No. 19-56224

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH J. MOSER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellee,

v.

BENEFYTT TECHNOLOGIES, INC.; NATIONAL CONGRESS OF EMPLOYERS, INC.; COMPANION LIFE INSURANCE COMPANY; DONISI JAX, INC.; HELPING HAND HEALTH GROUP, INC.; ANTHONY MARESCA; AND MATTHEW HERMAN,

Defendants-Appellants.

On Appeal from the U.S. District Court for the Southern District of California, No. 17-cv-12270WQH-KSC (Hon. William Q. Hayes)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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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 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, 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, including 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 place of incorporation and principal place of business, the two places where they would be subject to general personal jurisdiction. Also, the Chamber's members often are sued in putative nationwide class actions in States where they are not subject to general personal jurisdiction.

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[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.

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. That would encourage abusive forum shopping and impose substantial harm on businesses and on the judicial system.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case raises an important question of first impression in this Circuit: Whether, in a class action, the Due Process Clause permits a court to exercise specific personal jurisdiction over the defendant with respect to all class members' claims, even though some class members' claims lack a sufficient connection to the forum.

The answer to that question is straightforward: 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 *all* class members' claims. If some class members cannot show the necessary connection between their claims and the defendant's activities in the

forum – and they therefore could not maintain their claims as individual actions in the forum – the class action may not encompass those claims.

That rule follows from decades of Supreme Court precedent establishing that specific personal jurisdiction depends on a plaintiff-by-plaintiff, claim-by-claim assessment. To satisfy due process, 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 principle 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, for a mass tort action to proceed in state court, the court had to find that it had specific personal jurisdiction over the defendant with respect to *all* plaintiffs' claims. *Id.* at 1778-79. The nonresident plaintiffs' claims lacked the necessary connection to the forum, and the mere fact that the nonresident plaintiffs raised similar claims to the resident plaintiffs 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 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 in the forum as part of a mass action or a class action.

Some federal district courts, and the Seventh Circuit, have held to the contrary. But the arguments they accepted are unpersuasive.

First, those courts have relied on procedural differences between class actions and mass actions, including that class members other than the named plaintiffs are not considered "parties" for some purposes. But those procedural differences are irrelevant. Class members are parties for purposes of seeking a judgment on their claims and being bound by that judgment. A court therefore cannot certify a class unless it concludes that it has personal jurisdiction over the defendant with respect to all plaintiffs' claims.

Second, some courts have suggested that the requirements of Federal Rule of Civil Procedure 23 satisfy due process. But Rule 23

addresses whether it makes sense for the plaintiffs to be able to proceed together, not whether the plaintiffs' claims all have a sufficient connection to the forum to satisfy due process.

Third, some courts have reasoned that excusing class members not named in the complaint from establishing personal jurisdiction makes class action litigation more efficient. But supposed efficiency gains cannot override defendants' due process rights. Relatedly, a few courts have refused to apply *BMS* on the belief that it would prevent plaintiffs from bringing nationwide class actions. But they are mistaken; plaintiffs can file nationwide class actions where defendants are subject to general jurisdiction.

Finally, some courts believed that the reasoning of *BMS* does not apply to cases in federal court that involve federal causes of action. That is mistaken. Under Federal Rule of Civil Procedure 4(k), federal courts follow the personal jurisdiction rules of the States in which they sit unless Congress has specified to the contrary. When state rules provide the basis for personal jurisdiction, the Due Process Clause of the Fourteenth Amendment applies.

The rule reflected in the certification 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, in turn, would eliminate the predictability that due process affords corporate defendants to allow them to structure their primary conduct. It also 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 reverse 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 *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*. The district court erred in certifying the classes in this case.[2]

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

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[2] The district court did not address the merits of this issue, instead concluding that the issue had been waived. ER 9-10; *but see* Opening Br. 27-33 (challenging the district court's waiver holding). Because this Court granted review on the issue, the Chamber submits this brief to provide its views on the merits of that important question.

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

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. The Due Process Clause also 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. *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*." *Id.* at 1781 (emphasis added).

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

In a putative class action, as in the mass tort action in *BMS*, multiple plaintiffs attempt to bring similar claims against the same defendant in the same forum. To assert personal jurisdiction over the plaintiffs' claims, the court must find 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. Because "the requirements of personal jurisdiction must be satisfied independently for 'the specific claims at issue,' . . . 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) (quoting *BMS*, 137 S. Ct. at 1781). The fact that *some* 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 *other* class members. *See BMS*, 137 S. Ct. at 1779, 1781; *Walden*, 571 U.S. at 286.

