**No. 18-7162**

# United States Court of Appeals for the D.C. Circuit

WHOLE FOODS MARKET GROUP, INC.,

*Appellant*,

v.

MICHAEL MOLOCK, *et al.*,

*Appellees*.

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

On Appeal from the U.S. District Court
for the District of Columbia, No. 16-CV-02483 (APM)
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## CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amici curiae* the Chamber of Commerce of the United States of America and the Business Roundtable state:

Parties and *Amici*. All parties, intervenors, and other *amici* appearing in this Court are listed in the Brief of Appellant, except for Washington Legal Foundation, which filed a notice of intent to file an *amicus curiae* brief on February 1, 2019.

Rulings Under Review. An accurate reference to the rulings at issue appears in the Brief of Appellant.

Related Cases. An accurate statement regarding related cases appears in the Brief of Appellant.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amici curiae* the Chamber of Commerce of the United States of America (Chamber) and the Business Roundtable state:

The Chamber is a nonprofit corporation representing the interests of more than three million businesses of all sizes, sectors, and regions. The Chamber has no parent corporation, and no publicly held company owns 10% or more of its stock.

The Business Roundtable is an association of chief executive officers of leading U.S. companies. The Business Roundtable has no parent corporation, and no publicly held company owns 10% or more of it.

## STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief.† The Chamber of Commerce of the United States of America and the Business Roundtable filed their notice of intent to participate in this case as *amici curiae* on February 4, 2019.

Pursuant to Circuit Rule 29(d), *amici* certify that a separate brief is necessary to provide the unique perspective of *amici* and the businesses that they represent on the important personal jurisdiction issue presented by this case.

† No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

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## INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, such as personal jurisdiction issues.

The Business Roundtable is an association of chief executive officers who collectively manage nearly 15 million employees and over $7 trillion in annual revenues. The association was founded on the belief that businesses should play an active and effective role in the formation of public policy. It files *amicus curiae* briefs in a variety of contexts where important business interests are at stake.

Many of *amici*'s members conduct business in States other than their State of incorporation and State of principal place of business, the two connections that subject businesses to general personal jurisdiction. They therefore have a substantial interest in the rules under which

States can subject nonresident corporations to specific personal jurisdiction.

That is especially true in the class-action context. *Amici*'s members often are sued in putative nationwide class actions in States where they are not subject to general personal jurisdiction. *Amici*'s members have a strong interest in ensuring that *all* class members, not just the named plaintiffs, are required to establish the prerequisites for specific personal jurisdiction. Otherwise, those companies will be forced to defend against claims that lack the requisite connection to the forum States, claims for which the companies could not reasonably have expected to be sued in those States. Requiring only the named plaintiffs to establish specific personal jurisdiction would encourage untrammeled forum shopping and impose substantial harm on businesses and the judicial system.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises an important question of first impression in this Circuit: Whether, in a class action, a court must find that the defendant is subject to personal jurisdiction with respect to all class members' claims, or only with respect to the named plaintiffs' claims.

The answer to that question is clear: The court may allow the class action to proceed only if the defendant is subject to specific personal jurisdiction in the forum with respect to each class member's claim. If some class members cannot show the necessary connection between their claims and the defendant's activities in the forum – and they therefore could not maintain their claims as individual actions in the forum – the class action may not encompass those claims.

That rule follows from decades of Supreme Court precedent establishing that specific personal jurisdiction depends on a plaintiff-by-plaintiff, claim-by-claim assessment, so that a court in an action with multiple plaintiffs must find that the defendant has the necessary connection to the forum for each plaintiff's claim.

The Supreme Court recently applied that rule to reject an expansive exercise of specific jurisdiction in *Bristol-Myers Squibb Co. v.*

*Superior Court*, 137 S. Ct. 1773 (2017) (*BMS*). The Court held that a state court considering a mass tort action could not assert specific personal jurisdiction over the defendant with respect to claims of nonresident plaintiffs that lacked the necessary connection to the forum. *Id.* at 1778-79. The mere fact that the nonresident plaintiffs raised similar claims to the resident plaintiffs, the Court explained, was not enough to satisfy due process. *Id.* at 1781.

