follow the decisions. 359 Ill. App. 3d at 617. Instead, it found the "legal cause" standard adopted by the Seventh Circuit and other circuits to be a "more concrete and workable standard," that "correctly considers the interest of the forum state while protecting the defendant's due process rights by providing jurisdiction only over causes of action directly arising out of or related to the defendant's contacts." *Id.*

Because the non-Illinois Plaintiffs' claims do not "aris[e] out of or relat[e] to" Bayer's contacts with Illinois, *Bristol-Myers*, 137 S. Ct. 1780, there is no specific personal jurisdiction over the claims of the non-Illinois Plaintiffs, and the decision below should be reversed.

III. EXERCISING JURISDICTION OVER THE NON-ILLINOIS PLAINTIFFS' CLAIMS IS UNREASONABLE.

Finally, in arguing that jurisdiction is reasonable, Plaintiffs point to the lower court's conclusions that litigation "will move forward in Illinois" with the Illinois Plaintiffs, and that "Illinois has an undeniable interest in resolving a dispute arising, in part, from clinical trials held in Illinois, by Illinois doctors, in Illinois facilities." Pls. Br. 30–31 (quoting A14, A25).

As Bayer's opening brief showed, neither of these arguments has merit. The clinical trials were conducted across the country, none of the non-Illinois Plaintiffs participated in an Essure clinical trial in Illinois, and none of the claims in the First Amended Complaint relate to the conduct of the clinical trials in Illinois or anywhere else. *See* Bayer Br. 24, 26. Illinois has no interest in claims brought by nonresident plaintiffs against nonresident defendants for alleged injuries that occurred elsewhere. And the mere fact that the 21 Illinois Plaintiffs' claims may be litigated in Illinois is no

reason to have the claims of the other 160 Plaintiffs who have no connection to Illinois tried in Madison County. The minimal burden of trying less than two dozen claims brought by local residents pales in comparison to the public and private costs of litigating scores of other cases from more than thirty other states.

Plaintiffs also do not respond to Bayer's showing that the "piecemeal litigation" concern, A14–15, A25–26, is a false dilemma. *See* Bayer Br. 30–31. It appears that all but five of the non-Illinois Plaintiffs in this case also *filed complaints raising the same issues in California state court*. Since Bayer first raised this issue, many of these Plaintiffs have voluntarily dismissed their California claims, and Bayer is not contesting personal jurisdiction over the remaining *Rios* or *Hamby* duplicate claims in that forum. *Id.*[11]. If the Plaintiffs wish to litigate their claims together, they could litigate them in that forum, or in another jurisdiction where defendants reside, or in their home state with other plaintiffs from or allegedly injured in that state. There is simply no reason for the 160 non-Illinois Plaintiffs' claims—none of which has anything to do with Illinois—to be tried in Madison Country.

CONCLUSION

For the foregoing reasons and those stated in Bayer's opening brief, the Court should reverse the order of the Fifth District Appellate Court and remand with instructions to dismiss the non-Illinois Plaintiffs' claims for lack of personal jurisdiction.

DATED: December 18, 2019 Respectfully Submitted,

By: /s/ W. Jason Rankin

[11] After Bayer raised this issue in the circuit court, some of the re-filing plaintiffs chose to voluntarily dismiss their California complaints. *See* Bayer Br. 30 n.12.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ W. Jason Rankin

Nos. 125020, 125021

IN THE
SUPREME COURT OF ILLINOIS

NICHOLE HAMBY ET AL., *Plaintiffs-Appellees* v. **BAYER CORPORATION ET AL.,** *Defendants-Appellants,* and **DOES 1–10,** *Defendants.*	On Appeal from the Appellate Court of Illinois, Fifth District, No. 5-18-0279 There on Interlocutory Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 16-L-1617 The Hon. William A. Mudge Judge Presiding
CHRISTINE RIOS ET AL. *Plaintiffs-Appellees* v. **BAYER CORPORATION ET AL.,** *Defendants-Appellants,* and **DOES 1–10,** *Defendants.*	On Appeal from the Appellate Court of Illinois, Fifth District, No. 5-18-0278 There on Interlocutory Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 16-L-1046 The Hon. Denis R. Ruth Judge Presiding

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 341(C)

W. Jason Rankin, being of adult age and under no legal disability, upon his sworn oath, certifies as follows:

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 17 pages.

FURTHER AFFIANT SAYETH NOT

W. Jason Rankin

STATE OF ILLINOIS)
)
COUNTY OF MADISON)

SUBSCRIBED AND SWORN to before me on this 18th day of December, 2019, W. Jason Rankin, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

(SEAL) Signature

"OFFICIAL SEAL"
PAMELA A. RAMSEY
NOTARY PUBLIC — STATE OF ILLINOIS
MY COMMISSION EXPIRES SEPT. 6, 2023

Nos. 125020, 125021

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PLEASE TAKE NOTICE that on December 18, 2019 we electronically filed the Reply Brief of Defendants-Appellants Bayer Corporation, Bayer HealthCare LLC, Bayer Essure Inc., and Bayer HealthCare Pharmaceuticals Inc. with the Clerk of the Illinois Supreme Court, copies of which are hereby served upon you.

DATED: December 18, 2019

Respectfully Submitted,

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