**No. 21-1672**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

KEVIN JOSEPH KELLY; KARRIEM BEY,
on behalf of themselves and all others similarly situated,

*Appellants*,

v.

REALPAGE INC. D/B/A ONSITE; RP ON SITE, LLC,

*Appellees*.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
No. 19-cv-1706 (Hon. Joshua D. Wolson)

# BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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**United States Court of Appeals for the Third Circuit**

**Corporate Disclosure Statement and Statement of Financial Interest**

No. 21-1672

KEVIN JOSEPH KELLY; KARRIEM BEY, on behalf of themselves and all others similarly situated, Appellants

v.

REALPAGE INC., d/b/a ONSITE; RP ON SITE, LLC, Appellees.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, The Chamber of Commerce of the United States of America makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
N/A

s/ Nicole A. Saharsky
(Signature of Counsel or Party)

Dated: 8/5/2021

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## INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation's business community.[1]

The standing, personal-jurisdiction, and statutory issues raised in this case are important to business. Many of the Chamber's members have been sued by plaintiffs alleging bare statutory violations (with no concrete injury), who seek to represent individuals with no ties to the forum. The Chamber's members have a strong interest in ensuring that all class members prove they suffered a concrete harm and establish the prerequisites for

[1] No counsel for a party authored this brief in whole or in part, and no person other than the Chamber, 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.

specific personal jurisdiction. Without those requirements, plaintiffs' lawyers will be able to engage in abusive forum shopping in search of massive statutory damages against businesses. The Chamber's members also have a strong interest in advocating against overbroad interpretations of businesses' statutory obligations that needlessly increase costs for businesses, to the ultimate detriment of consumers.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises three important legal issues. The first is whether a bare statutory violation is a sufficient injury to confer Article III standing. The Supreme Court recently held that it is not, in a case involving the same statute as this case. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021). The Court explained that a plaintiff can invoke federal-court jurisdiction only if he or she alleges a "physical, monetary, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id*. at 2206.

The required harm is lacking here. Plaintiffs allege that they, and each proposed class member, received from RealPage a report that lacked one piece of information required by the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. (FCRA) – the name of any third-party provider of data in the report. The only harm Plaintiffs identify is an "informational injury"

from not receiving that information. JA21. But *TransUnion* makes clear that a bare informational injury is not sufficient to confer Article III standing. 141 S. Ct. at 2214. Instead, plaintiffs must demonstrate "downstream consequences" and "adverse effects" from the alleged statutory violation, meaning physical or monetary injury or an intangible harm traditionally cognizable at common law. *Id.* (internal quotation marks omitted). Plaintiffs have not satisfied that standard.

Requiring plaintiffs to allege real-world adverse consequences from a statutory violation not only is required by *TransUnion*, but it also makes sense. Allowing plaintiffs to bring suit on a bare allegation of a statutory violation would incentivize plaintiffs' lawyers to seek certification of classes where the vast majority of class members suffered no identifiable harm, and then leverage the threat of massive statutory damages to force companies into settlement. That would impose significant costs that ultimately would be borne by employees and consumers.

The second legal issue is whether, in a class action, the Due Process Clause permits a court to exercise specific personal jurisdiction over the defendant with respect to claims of class members that lack a sufficient connection to the forum. The Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (*BMS*), largely answers

that question. In *BMS*, the Court explained that, in an action with multiple plaintiffs, *each* plaintiff must show the necessary connection to the forum for his or her claim.

The district court believed that *BMS* is not controlling because it involved a mass tort action in state court, whereas this case is a putative class action in federal court. Those are distinctions without a difference for this purpose; the same due-process principles apply. The *BMS* Court's principal concern was that a defendant could not reasonably expect to be haled into a forum to defend against claims unconnected to that forum. That concern applies equally to claims in mass actions and claims in putative class actions. And the fact that this case involves claims under a federal statute is irrelevant, because the federal district court's authority to bind defendants here is subject to the same due-process limitations that apply to state courts.