The Court's concern in *BMS* was that the defendant corporation could not reasonably expect, based on its activities within the forum, that it would be subject to suit there for claims by nonresident plaintiffs that are unconnected to the forum. *BMS*, 137 S. Ct. at 1780; *see World-Wide Volkswagen*, 444 U.S. at 297. That concern applies equally to both mass actions and putative class actions. "A 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). "A defendant is therefore entitled to due process protections – including limits on assertions of personal jurisdiction – with respect to all claims in a class action for which a judgment is sought." *Id.*

A contrary rule would disregard the interests of other States. 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.

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 California named plaintiff that wishes to represent nationwide classes that he claims have more than one million members to assert a violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA), in federal court in California. *See* ER 272. Plaintiff does not attempt to limit the classes to persons and entities that received calls in California. ER 5-6.

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 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.

D. The Arguments To The Contrary Are Unpersuasive

Dozens of federal district courts have addressed the issue in this case, and they have disagreed on the answer.[3] The federal appellate judges that have addressed the issue also have disagreed. In particular, the Seventh Circuit held that *BMS* "does not govern" in the class-action

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[3] Some courts have correctly held that all class members, not just the named plaintiffs, are required to establish the prerequisites for specific personal jurisdiction. *See*, *e.g.*, *Carpenter v. Petsmart*, 441 F. Supp. 3d 1028, 1034-35 (S.D. Cal. 2020); *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 723-24 (E.D. Mo. 2019); *Leppert v. Champion Petfoods USA Inc.*, No. 18-4347, 2019 WL 216616, at *4-*5 (N.D. Ill. Jan. 16, 2019); *DeBernardis v. NBTY, Inc.*, No. 17-6125, 2018 WL 461228, at *1-*2 (N.D. Ill. Jan. 18, 2018); *Wenokur v. AXA Equitable Life Ins.*, No. 17-165, 2017 WL 4357916, at *4 n.4 (D. Ariz. Oct. 2, 2017).

Other courts have held that a court need not find that it has personal jurisdiction over all class members' claims to comply with the Due Process Clause. *See*, *e.g.*, *Prescott v. Bayer HealthCare LLC*, No. 20-0102, 2020 WL 3505717, at *2-*3 (N.D. Cal. June 29, 2020); *Al Haj v. Pfizer Inc.*, 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 09-2047, 2017 WL 5971622, at *12-*21 (E.D. La. Nov. 30, 2017).

context and that class members other than the named plaintiffs are not required to establish personal jurisdiction over the defendant. *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445, 447 (7th Cir. 2020). In contrast, when the issue was presented to the D.C. Circuit, the one judge who reached the merits disagreed with the Seventh Circuit's view. *Molock*, 952 F.3d at 305-10 (Silberman, J., dissenting).[4]

The courts that have refused to apply *BMS* in the class-action context have offered a number of justifications for their approach, none of which has merit.

1. First, some courts, including the Seventh Circuit, have determined that class members need not establish specific personal jurisdiction with respect to their claims because of 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 class members not named in the complaint "may be parties for some purposes and not for others."

[4] The D.C. Circuit majority determined that it should wait to decide the issue until the class-certification stage, rather than decide it at the motion-to-dismiss stage. *See Molock*, 952 F.3d at 298.

See Mussat, 953 F.3d at 447; *Fitzhenry-Russell*, 2017 WL 4224723, at *5.

But the *Devlin* Court held that such class members *are* considered parties for purposes of appeal because they are bound by the judgment. 536 U.S. 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. Indeed, without personal jurisdiction, any purported judgment is necessarily "void" and nonbinding. *Pennoyer v. Neff*, 95 U.S. 714, 732 (1877); *see World-Wide Volkswagen*, 444 U.S. at 291; *see also Burnham v. Superior Court*, 495 U.S. 604, 608-09 (1990) (plurality opinion).

When a court certifies a class, it makes class members parties to the suit for purposes of adjudicating the merits of their claims and binding them to a judgment. *See Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (contrasting "an unnamed member of a proposed but uncertified class," who does not qualify as a party to the litigation, with

"an unnamed member of a *certified* class"). As this Court has observed, certification is the act by which "[t]he claims of unnamed class members are added to the action." *Gibson v. Chrysler Corp.*, 261 F.3d 927, 940 (9th Cir. 2001). Before the court takes that step, it must first ensure that its assertion of jurisdiction over those claims is compatible with the defendant's rights under the Due Process Clause.