That analysis resolves this case. The only difference between this case and *BMS* is that *BMS* was a mass tort action and this case is a putative class action. But the same due process principles apply. Like the nonresident plaintiffs in *BMS*, many of the absent class members in this case could not bring their claims individually against the defendant in the forum State. Because those plaintiffs could not bring their claims in individual lawsuits, they could not bring them in a mass action and also may not do so in a class action.

*BMS* made clear that the Due Process Clause's protections for defendants do not change based on the number of plaintiffs. And in the class-action context, those protections are buttressed by the Rules Enabling Act, which bars plaintiffs from using the class-action device to

abridge defendants' substantive rights, including the right to contest personal jurisdiction over any individual's claim.

A contrary ruling would cause substantial harm to business and the judicial system. It would enable plaintiffs to avoid *BMS* and the strict limits on general personal jurisdiction by bringing nationwide class actions anywhere they could find one plaintiff with the requisite connection to the forum. That would eliminate the predictability that due process affords corporate defendants to allow them to structure their primary conduct. And it would allow the forum State to decide claims over which it has little legitimate interest, to the detriment of other States' interests.

This Court therefore should reverse the judgment of the district court.

## ARGUMENT

### I. THE DUE PROCESS CLAUSE BARS A COURT FROM EXERCISING SPECIFIC PERSONAL JURISDICTION OVER THE CLAIMS OF ABSENT CLASS MEMBERS THAT LACK THE REQUISITE CONNECTION TO THE FORUM

The Supreme Court's precedents, including its recent decision in *BMS*, establish that personal jurisdiction must be assessed on a plaintiff-by-plaintiff, claim-by-claim basis. That principle applies to

class actions just as it applied to the mass tort action in *BMS*. If the rule were otherwise, a plaintiff would be able to escape the limits of the Due Process Clause simply by bringing a case as a class action. And the Rules Enabling Act confirms that plaintiffs cannot use class actions to override the substantive defenses that would be available in individual actions.

### A. Specific Personal Jurisdiction Requires A Substantial Connection Between Each Class Member's Claim And The Defendant's Forum Contacts

Whether an exercise of personal jurisdiction comports with the "traditional notions of fair play and substantial justice" underlying the Due Process Clause generally depends on whether the defendant has certain minimum contacts with the forum State. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The Supreme Court has explained that those contacts can support two types of personal jurisdiction. First, a court may assert general, or "all-purpose," personal jurisdiction in States where a company is "essentially at home" – either because the State is the company's place of incorporation or its principal place of business. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (quoting *Daimler AG v. Bauman*,

571 U.S. 117, 127 (2014)). Second, a court may assert specific, or "case-linked," personal jurisdiction in a State where the lawsuit arises out of, or relates to, the defendant's activities in the State. *Daimler AG*, 571 U.S. at 122, 127.

This case concerns only specific jurisdiction. To exercise specific jurisdiction over a defendant, a court must conclude that the defendant's "suit-related conduct" creates a substantial connection with the forum State. *Walden v. Fiore*, 571 U.S. 277, 284 (2014). That is, the court must find a substantial relationship between the forum, the defendant, and the particular plaintiff's claim, so that it is "reasonable" to call the defendant into that court to defend against that claim. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

The Supreme Court recognized this principle more than 70 years ago in its seminal decision in *International Shoe*. The Court explained that a State may exercise personal jurisdiction over an out-of-state defendant based on its in-state activities because the defendant that obtains "the privilege of conducting activities within a state" must accept the "obligations" that "arise out of or are connected with the activities within the state," including the obligation to respond to claims

arising out of its in-state activities in the State's courts. 326 U.S. at 319-20.

Since *International Shoe*, the Supreme Court has reaffirmed that a court's exercise of specific jurisdiction depends on the link between the plaintiff's claim and the defendant's activity in that jurisdiction. For example, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), the Court observed that the "essential foundation" of specific jurisdiction is the "relationship among the defendant, the forum, and the litigation." *Id.* at 414. Similarly, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), the Court explained that specific jurisdiction "depends on an affiliation between the forum and the underlying controversy," and a court asserting specific jurisdiction therefore is "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Id.* at 919 (internal quotation marks and alteration omitted).

