No. 19-1204

In the

United States Court of Appeals

for the

Seventh Circuit

FLORENCE MUSSAT, M.D., S.C.,

Plaintiff-Appellant,

v.

IQVIA, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Illinois, Case No. 17-cv-8841
Hon. Virginia M. Kendall

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1204

Short Caption: Florence Mussat, M.D., S.C. v. IQVIA, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

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Attorney's Signature: s/ Steven P. Lehotsky Date: April 19, 2019

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INTEREST OF THE *AMICUS 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 Chamber files this brief to address the important personal jurisdiction issue in this case.[1]

Many of the Chamber's members conduct business in States other than their State of incorporation and State of principal place of business, the two places where they would be subject to general personal jurisdiction. Those members therefore have a substantial interest in the rules under which States can subject nonresident corporations to specific personal jurisdiction.

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

That is especially true in the class-action context. The Chamber's members often are sued in putative nationwide class actions in States where they are not subject to general personal jurisdiction. The Chamber'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 on 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 putative 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. A court faced with 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 class members in this case could not bring their claims individually against the defendant in the forum and they therefore may not bring them there as a mass action or a class action.

The Due Process Clause's protections do not change based on the number of plaintiffs or the procedural device used to aggregate multiple plaintiffs' claims. 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, which include the right to contest personal jurisdiction over any individual's claim.

Plaintiff contends that those settled due-process principles do not apply because this is a case in federal court involving a federal cause of action. But under Federal Rule of Civil Procedure 4(k), federal courts follow the personal jurisdiction rules of the States in which they sit unless Congress separately has authorized service of process. And when state rules provide the basis for subjecting the defendant to the court's jurisdiction, personal jurisdiction is evaluated under the Due Process Clause of the Fourteenth Amendment. The Supreme Court so held in *Walden v. Fiore*, 571 U.S. 277, 283 (2014), when it applied the Fourteenth Amendment's Due Process Clause to assess personal jurisdiction with respect to a federal claim in federal court.

Here, the federal statute at issue does not authorize service of process, so Illinois personal jurisdiction rules apply, and personal jurisdiction is evaluated under the Due Process Clause of the Fourteenth Amendment.

Reversing the district court's holding—and permitting plaintiffs to use the class-action device to circumvent the protections of the Due Process Clause—would cause substantial harm to businesses and to 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 should affirm the decision of the district court.

ARGUMENT

I. The Due Process Clause Bars A Court From Exercising Specific Personal Jurisdiction Over Class Members' Claims 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*.

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).

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. 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*, 571 U.S. at 284. 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 foundational decision in *International Shoe*. The Court explained that a State may exercise personal jurisdiction over an out-of-state defendant based on the defendant's in-state activities because a party 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 in the State's courts to claims arising out of its in-state activities. 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 that 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. *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" (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.* 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.

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).

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

1. 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 the requisite connection between the defendant and the forum for "the specific claims at issue," *BMS*, 137 S. Ct. at 1781, meaning each putative class member's claim. The fact that class members resident in the forum can establish specific personal jurisdiction over the defendant with respect to their claims does not allow them to bootstrap jurisdiction for the claims of nonresident class members. *See Walden*, 571 U.S. at 286.

BMS makes clear that similarity among plaintiffs' claims does not excuse the requirement that each claim be adequately linked to the defendant's conduct in the forum. 137 S. Ct. at 1779, 1781. Put simply, a plaintiff cannot override the due process limits that prevent him from

bringing an individual action in a particular forum by bundling his claim with similar claims by other individuals that can 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. "Whether it be an individual, mass, or class action, the defendant's rights should remain constant." S.A. 13; *see, e.g.*, *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 723 (E.D. Mo. 2019); *Leppert v. Champion Petfoods USA Inc.*, No. 18C4347, 2019 WL 216616, at *4 (N.D. Ill. Jan. 16, 2019).

More generally, the 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 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 require the defendant to appear in the State 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. 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 when it has a legitimate interest in adjudicating those particular claims. When 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.