The personal-jurisdiction rule reflected in the order below, if left uncorrected by this Court, would cause substantial harm to businesses and to the judicial system. It would enable plaintiffs to make an end-run around the Due Process Clause 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, and it would allow the forum State to decide claims over which it has little legitimate interest, to other States' detriment.

The third legal issue is whether FCRA's disclosure obligations apply only when a consumer requests his or her complete file (as the district court held), or also when someone else makes the request or the consumer requests less than the complete file. The text of the statute answers that question; the "request" for a consumer's file must come from that consumer, and the request must specifically be for "[a]ll information in the consumer's file," meaning the complete file. 15 U.S.C. § 1681g(a). Plaintiffs' contrary reading would greatly expand the scope of FCRA's obligations, imposing onerous and unwarranted costs on businesses subject to the statute.

The Court should vacate the district court's decision and remand with instructions to dismiss the case for lack of subject-matter jurisdiction. In the alternative, the Court should correct the district court's personal-jurisdiction error, affirm its statutory holding, and affirm its decision denying class certification.

## ARGUMENT

### I. A Plaintiff Must Have Suffered A Concrete Harm To Invoke Federal-Court Jurisdiction

The Supreme Court's decision in *TransUnion* definitively establishes that a plaintiff who alleges that he or she was denied information to which he or she was entitled, without any concrete harm arising from that denial, lacks an injury sufficient to support Article III standing.

#### A. *TransUnion* Establishes That A Bare "Informational Injury" Is Insufficient To Establish Article III Standing

A plaintiff seeking to invoke federal-court jurisdiction must establish the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To do that, each plaintiff (including an unnamed class member) must show that: (1) he or she suffered an "injury in fact" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) there is a "causal connection between the injury and the conduct complained of"; and (3) the injury "likely" "will be redressed by a favorable decision." *Id.* (internal quotation marks omitted). This case involves the first element – injury in fact.

Plaintiffs allege that they suffered an "informational" injury. JA21. They allege that when RealPage provided individuals with their complete files, it failed to disclose one piece of information required by the FCRA –

the names of any third-party data providers. JA5; *see* 15 U.S.C. § 1681g(a). They argue that this omission, standing alone, is sufficient to confer Article III standing – even if all the information on the individual's file otherwise was correct, and even if the individual never suffered any adverse consequences from the omission. JA10-11. The district court agreed with Plaintiffs. JA10-11.

The Supreme Court in *TransUnion* recently rejected Plaintiffs' theory of injury. The *TransUnion* plaintiffs brought several claims under the FCRA, one of which was that TransUnion failed to disclose all the required information in their files in the manner required by the statute. 141 S. Ct. at 2202. The lower courts held that that bare "informational injury" (simply being denied information required by a statute) gave the plaintiffs Article III standing. *Id.*

The Supreme Court rejected that broad view of standing, explaining that a plaintiff must have suffered a "concrete" harm – meaning one that is "real, and not abstract" – to invoke federal jurisdiction. *TransUnion*, 141 S. Ct. at 2204-05 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)). Those harms include "traditional tangible harms, such as physical harms and monetary harms," as well as "intangible harms" that have "a close re-

lationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.* at 2204 (citing *Spokeo*, 578 U.S. at 340-41). An allegation of a mere "injury in law" is not sufficient, even if Congress provides plaintiffs with a cause of action and a statutory remedy. *Id.* at 2205-06. Thus, "[o]nly those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation." *Id.* at 2205.

The Court explained why concrete harm is required to establish standing: Article III does not grant federal courts "a freewheeling power to hold defendants accountable for legal infractions," and allowing a plaintiff with no concrete harm to bring suit would contravene Article III's "case or controversy" requirement and would infringe on the Executive Branch's prerogative to decide when to bring enforcement actions for violations of the law. 141 S. Ct. at 2205-07 (internal quotation marks omitted).