That limitation on personal jurisdiction reflects the fairness concerns animating the Due Process Clause. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 472 (1985). It provides a "degree

of predictability" to defendants, especially corporate defendants, so that they can "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. And it protects important federalism interests by preventing States from reaching beyond their borders to adjudicate claims over which they "may have little legitimate interest." *BMS*, 137 S. Ct. at 1780-81.

### B. The Supreme Court's Decision In *BMS* Confirms That Specific Personal Jurisdiction Must Exist For Each Plaintiff's Claim

The Supreme Court recently applied those settled principles in a case involving multiple plaintiffs and reaffirmed that the court must find specific personal jurisdiction with respect to each plaintiff's claim.

In *BMS*, 86 California residents and 592 plaintiffs from other States sued BMS in California, alleging injuries from taking the drug Plavix. 137 S. Ct. at 1778. The nonresident plaintiffs did not claim any connections with California: They "were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California." *Id.* at 1781. Nonetheless, the California Supreme Court upheld the state court's

assertion of specific jurisdiction over the nonresidents' claims, on the theory that the nonresidents' claims were "similar in several ways" to the claims of the California residents (for which there was specific jurisdiction). *Id.* at 1778-79.

The U.S. Supreme Court reversed, finding no "adequate link between the State and the nonresidents' claims." 137 S. Ct. at 1781. The fact that "*other* plaintiffs" (*i.e.*, the resident plaintiffs) "were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims." *Id.* That is because the defendant must have a sufficient relationship to the forum with respect to each plaintiff's claim; the fact that the defendant has the necessary relationship with respect to some plaintiffs' claims is not sufficient. *Id.*; *see Walden*, 571 U.S. at 286 ("[A] defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction."). That is true even when the claims raised by the resident and nonresident plaintiffs are similar. *BMS*, 137 S. Ct. at 1781. The *BMS* Court explained that its conclusion followed

from its "straightforward application . . . of settled principles of personal jurisdiction." *Id.* at 1783.

In rejecting the California Supreme Court's theory of tack-on jurisdiction, the Supreme Court relied on the fairness, predictability, and federalism interests underlying its specific jurisdiction decisions. The Court's "primary concern" in assessing the California court's exercise of specific jurisdiction was "the burden on the defendant," which included both "the practical problems resulting from litigating in the forum" and "the more abstract matter of" requiring a defendant to "submit[] to the coercive power of a State" lacking any legitimate interest in the dispute. *BMS*, 137 S. Ct. at 1780. Without the necessary link to the forum for each plaintiff's claim, the Court explained, it would be unfair to require the defendant to appear in the forum to answer that claim. *Id.*

The Supreme Court summarized: "What is needed – and what is missing here – is a connection between the forum and the *specific claims at issue*." *BMS*, 137 S. Ct. at 1781 (emphasis added). That is, to assert specific personal jurisdiction over a defendant to adjudicate

multiple plaintiffs' claims, the court must find the necessary contacts for every plaintiff's claim, not just some plaintiffs' claims.

### C. The Supreme Court's Reasoning In *BMS* Applies Equally To Class Actions

In a putative class action, as in the mass tort action in *BMS*, multiple plaintiffs attempt to bring similar claims against the same defendant in the same forum. To assert personal jurisdiction over the plaintiffs' claims, the court must find that the defendant has the requisite connection between the forum and "the specific claims at issue," *BMS*, 137 S. Ct. at 1781, meaning every putative class member's claim. The fact that resident plaintiffs can establish specific personal jurisdiction over the defendant does not allow them to bootstrap the claims of nonresident plaintiffs. *See Walden*, 571 U.S. at 286. And the similarity among plaintiffs' claims does not excuse the requirement that each claim be adequately linked to the defendant's conduct in the forum. *BMS*, 137 S. Ct. at 1779, 1781. Put simply, a plaintiff cannot override the due process limits that prevent him from bringing a claim in the forum in an individual action by bundling that claim with similar claims by other individuals that may be asserted in that forum.