If the rule were otherwise, plaintiffs could make an end-run around *BMS* by bringing cases as class actions rather than as 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 a single Illinois named

plaintiff that wishes to represent a nationwide class of an unknown number of fax recipients to assert a violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA), in federal court in Illinois. S.A. 2. Plaintiff does not attempt to limit the class to entities that received faxes in Illinois. S.A. 7.

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

This Court therefore should hold that a named plaintiff in a putative class action cannot represent class members who would be precluded by the Due Process Clause from asserting their claims individually in the forum State.

2. Plaintiff contends that differences between named plaintiffs and absent class members affect the availability of a personal jurisdiction defense against their claims. That view is mistaken.

a. 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. To the contrary, "[d]ue 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 a personal jurisdiction defense.

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. It provides that rules of procedure, including Rule 23, "'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)).

The Supreme Court enforced the Rules Enabling Act's command with respect to Rule 23 in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338

(2011). In that case, 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. *Cf. In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018) (*Dukes* applies to "a challenge to a plaintiff's ability to prove an element of liability," which implicates defendants' Seventh Amendment and due process rights). The district court therefore correctly 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." S.A. 13.

Plaintiff also contends (Br. 23-24) that named plaintiffs and proposed class members are differently situated because proposed class members are not parties until the court certifies the class. But that argument is circular. Saying that the class has not yet been certified

does not answer the question whether a proposed class can be certified when it includes claims that could not be brought in the forum as individual actions. And once a class is certified, the class members who were not named in the complaint 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).

b. Plaintiff relies (Br. 13-14) on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), to support its proposed rule, but that reliance is misplaced.

In *Shutts*, the Supreme Court considered the due process rights of absent class-action *plaintiffs*. It held a state court could subject those plaintiffs to its jurisdiction—and bind them to a judgment—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 objection to the state court's exercise of personal jurisdiction over it, and so the Supreme Court did not consider one.

Significantly, the *Shutts* Court recognized that the test for subjecting an absent plaintiff to a court's jurisdiction is different from, and less rigorous than, the test for asserting jurisdiction over a

nonresident defendant. "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 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.*, S.A. 11-12; *Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840, 862 (N.D. Ill. 2018).

c. Plaintiff's *amicus* attempts (Br. 16-17) to distinguish mass tort actions from class actions on the ground that a case must meet the requirements of Rule 23 to be certified as a class action and (in its view) the Rule 23 requirements satisfy due process. *See, e.g.*, *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 126 (D.D.C. 2018) (accepting that argument), *appeal pending*, No. 18-7162 (D.C. Cir.). 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.

Plaintiff's *amicus* also relies (Br. 15, 20-21) on *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002), which stated that unnamed class members "may be parties for some purposes and not for others." But the *Devlin* Court held that unnamed class members *are* considered parties for purposes of appeal because they are bound by the judgment. *Id.* at 10-11. If class members who are not named in the complaint are considered parties for protecting their own interests that are affected by 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 unfair forum and being bound by its judgment.

D. The Due Process Clause Of The Fourteenth Amendment Applies In This Case

Plaintiff (Br. 29-31) and its *amicus* (Br. 7-16) attempt to distinguish *BMS* on the ground that the Court's Fourteenth Amendment due process analysis does not apply in federal court. That contention is wrong, and the Supreme Court and this Circuit already have rejected it.

The Due Process Clause of the Fourteenth Amendment limits the exercise of personal jurisdiction in this case because Federal Rule of Civil Procedure 4(k) incorporates state personal jurisdiction rules and the Fourteenth Amendment limitations on them. As the Supreme Court has explained, "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Walden*, 571 U.S. at 283 (quoting *Daimler AG*, 571 U.S. at 125). That is because Federal Rule of Civil Procedure 4(k) directs federal courts to follow the personal jurisdiction rules of the States in which they sit unless Congress separately has authorized service of process for a particular federal claim or defendant.

Specifically, Rule 4(k)(1)(A) provides that service of process "establishes personal jurisdiction over [the] defendant" if the defendant "is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). Rule 4(k) does not merely address service of process by the named plaintiff; rather, it voluntarily incorporates state personal jurisdiction rules, which include the limitations imposed by the Due Process Clause of the Fourteenth Amendment. After all, a defendant could not be "subject to

the jurisdiction of" a state court (as required by the Rule) if due process precluded the state court from asserting jurisdiction over it.