The *TransUnion* Court concluded that *none* of the unnamed plaintiffs in that class action had suffered an injury in fact from TransUnion's alleged failure to provide information in the manner required by the FCRA. 141 S. Ct. at 2213-14. Those plaintiffs had not identified *any* injury from the violation, much less a traditionally recognized intangible harm. *Id.* at 2213. The mere possibility of future injury from the alleged failure to provide the

information in the correct format also was not sufficient to establish injury. *Id.* at 2213-14. The Court rejected the argument that an informational injury is sufficient without any "downstream consequences." *Id.* at 2214.

*TransUnion* forecloses the district court's approach here. At bottom, Plaintiffs advance the same type of claim as the plaintiffs who lacked standing in *TransUnion* – they allege that RealPage failed to provide them with information required by the FCRA. *See* JA5. As in *TransUnion*, a bare violation of FCRA's disclosure obligations, standing alone, is not a concrete injury. Plaintiffs here do not allege any tangible or intangible injury resulting from the omission of the names of any third-party data providers. At most, they suggest that the omission might increase the risk that an incorrect report would be sent out (by making it more difficult to correct any inaccuracies). *See* D. Ct. Dkt. 62, at 10 n.10. But that risk is particularly remote, because RealPage disclosed the court systems from which the public-record information originated, JA152; *see* JA37-38, 53, and Plaintiffs do not allege that the risk ever materialized. The Court in *TransUnion* made clear that a mere risk of future harm is not sufficient to support a damages claim. *See* 141 S. Ct. at 2210-12.

This case therefore should be dismissed for lack of standing.

### B. Allowing Plaintiffs To Bring Claims When They Have Not Suffered Any Actual Harm Would Subject Defendants To Unfair Suits Seeking Enormous Windfall Damages

Allowing plaintiffs to bring suit on a bare allegation of a statutory violation would have detrimental consequences for businesses because it would erode a fundamental requirement for class certification. As the Court noted in *TransUnion*, every class member must have standing in order to recover damages in federal court. 141 S. Ct. at 2208; *see, e.g.*, *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (3d Cir. 2000). That requirement easily would be met if a bare statutory violation were sufficient for standing.

This case provides a vivid example. The proposed classes were defined to include every person whose RealPage file did not contain the name of a third-party data provider. JA6. Under the district court's approach, if (as Plaintiffs allege) that omission violated the FCRA, then all of those individuals would have standing and could be part of a certified class. That class would consist of "hundreds-of-thousands, if not millions, of members." JA16. But the Constitution does not allow that; as *TransUnion* teaches, only individuals with concrete injuries traceable to the alleged omission have standing. That is a much smaller group of people; in fact, it is not clear that any person could make that showing here.

The district court's approach to standing, if accepted, would provide a roadmap for enterprising plaintiffs' lawyers: Allege statutory violations on behalf of the broadest possible class, notwithstanding the absence of identifiable, real-world harm, and leverage the threat of massive statutory-damages awards to secure unjustified settlements. 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 AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (recognizing the "risk of 'in terrorem' settlements that class actions entail"). Unsurprisingly, businesses often yield to the pressure generated by class certification to settle even meritless claims. *See* Carlton Fields, *2021 Class Action Survey* 26 (2021), https://perma.cc/BXV9-JQG3 (reporting that companies settle around 60% of class actions) (*Class Action Survey*).

The coercive settlement pressure of future class actions would only increase if plaintiffs' lawyers could obtain certification of classes that include members who have suffered no concrete harm. "What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of individuals in a

nationwide or statewide class." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009).

Defending and settling lawsuits designed to extract lucrative settlements would require businesses to expend enormous resources. *See Class Action Survey* 7 (reporting that companies spent $2.9 billion defending class actions in 2020). The harmful consequences of this increase in costs would not be limited to businesses. Rather, the expenses likely would be passed along to innocent employees and customers in the form of lower wages and benefits and higher prices.