The Court's concern in *BMS* was that the defendant corporation could not reasonably expect, based on its activities within the forum, that it would be subject to suit there for claims by nonresident plaintiffs that are unconnected to the forum. *BMS*, 137 S. Ct. at 1780; *see World-Wide Volkswagen*, 444 U.S. at 297. That concern applies equally to both mass actions and putative class actions. "[A] defendant's due process rights should remain constant regardless of the suit against him, be it an individual, mass, or class action." *Leppert v. Champion Petfoods USA Inc.*, No. 18C4347, 2019 WL 216616, at *4 (N.D. Ill. Jan. 16, 2019).

More generally, the fairness, predictability, and federalism interests motivating the Court's decision in *BMS* apply equally, if not more so, to class actions. From the defendant's perspective, it is at least as bad – if not worse – to be forced to litigate the claims of hundreds or thousands of absent class members whose claims are unconnected to the forum as it is to be forced to litigate the claims of hundreds of individuals in a mass tort action whose claims are unconnected to the forum. In either case, it is unfair to hale the defendant into a State's court to defend against claims that are unconnected to that State.

In addition, allowing a State to assert jurisdiction over the claims of a putative nationwide class based on a single named plaintiff's connection to the forum would permit the forum State to decide claims as to which it has insufficient legitimate interest, infringing on the authority of other States. *See BMS*, 137 S. Ct. at 1780. The requirement of a relationship between each plaintiff's claim and the defendant's forum State activities ensures that States "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292.

Whether multiple plaintiffs' claims are presented in a mass action or in a putative class action, a forum State's exercise of specific jurisdiction is justified only by its legitimate interest in regulating the activity on which a particular plaintiff's claim is based. If some plaintiffs lack the requisite connection to the forum, then the court cannot assert specific personal jurisdiction over the defendant with respect to their claims.

This Court therefore should hold that a named plaintiff in a putative class action cannot represent absent class members who would

be precluded by the Due Process Clause from asserting their claims individually in the forum State. If the rule were otherwise, plaintiffs could make an end-run around *BMS* by bringing cases as class actions rather than multiple individual lawsuits or mass actions.

*BMS* involved 678 plaintiffs from 34 different States asserting similar tort claims against BMS in California. 137 S. Ct. at 1778. This case involves five remaining named plaintiffs who wish to represent a nationwide class of thousands of current and former Whole Foods employees in asserting similar employment-related claims in the District of Columbia. J.A. 1-5, 69.

In both cases, some plaintiffs are residents of the forum State who can establish personal jurisdiction over the defendant for their claims, and other plaintiffs are nonresidents who cannot establish the necessary connection. It would make no sense to allow all of the plaintiffs in this case to proceed with their claims when the Court prohibited the nonresident plaintiffs from doing so in *BMS*.

### D. The District Courts' Reasons For Distinguishing *BMS* Lack Merit

No court of appeals has yet addressed the question presented. The district courts that have considered the issue have divided. *See*

J.A. 20. None of the reasons given by the district court here (or the other district courts reaching the same result) has merit.

1. The district court's decision rests on the view that the Due Process Clause affords the same defendant different protections depending on whether the individual asserting a claim is a named plaintiff or an absent member of a putative class. That is mistaken.

A Rule 23 class action is a "species" of "traditional joinder" that "enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). It is a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). There is nothing special about a class action that overrides the due process principles recognized by the Supreme Court. "Due process requires that there be an opportunity to present every available defense," *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted), including the defense that the court may not exercise personal jurisdiction over a plaintiff's claims.

The Rules Enabling Act confirms that plaintiffs cannot use the class-action device to make an end-run around the due process constraints on specific personal jurisdiction. The Act provides that rules of procedure, including Federal Rule of Civil Procedure 23 (which sets the rules for class actions), "shall not abridge, enlarge[,] or modify any substantive right." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting 28 U.S.C. § 2072(b)). That means a plaintiff cannot deprive a defendant of a defense it would have in an individual action by bringing the case as a class action.

The Supreme Court has enforced the Rules Enabling Act's command in the class-action context. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), for example, the Court refused to permit class certification that would prevent the defendant from litigating a statutory defense to individual claims. *Id.* at 367. A contrary rule, the Court explained, would "interpret[] Rule 23 to 'abridge, enlarge or modify any substantive right'" in violation of the Act. *Id.*

That reasoning is not limited to statutory defenses, but applies equally to individual defenses based on constitutional due process, such as a personal jurisdiction defense. For that reason, the district courts

that have (correctly) applied *BMS* in the class-action context have recognized that the Rules Enabling Act requires "consistent and uniform application of defendants' due process rights" between "class actions under Rule 23" and "individual or mass actions." *Mussat v. IQVIA Inc.*, No. 17C8841, 2018 WL 5311903, at *6 (N.D. Ill. Oct. 26, 2018).