The Supreme Court has so held. In *Walden*, the Court considered the due-process limitations applicable to a Fourth Amendment claim that individuals brought against a state police officer in federal court in Nevada. 571 U.S. at 281. Even though the case involved a federal claim brought in federal court, the Court applied the Due Process Clause of the Fourteenth Amendment to evaluate personal jurisdiction. The Court explained that, under Rule 4(k), "a federal district court's authority to assert personal jurisdiction in most cases is linked to service of process" on a defendant that is subject to personal jurisdiction in the State where the federal court sits. *Id.* at 283 (citing Fed. R. Civ. P. 4(k)(1)(A)). That was the case in *Walden*, and so the Court asked "whether the exercise of jurisdiction comports with the limits imposed by federal due process on the State of Nevada" by the Fourteenth Amendment. *Id.* (quotation marks omitted).

Walden was a federal-question case, but the Court has applied the same rule to diversity cases in federal court, explaining that because federal law incorporates state jurisdictional rules, the personal

jurisdiction principles "embodied in the Due Process Clause of the Fourteenth Amendment" apply. *Burger King*, 471 U.S. at 464. The federal government recognizes this as well. *See* U.S. Br. at *1, *BMS* (No. 16-466), 2017 WL 1046237 (noting that, because of Rule 4(k), "the Fourteenth Amendment's limitations on state court jurisdiction also often constrain the jurisdiction of federal courts").

This Court has applied the same analysis. For example, in *Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.*, 751 F.3d 796 (7th Cir. 2014), a Lanham Act case, the Court applied the Supreme Court's Fourteenth Amendment precedents to evaluate personal jurisdiction over a manufacturer sued in federal court in Indiana. The Court explained that, "[b]ecause the Lanham Act does not have a special federal rule for personal jurisdiction," the Court "look[s] to the law of the forum for the governing rule." *Id.* at 800.

In this case, Plaintiff raises a claim under the TCPA. That federal statute does not provide its own service-of-process rule. *See* 47 U.S.C. § 227. Rule 4(k)(1)(A) therefore directs application of Illinois personal jurisdiction rules, which are evaluated under the Due Process Clause of the Fourteenth Amendment.

The fairness and federalism concerns embodied in the Court's Fourteenth Amendment due-process decisions (including *BMS*) fully apply here. This putative class action involves claims not only by resident plaintiffs, but also claims by plaintiffs from all over the country, "without geographic restriction." S.A. 1. If the district court had adjudicated all of those claims, it would have been "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 Illinois has its own interest in resolving the claims because the claims arose out of the defendant's activities in the forum. But it does not.

Plaintiff and its *amicus* rely on decisions that involve special service-of-process rules created by Congress, such as *ISI International, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 551 (7th Cir. 2001), and *SEC v. Carrillo*, 115 F.3d 1540, 1542-44 (11th Cir. 1997), which concerned a federal rule providing for nationwide service of process for federal claims against alien defendants (meaning defendants who are not subject to jurisdiction in any State's courts of general jurisdiction), and *KM Enterprises, Inc. v. Global Traffic Technologies, Inc.*, 725 F.3d

718, 724 (7th Cir. 2013), which involved the Clayton Act's nationwide service-of-process rule. Those cases are inapposite because federal law provided the basis for service of process and the exercise of personal jurisdiction, and so the Due Process Clause of the Fifth Amendment—rather than the Due Process Clause of the Fourteenth Amendment—applied.

Plaintiff (Br. 29) and its *amicus* (Br. 7-8) therefore are wrong to assert that, for a case in federal court, the Fifth Amendment's Due Process Clause applies, and all the plaintiff must do is establish that the defendant has sufficient contacts to the United States as a whole. The Supreme Court already rejected that view for the federal-question and diversity cases where Rule 4(k)(1)(A) borrows state law. And the Supreme Court has repeatedly declined to address, in cases where federal personal jurisdiction rules apply, whether the Fifth Amendment imposes the same restrictions as the Fourteenth Amendment on the exercise of personal jurisdiction. *BMS*, 137 S. Ct. at 1784. There is no need to address that question here, because *Walden* establishes that the Fourteenth Amendment applies. *See* 571 U.S. at 283.