## II. 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 establish that personal jurisdiction must be assessed on a plaintiff-by-plaintiff, claim-by-claim basis. If a plaintiff's claim does not have the necessary connection to the forum, then the plaintiff cannot proceed against the defendant in that forum. The district court erred in holding otherwise.

### A. *BMS* Confirms That Specific Personal Jurisdiction Must Exist For Each Class Member's Claim

Whether an exercise of personal jurisdiction comports with 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 – general personal jurisdiction, in States where a company is "essentially at home" (its place of incorporation or principal place of business), and specific personal jurisdiction, in a State where the lawsuit arises out of, or relates to, the defendant's activities in the State. *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)).

This case concerns specific jurisdiction. To exercise specific jurisdiction over a defendant, a 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).

That limitation on personal jurisdiction reflects the fairness concerns animating the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 472 (1985). It provides a "degree of predictability" to 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. It also protects important federalism interests, by preventing

States from adjudicating claims over which they "may have little legitimate interest." *BMS*, 137 S. Ct. at 1780-81.

In *BMS*, the Supreme Court 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. There, 86 California residents and 592 plaintiffs from other States sued BMS in California, alleging injuries from taking the drug Plavix. *BMS*, 137 S. Ct. at 1778. The nonresident plaintiffs did not claim any connections with California. *Id.* at 1781. Nonetheless, the California Supreme Court upheld the state court's assertion of specific jurisdiction over the nonresidents' claims, because the nonresidents' claims were "similar in several ways" to the claims of the California residents. *Id.* at 1778-79.

The U.S. Supreme Court reversed, finding no "adequate link between the State and the nonresidents' claims." *BMS*, 137 S. Ct. at 1781. The fact that "*other* plaintiffs" (the resident plaintiffs) "were prescribed, obtained, and ingested Plavix in California" "does not allow the State to assert specific jurisdiction over the nonresidents' claims." *Id.* Instead, the defendant must have a sufficient relationship to the forum with respect to *each* plaintiff's claim, no matter how similar the plaintiffs' claims. *Id.*

In rejecting the California Supreme Court's theory of tack-on jurisdiction, the U.S. 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.*

### B. 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*, many 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. That is, "personal jurisdiction over claims asserted on behalf of absent class members must be analyzed on a claim-by-claim basis." *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 306 (D.C.

Cir. 2020) (Silberman, J., dissenting). The fact that *some* class members can establish specific personal jurisdiction over the defendant for their claims does not allow them to bootstrap jurisdiction for the claims of *other* class members. *See BMS*, 137 S. Ct. at 1779, 1781.

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. That concern applies equally to mass actions and putative class actions. "A court that adjudicates claims asserted on behalf of others in a class action exercises coercive power over a defendant just as much as when it adjudicates claims of named plaintiffs in a mass action." *Molock*, 952 F.3d at 307 (Silberman, J., dissenting). Further, 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 a district court in the forum State to decide claims as to which the State has insufficient legitimate interest, infringing on the authority of other States. *See BMS*, 137 S. Ct. at 1780.[2]

[2] The Court's decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), does not change the analysis. That case involved *what* forum contacts are needed to support personal jurisdiction, not *who* must have those contacts. *Id.* at 1029. The problem here is that

A contrary rule would permit plaintiffs to make an end-run around *BMS* by bringing cases as class actions rather than as multiple individual lawsuits or mass actions. In both cases, some 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 nonresident plaintiffs in *BMS* could not.

### C. The Arguments For Not Applying *BMS* To Class Actions Are Unpersuasive

There is a division of authority among the federal courts about whether the rule in *BMS* applies to class actions. The federal appellate judges who have considered the issue have disagreed.[3] This Circuit has

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many unnamed plaintiffs have *no* contacts with the forum, meaning they cannot establish specific personal jurisdiction over RealPage.