Here, the district court distinguished mass tort actions from class actions on the ground that, "for a case to qualify for class action treatment, it needs to meet the additional due process standards for class certification under Rule 23 – numerosity, commonality, typicality, adequacy of representation, predominance and superiority." J.A. 14 (quoting *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 09-2047, 2017 WL 5971622, at *14 (E.D. La. Nov. 30, 2017)). In the district court's view, those "additional elements of a class action supply due process safeguards not applicable in the mass tort context." *Id.*

But the requirements of Rule 23 differ from, and do not satisfy, the due process requirements to establish personal jurisdiction. Due process requires a substantial relationship between the defendant, the forum, and the particular claim. Nothing in Rule 23 ensures that that

relationship exists. Rule 23 requires that the plaintiffs' claims be similar, and that the named plaintiffs' claims be typical of other class members' claims – but mere similarity of claims or a relationship between the plaintiffs is not enough to satisfy the due process limits on personal jurisdiction. *BMS*, 137 S. Ct. at 1781. The fact that claims are numerous or that a class action might be an efficient way to resolve them likewise does not show the necessary relationship to the forum. And without that relationship, it would be unfair to require the defendant to have to answer for those claims in that court.

2. The district court here also refused to apply *BMS* because it believed doing so "would effectively eviscerate all multi-state class actions." J.A. 13 (internal quotation marks omitted). That is incorrect. Plaintiffs can file a nationwide class action anywhere that the defendant is subject to general personal jurisdiction. *See BMS*, 137 S. Ct. at 1783 ("Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS."); *see also, e.g.*, *Leppert*, 2019 WL 216616, at *4; *Chavez v. Church & Dwight Co.*, No. 17C1948, 2018 WL 2238191, at *9-*11 (N.D. Ill. May 16, 2018). That outcome is

sensible, because a defendant would expect that it could be sued in its home State by plaintiffs from any State for any type of claim. Indeed, that is the essence of general personal jurisdiction. *See, e.g.*, *BNSF Ry.*, 137 S. Ct. at 1558-59.[1]

Other district courts have suggested that "[i]f due process acted as a constraint on nationwide class actions, then settlement classes would also be uncertifiable." *Chinese-Manufactured Drywall*, 2017 WL 5971622, at *18. That rationale is mistaken. First, a court could certify a settlement class limited to claims for which there is the necessary connection to the forum. And if the defendant desired a broader settlement class, it could waive its personal jurisdiction defense. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999). A defendant is free to trade its due process right to contest the personal jurisdiction over the claims of each putative class member for certainty and finality. But that is the defendant's choice, and if the defendant chooses to litigate, it does not lose its personal jurisdiction defense

[1] Plaintiffs also could bring suit in one place if all class members' claims arose out of the defendant's contacts with the forum, regardless of where the class members happen to reside.

simply because the plaintiffs brought the case as a class action. *See Wal-Mart*, 564 U.S. at 367.

At least one district court reasoned that the Class Action Fairness Act of 2005 (CAFA) supports the view that "personal jurisdiction in federal court is permissible even when there are nonresident plaintiffs or class members whose claims arise from conduct outside of the forum state." *Chinese-Manufactured Drywall*, 2017 WL 5971622, at *18. But CAFA says nothing about personal jurisdiction. Instead, it expands the subject-matter jurisdiction of the federal district courts so that they can hear certain high-stakes diversity cases. *See* 28 U.S.C. §§ 1332(d), 1453. If Congress wished to create nationwide personal jurisdiction anywhere a qualifying class action is filed, it would have said so. And such an authorization of personal jurisdiction still would be limited by due process constraints.