E. The Other Purported Reasons For Distinguishing *BMS* Lack Merit

None of the other reasons given by Plaintiff and its *amicus* has merit.

1. Plaintiff first relies (Br. 11-13) on *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). But that case did not present any personal jurisdiction issue.

The *Califano* Court considered two class-action issues: (1) whether a plaintiff could bring a class action under a provision of the Social Security Act, 42 U.S.C. § 405(g), that authorized an "individual" to challenge an agency determination in federal court, and (2) whether the district court abused its discretion in certifying a nationwide class. 442 U.S. at 698-99. The Court held that a plaintiff may bring a class action under 42 U.S.C. § 405(g) because that provision did not clearly preclude class actions, 442 U.S. at 700, and that the district court did not abuse its discretion in certifying the class because the requirements of Rule 23 had been met, *id.* at 701-02.

The Court did not consider any personal jurisdiction objection or hold that the plaintiffs had established personal jurisdiction in that case. And contrary to Plaintiff's suggestion (Br. 12, 17), the Court did

not suggest that a district court has discretion to certify a nationwide class irrespective of personal jurisdiction objections.

The district court's holding here does not preclude nationwide class actions. Plaintiffs can file a nationwide class action anywhere 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. 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.

2. Plaintiff (Br. 15-16) and its *amicus* (Br. 19-21) contend that courts should allow class actions to proceed without requiring all class

members to establish personal jurisdiction over their claims because it would be more efficient. 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). The due process limitations on personal jurisdiction, in particular, "protect the liberty of the nonresident defendant—not the convenience of plaintiffs." *Walden*, 571 U.S. at 284; *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).

Plaintiff also is wrong to say (Br. 15) that enlarging the class does not "add to the litigation burden o[n] the defendant." Expanding the class requires the defendant to evaluate and defend against additional claims and significantly raises the potential damages exposure. This case proves the point: Plaintiff wishes to represent an unknown number

of plaintiffs, potentially from every State, to recover under a federal statute that permits statutory damages, which potentially can be tripled. *See* 47 U.S.C. § 227(b)(3).

An expanded class means that the claims are less likely to be litigated to final judgment, no matter how dubious their merits. Defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); *accord In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995); *see also, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (recognizing the "risk of 'in terrorem' settlements that class actions entail"). That settlement pressure is substantially greater in a nationwide class action.

II. Permitting A Court To Exercise Specific Personal Jurisdiction Over Class Members' Claims With No Connection To The Forum Would Harm Businesses And The Judicial System

Plaintiff's proposed approach to personal jurisdiction not only violates core due process principles, but if adopted, it would impose serious, unjustified burdens on the business community and the courts.

These burdens provide an additional, compelling reason to affirm the decision below.

A. Plaintiff's Rule Would Encourage Abusive Forum Shopping

Plaintiff's rule would encourage class-action plaintiffs to engage in 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 Plaintiff'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. A nationwide class action

could be filed 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 Plaintiff's rule, out-of-state class members could outnumber the in-state named plaintiffs

and other 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 v. Dr. Pepper Snapple Group, Inc.*, 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." No. 17-cv-00564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017). 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. 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 Plaintiff'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, Plaintiff'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. Plaintiff's Rule Would Make It Exceedingly Difficult For Businesses To Predict Where They Could Be Sued

Relatedly, Plaintiff'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 inflict significant 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 Class Action Fairness Act).

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 Plaintiff's rule were accepted, a company could be forced into a State's court to answer for claims entirely unrelated to that State.

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 arose from out-of-state conduct—no matter how "distant or inconvenient" the forum State. *World-Wide Volkswagen*, 444 U.S. 292. Plaintiff'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 Plaintiff's approach. 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 decision below should be affirmed.

Dated: April 19, 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 Circuit Rule 29 because it contains 6,993 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b) 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: April 19, 2019

/s/ *Nicole A. Saharsky*
Nicole A. Saharsky

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(c) and Circuit Rule 25(a), I hereby certify that on April 19, 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: April 19, 2019

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