[3] *Compare Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445-47 (7th Cir. 2020) (*BMS* "does not govern" class actions), *and Lyngaas v. Curaden AG*, 992 F.3d 412, 432-38 (6th Cir. 2021) (same), *with id.* at 440-45 (Thapar, J., concurring and dissenting) (*BMS* applies to class actions), *and Molock*, 952 F.3d at 305-10 (Silberman, J., dissenting) (same). The *Molock* majority determined that it should wait to decide the issue until the class-certification stage. 952 F.3d at 298. The Ninth Circuit also is considering the issue, in *Moser v. Benefytt, Inc.*, No. 19-65224 (9th Cir. argued May 13, 2021).

In addition, this Court and the First and Sixth Circuits currently are considering whether *BMS* applies to collective actions brought under the Fair Labor Standards Act. *See Fischer v. Fed. Express Corp.*, Nos. 21-1683,

not considered the issue, and the district courts in the Circuit have disagreed.[4]

The courts that have refused to apply *BMS* to class actions have offered a number of justifications for doing so, none of which has merit.

1. Some courts pointed to procedural differences between mass actions and class actions. Among other things, they have relied on the Supreme Court's statement in *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002), that unnamed class members "may be parties for some purposes and not for others." *See Lyngaas v. Curaden AG*, 992 F.3d 412, 437 (6th Cir. 2021); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020).

But unnamed class members *are* considered parties for purposes of appeal because they are bound by the judgment. *Devlin*, 536 U.S. at 10-11. If unnamed class members are parties for protecting their own interests that are affected by a binding judgment, then surely they are parties for

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21-1684 (3d Cir. filed Apr. 12, 2021); *Canaday v. Anthem Cos.*, No. 20-5947 (6th Cir. argued June 10, 2021); *Waters v. Day & Zimmerman NPS, Inc.*, No. 20-1997 (1st Cir. argued June 7, 2021).

[4] *Compare Hickman v. TL Transp., LLC*, 317 F. Supp. 3d 890, 899 (E.D. Pa. 2018) (all class members must establish personal jurisdiction over the defendant), *with McIntyre v. RealPage, Inc.*, No. 18-cv-3934, 2020 WL 5017612, at *17 (E.D. Pa. Aug. 25, 2020) (only named plaintiffs need to establish personal jurisdiction over the defendant), *and Gress v. Freedom Mortg. Corp.*, 386 F. Supp. 3d 455, 465 (M.D. Pa. 2019) (same).

purposes of personal jurisdiction, a constitutional defense protecting a defendant's interests in not being forced to litigate in a far-flung forum and being bound by its judgment.

Some courts have noted that class members other than the named plaintiffs are not considered parties in assessing diversity jurisdiction or venue. *See Mussat*, 953 F.3d at 447. But unlike the rules governing diversity jurisdiction and venue, which are examples of purely "procedural rules," *Devlin*, 536 U.S. at 10, personal jurisdiction is a constitutional defense rooted in due process, *see Lyngaas*, 992 F.3d at 443 (Thapar, J., concurring and dissenting).

None of these procedural differences justifies disregarding the Due Process Clause. A class action is a "species" of "traditional joinder" that permits the court "to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 408 (2010) (plurality opinion). "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 a personal-jurisdiction defense. A court may not certify a class that would prevent the defendant from litigating a defense to individual claims. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011); *see* 28 U.S.C. § 2072(b)

(rules of procedure may not "abridge" substantive rights). Plaintiffs therefore cannot use the class-action device to make an end-run around the due-process constraints on specific personal jurisdiction.

2. Some courts have attempted to distinguish mass tort actions from class actions on the ground that class actions must meet the requirements of Federal Rule of Civil Procedure 23. In their view, compliance with those requirements satisfies due process. *See Lyngaas*, 992 F.3d at 436; *Mussat*, 953 F.3d at 447. 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. The 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.