Some district courts have permitted class actions to proceed without requiring absent class members to establish personal jurisdiction over their claims in order to "promot[e] expediency in class action litigation." *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17CV564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017). But

the desire for efficiency cannot override constitutional rights. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). The Due Process Clause "is not intended to promote efficiency or accommodate all possible interests"; "it is intended to protect the particular interests of the person" whose rights are at stake. *Fuentes v. Shevin*, 407 U.S. 67, 91 n.22 (1972); *see BMS*, 137 S. Ct. at 1780-81 ("[R]estrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation," and they apply "even if the forum State is the most convenient location for litigation.") (internal quotation marks omitted). In the personal jurisdiction context, fundamental fairness is satisfied only when the defendant has sufficient contacts with the forum to justify subjecting the defendant to suit in the forum's courts. *Int'l Shoe*, 326 U.S. at 319-20.

3. The district court suggested that differences between named plaintiffs and absent class members affect the availability of a personal jurisdiction defense against their claims. The court noted that an absent class member is not a "real party in interest to the complaint,"

meaning that the absent class member is not named as a plaintiff in the complaint. J.A. 14 (citing *Fitzhenry-Russell*, 2017 WL 4224723, at *5).

But the district court did not explain why that should matter. To the extent that the argument rests on the fact that absent class members are not parties before the court certifies the class, then the argument is circular. Saying that the class has not yet been certified does not answer the question whether a class that includes nonresident plaintiffs can be certified. And once the class is certified, the absent class members become parties for all relevant purposes, including gaining the benefit of the eventual judgment. *See United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018).

Some district courts have relied on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), to treat named plaintiffs and absent class members differently. *See Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1365-66 (N.D. Ga. 2018); *Chinese-Manufactured Drywall*, 2017 WL 5971622, at *12.

In *Shutts*, the Supreme Court considered the due process rights of absent class-action plaintiffs. It held a state court could exercise personal jurisdiction over those class members' claims as long as it

provided them with notice and an ability to opt out of the suit. 472 U.S. at 808-12. The defendant in *Shutts* did not raise any personal jurisdiction objection, and so the Supreme Court did not consider one.

Significantly, the *Shutts* Court recognized that plaintiffs and defendants are differently situated for personal jurisdiction purposes. "The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant": The out-of-state defendant is "faced with the full powers of the forum State to render judgment against it" and therefore must "hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgment." 472 U.S. at 808. By contrast, "an absent class-action plaintiff is not required to do anything." *Id.* at 810. Because of those "fundamental differences" between absent class plaintiffs and defendants, "the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter." *Id.* at 811.

Accordingly, the fact that due process allows a court to exercise jurisdiction over out-of-state plaintiffs in certain circumstances does not mean that the same rules apply to out-of-state defendants. The *BMS*

Court made just this point: "Since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here." 137 S. Ct. at 1783; *see, e.g.*, *Mussat*, 2018 WL 5311903, at *5; *Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840, 862 (N.D. Ill. 2018).

Some courts have relied on the statement in *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002), that nonnamed plaintiffs "may be some parties for some purposes and not for others." *E.g.*, *Fitzhenry-Russell*, 2017 WL 4224723, at *5. But the *Devlin* Court held that nonnamed class members *are* considered parties for purposes of appeal because they are bound by the judgment. 536 U.S. at 10-11. If absent class members are considered parties to protect their own interests in a binding judgment, surely they are considered parties for purposes of personal jurisdiction, a constitutional defense protecting a defendant's interests in not being haled into an inappropriate court and being bound by its judgment.

4. Finally, some district courts have distinguished *BMS* on the ground that the federalism interests supporting the Court's Fourteenth Amendment due process analysis "do not apply" in federal court. *Chinese-Manufactured Drywall*, 2017 WL 5971622, at *20; *see, e.g.*,

*Sanchez*, 297 F. Supp. 3d at 1366-67. But this is a diversity case where the federal court is adjudicating state-law claims, and so the personal-jurisdiction principles "embodied in the Due Process Clause of the Fourteenth Amendment" apply. *Burger King*, 471 U.S. at 464. As this Court has held, "[i]n a diversity case, the [D.C.] federal district court's personal jurisdiction over the defendant is coextensive with that of a District of Columbia court." *Helmer v. Doletskaya*, 393 F.3d 201, 205 (D.C. Cir. 2004). The district court in this case recognized as much when it rejected plaintiffs' attempt to "limit[] *Bristol-Myers* to state courts." J.A. 12.[2]