3. Some district courts refused to apply *BMS* to class actions in order to "promot[e] expediency in class action litigation." *Fitzhenry-Russell v. Dr. Pepper Snapple Grp.*, No. 17-cv-564, 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). The due-process limitations on personal jurisdiction, in particular, "protect the liberty of the nonresident defendant – not the convenience of plaintiffs." *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

Moreover, that view fails to take into account defendants' countervailing interests in defending the claims against them on the merits. Expanding the class requires the defendant to defend against additional claims and significantly raises the potential damages exposure. The claims thus are less likely to be litigated to final judgment, no matter how dubious their merits. *See* pp. 11-12, *supra*.

4. Some courts have refused to apply *BMS* on the belief that doing so "would require plaintiffs to file fifty separate class actions in fifty or more separate district courts across the United States." *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 09-mdl-2047, 2017 WL 5971622, at

*19 (E.D. La. Nov. 30, 2017). That is incorrect. Plaintiffs can file a nationwide class action anywhere the defendant is subject to general personal jurisdiction. *See Lyngaas*, 992 F.3d at 444 (Thapar, J., concurring and dissenting). 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.

5. Finally, some courts (including the court below, JA9) have attempted to distinguish *BMS* on the ground that claims under federal law do not implicate the same "interstate federalism concerns" animating *BMS* and other Fourteenth Amendment due-process cases. *Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 858-59 (N.D. Cal. 2018). The Supreme Court already has rejected that argument. *See Walden*, 571 U.S. at 283.

The Due Process Clause of the Fourteenth Amendment applies in this case, just as it applies in state court. That is because the basis for personal jurisdiction in federal court is Federal Rule of Civil Procedure 4(k), which incorporates state personal-jurisdiction rules and the Fourteenth Amendment limitations on them. 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) thus voluntarily incorporates state personal-jurisdiction rules, which include the limitations imposed by the Fourteenth Amendment's Due Process Clause.

The Supreme Court has recognized that Rule 4(k) incorporates the Fourteenth Amendment due-process limitations on personal jurisdiction, even in cases involving federal claims. In *Walden*, the Court considered 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. *Id.* at 283-91. That makes sense, because unless Congress provides a special service-of-process rule in the federal statute at issue, a federal district court's authority to issue binding judgments is the same as that of a similarly situated state court, and therefore subject to the same due-process limitations. *See Lyngaas*, 992 F.3d at 438-40 (Thapar, J., concurring and dissenting).

Plaintiffs in this case raise a claim under the FCRA. That statute does not provide its own service-of-process rule. *See* 15 U.S.C. § 1681p. Rule

4(k)(1)(A) therefore directs application of Pennsylvania personal-jurisdiction rules, which are limited by 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 by resident plaintiffs and class members across the United States. If the district court adjudicates all of those claims, it will be "reach[ing] 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 Pennsylvania had its own interest in resolving the claims because they arose out of RealPage's conduct in the forum. But the claims do not.

### D. The District Court's Approach Would Encourage Abusive Forum Shopping

The district court's rule, if affirmed by this Court, would impose serious, unjustified burdens on the business community.

1. 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://perma.cc/NNG8-NVXA. 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 approach 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 would have 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. 17-cv-6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018) (noting that "forum shopping is just as present in multi-state class actions" as it is in "mass torts").

Permitting that type of suit to be brought on a specific jurisdiction theory 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).

This abusive forum shopping violates basic principles of federalism. 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.

2. Relatedly, the approach reflected in the district court's certification order would make it nearly impossible for corporate defendants to predict where plaintiffs could bring high-stakes, multi-state class-action lawsuits based on specific personal jurisdiction. 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" by knowing where their conduct "will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. That "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). 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 a court need not have specific jurisdiction over the claims of all class members, 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, 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 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. at 292. That result 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. Here again, some of that cost increase would invariably be borne by employees and consumers.

Fortunately, there is an easy way to avoid these harmful consequences. The Supreme Court set out the governing rule in *BMS*. This Court should follow that rule and hold that, in a putative class action, the court may adjudicate only those claims for which there is personal jurisdiction over the defendant in the forum.