The federalism-based concerns set out in *BMS* therefore are fully applicable here. This putative class action involves state-law claims not only from resident plaintiffs, but plaintiffs from Georgia, Maryland,

[2] The Supreme Court has left "open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court" as the Fourteenth Amendment does. *BMS*, 137 S. Ct. at 1784. There is no need to address that question here because this is a diversity case involving only state-law claims. J.A. 4-6; *see Burger King*, 471 U.S. at 464. In any event, this Court recently rejected the view that "the Fifth Amendment's Due Process Clause imposes personal-jurisdiction restrictions that are less protective of defendants than those imposed by the Fourteenth Amendment." *Livnat v. Palestinian Auth.*, 851 F.3d 45, 54 (D.C. Cir. 2017).

North Carolina, Oklahoma, Virginia, and "throughout the country." J.A. 4; *see id.* at 6. If the district court adjudicates all of those claims, it will be "reaching out beyond [its] limits," *World-Wide Volkswagen*, 444 U.S. at 292, to resolve matters over which many other States have legitimate interests. That could be permissible if the District of Columbia had its own interest in resolving the claims because the claims arose out of the defendant's activities in the forum. But it does not.

The district court recognized the importance of other States' interests when it applied *BMS* to dismiss the claims of the nonresident *named* plaintiffs on the ground that those claims "simply have nothing to do with this forum." J.A. 13. The same is true of the claims of the nonresident *absent* plaintiffs, and the district court should have dismissed those claims for lack of personal jurisdiction as well.

## II. PERMITTING A COURT TO EXERCISE SPECIFIC PERSONAL JURISDICTION OVER ABSENT CLASS MEMBERS' CLAIMS WITH NO CONNECTION TO THE FORUM WOULD HARM BUSINESSES AND THE JUDICIAL SYSTEM

The decision below not only violates core due process principles, but if upheld, it would impose serious, unjustified burdens on the

business community and the courts. These burdens provide an additional, compelling reason to reverse the decision below.

### A. The District Court's Rule Would Encourage Abusive Forum Shopping

The district court's rule would encourage class-action plaintiffs to engage in abusive forum shopping. Not long ago, the plaintiffs' bar relied heavily on expansive theories of general jurisdiction to bring nationwide or multi-state suits in plaintiff-friendly "magnet jurisdictions." U.S. Chamber Inst. for Legal Reform, BMS *Battlegrounds: Practical Advice for Litigating Personal Jurisdiction After* Bristol-Myers 3-5 (June 2018), https://bit.ly/2TulA0d.

The Supreme Court responded to that abuse by limiting general personal jurisdiction to the places the defendant corporation can fairly be considered "at home." *BNSF Ry.*, 137 S. Ct. at 1558. Even a "substantial, continuous, and systematic course of business" by the defendant in the forum State, the Court explained, is not enough to support general jurisdiction. *Daimler AG*, 571 U.S. at 138.

But if the district court's rule were accepted, the plaintiffs' bar would be able to make an end-run around those limits on general personal jurisdiction by bringing cases as class actions. The decision

below enables plaintiffs' lawyers to file a nationwide class action anywhere that even a single individual with the requisite forum connection is willing to sign up as a named plaintiff – even though the State has no "legitimate interest" in the vast majority of the putative class's claims. *BMS*, 137 S. Ct. at 1780; *see DeBernardis v. NBTY, Inc.*, No. 17C6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 1, 2018) (noting that "forum shopping is just as present in multi-state class actions" as it is in "mass torts").

Permitting such a suit to be brought on a specific jurisdiction theory – especially when nearly all of the plaintiffs are nonresidents and have claims based on out-of-state conduct – would in effect "reintroduce general jurisdiction by another name" and on a massive scale. Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675, 687 (2015). Just as with expansive theories of general personal jurisdiction, the forum State's assertion of authority in those circumstances would be "unacceptably grasping." *Daimler AG*, 571 U.S. at 138-39 (internal quotation marks omitted).

And there is no logical stopping point. Under the district court's rule, out-of-state absent class members could outnumber the in-state named plaintiffs and absent class members by 500:1, or even 5000:1, and still invoke specific jurisdiction. In *BMS*, the nonresident plaintiffs outnumbered the California plaintiffs 592 to 86. 137 S. Ct. at 1778. In the class-action context, the ratio of out-of-state class members to in-state class members could be the same or larger.

This is a real, not hypothetical, problem. For example, in *Fitzhenry-Russell*, a lawsuit brought in California, the district court noted "that 88% of the class members are not California residents," a number it characterized as "decidedly lopsided." 2017 WL 4224723, at *5. Yet that court still exercised personal jurisdiction "as to the putative nationwide class claims." *Id.*

Similarly, in *Braver v. Northstar Alarm Services, LLC*, the court rejected the application of *BMS* in the class-action context and permitted a single Oklahoma named plaintiff to represent a nationwide class of 239,630 people located "across most of the country." No. 17-0383, 2018 WL 6929590, at *3-*4 (W.D. Okla. Oct. 15, 2018). Although the court did not break down the numbers of Oklahoma and non-

Oklahoma class members, Oklahoma contains just over 1% of the nation's population – meaning that if class members are proportionally distributed across the country, then almost 99% of the claims have no connection to the forum. *See also, e.g.*, *Maclin v. Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845, 847 (N.D. Ohio 2018) (in opt-in collective action, only 14 of 438 total employees, or about 3%, worked in Ohio, the forum State).

This abusive forum shopping violates basic principles of federalism. Under the district court's rule, courts in the forum State could decide claims over which they have little legitimate interest, including claims based on conduct that occurred exclusively in other States. That would substantially infringe on the authority of those other States to control conduct within their borders. As the Supreme Court has recognized, defendants should not have to "submit[] to the coercive power of a State" with "little legitimate interest in the claims in question." *BMS*, 137 S. Ct. at 1780.

In sum, the district court's rule would create a new way for plaintiffs' lawyers to forum shop, allowing them to file a limitless number of claims in a desired forum so long as the claims are brought

in a class action and one named plaintiff can establish specific personal jurisdiction over the defendant.

### B. The District Court's Rule Would Make It Exceedingly Difficult For Businesses To Predict Where They Could Be Sued

Relatedly, the district court's rule would make it nearly impossible for corporate defendants to predict where plaintiffs could bring high-stakes, nationwide or multi-state class-action lawsuits based on a specific personal jurisdiction theory. That in turn would cause economic harm.

The due process limitations on specific personal jurisdiction "give[] a degree of predictability to the legal system" so that "potential defendants" are able to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297; *see J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion). That "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (rejecting expansive interpretation of "principal place of business" in CAFA).

Under existing standards for specific personal jurisdiction, a company "knows that . . . its potential for suit [in a State] will be limited to suits concerning the activities that it initiates in the state." Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. Rev. 1313, 1346 (2005). But if the district court's rule were accepted, a company could be forced into a State's court to answer for claims entirely unrelated to that State. The company would have no way of predicting which plaintiffs' claims that lawsuit would include, or how many.

Businesses that sell products or services nationwide, or employ individuals in several States across the country, would have no way of avoiding nationwide class action litigation in any of those States. And they could be forced to litigate a massive number of claims in one State even though most, or even virtually all, of the claims arise from out-of-state conduct – no matter how "distant or inconvenient" the forum State. *World-Wide Volkswagen*, 444 U.S. 292. The district court's rule therefore would eviscerate the predictability and fairness guaranteed by the Due Process Clause.

The harmful consequences of this unpredictability would not be limited to businesses. The costs of litigation surely would increase if businesses are forced to litigate high-stakes class actions in unexpected forums. And some of that cost increase would invariably be borne by consumers in the form of higher prices.

Fortunately, there is an easy way to avoid the harmful consequences of the district court's rule. The Supreme Court set out the governing rule in *BMS*. This Court should follow that guidance and hold that, in a putative class action, the court may adjudicate only those claims that could have been brought in the forum as individual actions.

## CONCLUSION

The judgment below should be reversed.

Dated: February 4, 2019

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,482 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

Dated: February 4, 2019

/s/ *Nicole A. Saharsky*
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## CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(c) and Circuit Rule 25(a), I hereby certify that on February 4, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: February 4, 2019

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