## III. FCRA's Disclosure Obligations Apply Only When An Individual Requests His Or Her Complete File

Although the district court erred in its standing and personal-jurisdiction analyses, it correctly held that FCRA's disclosure requirements apply only when an individual requests his or her complete file, and not when a third party requests the individual's file, or when the request is for less than the complete file. JA11-13. For this and other reasons, the district court correctly concluded that Plaintiffs cannot satisfy Rule 23(b)(3)'s predominance requirement. JA20-22.

The limitations on FCRA's disclosure obligations flow directly from the text of the statute. The relevant provision of the FCRA provides:

"[e]very consumer reporting agency shall, upon *request*, . . . clearly and accurately disclose to the *consumer* . . . *[a]ll information* in the consumer's file at the time of the request." 15 U.S.C. § 1681g(a) (emphases added). As the district court explained, the most straightforward reading of the text is that the "request" for a "disclos[ure] to the consumer" must come *from* that consumer, and the consumer must request "[a]ll information in [his or her] file," meaning the complete file. JA11-13.

Plaintiffs would read this provision to apply to any "request" for a "report." Opening Br. 14, 19. That is not what the statute says, and Plaintiffs' atextual reading would vastly expand the scope of FCRA's disclosure obligations. Under Plaintiffs' reading, those obligations could apply whenever *anyone* makes a request for *any* information in the consumer's file, and the agency also sent that information to the consumer (as RealPage did as a matter of policy, JA3).

Plaintiffs attempt to justify this result by pointing to FCRA's "consumer-oriented objectives." Opening Br. 14. But the Supreme Court has repeatedly held that broad statements of a statute's purpose must yield to the statute's clear text – *i.e.*, to the way in which Congress actually chose to implement those objectives. *See, e.g.*, *Nichols v. United States*, 136 S. Ct. 1113, 1119 (2016). Anyway, Plaintiffs' reading actually would undermine

the purported statutory purpose of "broaden[ing] consumers' access to their files." Opening Br. 14. Many class members did not request anything from RealPage; RealPage gave its clients (such as prospective landlords) the option of providing consumers courtesy copies of their "Rental Reports" whenever the clients purchased the reports. JA3, 16. If (as Plaintiffs contend) RealPage's choice to provide that option subjected it to FCRA's obligations, that would only serve to discourage RealPage from providing the option in the first place.

Careful adherence to the statutory text increases certainty and predictability for consumers and businesses alike. *See, e.g.*, *Patterson v. Shumate*, 504 U.S. 753, 766 (1992) (Scalia, J., concurring). As with any statutory obligation, there are costs to consumer-reporting agencies for complying with FCRA's disclosure obligations. And the existence of a congressionally created cause of action for every violation of the statute, along with statutory damages for every willful violation, also promise significant costs for non-compliance (even as limited by Article III). *See* 15 U.S.C. §§ 1681n, 1681*o*. Plaintiffs' reading would only enhance these costs of compliance and the potential costs of non-compliance. Those costs, in all likelihood, would

be passed on to consumers and employees. The Court should reject Plaintiffs' invitation to expand FCRA's disclosure obligations beyond what the statute will support.

## CONCLUSION

The Court should vacate the district court's decision and remand the case with instructions to dismiss the case for lack of subject-matter jurisdiction. In the alternative, the Court should affirm the decision of the district court.

Dated: August 5, 2021

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(g) AND THIRD CIRCUIT RULES 28.3(d) AND 31.1(c)**

Pursuant to Third Circuit Rule 28.3(d), undersigned counsel certifies that she is a member of the bar of this Court.

Pursuant to Federal Rule of Appellate Procedure 32(g), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 6,492 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Pursuant to Third Circuit Rule 31.1(c), undersigned counsel certifies that the text of the electronic brief is identical to the text in the paper copies. Undersigned counsel further certifies that a virus detection program (Microsoft Windows Defender Antivirus version 1.343.2120.0, updated on August 2, 2021), was run on the file and no virus was detected.

Dated: August 5, 2021

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

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on August 5, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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