Some courts have also 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; *Al Haj*, 338 F. Supp. 3d at 820. 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. This Court has "recognized that the question of a federal court's competence to exercise personal jurisdiction over a defendant is distinct from the question of whether venue is proper." *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1178-79 (9th Cir. 2004).

None of these procedural differences provides a basis for courts to disregard the Due Process Clause. A class action is merely 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. In the class-action context, the Rules Enabling Act confirms this point. It specifies that 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)), including the right to put on a defense. As the Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), a court may not certify a class that would prevent the defendant from litigating a defense to individual claims. *Id.* at 367.

Nothing about the class action device overrides the due process principles recognized by this Court. "[T]he class action procedure is of course subject" to due process requirements. Fed. R. Civ. P. 23 Advisory Committee Note to 1966 Amendment. That procedure "is not a license for courts to enter judgments on claims over which they have no power."

Molock, 952 F.3d at 307 (Silberman, J., dissenting). 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 a case must meet the requirements of Federal Rule of Civil Procedure 23 to be certified as a class action. In their view, compliance with those requirements satisfies due process. *See Mussat*, 953 F.3d at 447; *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 126 (D.D.C. 2018), *aff'd on other grounds*, 952 F.3d 293. 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 the Supreme Court already has held that 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.

Some of the courts that have concluded that compliance with Rule 23 (or a state counterpart) satisfies due process have relied on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *See, e.g.*, *Sanchez v. Launch Technical Workforce Solutions, LLC*, 297 F. Supp. 3d 1360, 1365-66 (N.D. Ga. 2018); *In re Chinese-Manufactured Drywall*, 2017 WL 5971622, at *15-*16. That reliance is misplaced, because *Shutts* addressed the due process rights of unnamed class-action *plaintiffs*. The Court held a state court could subject those plaintiffs to its jurisdiction – and bind them to a judgment – by certifying a class as long as it provided them with notice and an ability to opt out of the suit. 472 U.S. at 808-12. The defendant in *Shutts* did not raise any personal-jurisdiction defense, and so the Court did not consider that issue.

Significantly, the *Shutts* Court recognized that the test for subjecting a plaintiff to a court's jurisdiction is different from, and less rigorous than, the test for asserting jurisdiction over a nonresident 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.*, *Molock*, 952 F.3d at 305 (Silberman, J., dissenting).

3. Some district courts have permitted class actions to proceed without requiring unnamed class members to establish personal jurisdiction over their claims in order to "promot[e] expediency in class action litigation." *Fitzhenry-Russell*, 2017 WL 4224723, at *5. 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); *Ring v. Arizona*, 536 U.S. 584, 607 (2002). 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" apply "even if the forum State is the most convenient location for litigation.") (internal quotation marks omitted).

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 evaluate and defend against additional claims and significantly raises the potential damages exposure – reducing the likelihood that those claims will be adjudicated on the merits. This case proves the point: Plaintiff wishes to represent classes that he claims contain over a million 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 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.

4. Relatedly, some courts have refused to apply *BMS* under 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." *E.g.*, *In re Chinese-Manufactured Drywall*, 2017 WL 5971622, at *19. That is incorrect. 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.*, *Molock*, 952 F.3d at 309 (Silberman, J., 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. Plaintiffs also could bring suit in one place if all class members' claims arose out of the defendant's constitutionally relevant contacts with the forum, regardless of where the class members happen to reside.

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

Some courts have attempted to distinguish *BMS* on the ground that the Court's Fourteenth Amendment due process analysis does not apply in federal court. *See Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 858-59 (N.D. Cal. 2018); *In re Chinese-Manufactured Drywall*, 2017 WL 5971622, at *19-21. In particular, they contend that the Fifth Amendment due process analysis applies and does not incorporate the same "interstate federalism concerns" animating *BMS* and the Supreme Court's other Fourteenth Amendment due process cases. *Sloan*, 287 F.

Supp. 3d at 858-59. The Supreme Court and this Circuit already have rejected that argument.

1. 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 Rule 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, by requiring a defendant to be "subject to the jurisdiction of" a state court, it voluntarily incorporates

state personal jurisdiction rules, which include the limitations imposed by the Due Process Clause of the Fourteenth Amendment. If the rule were otherwise, "litigants could easily sidestep the territorial limits on personal jurisdiction simply by adding claims – or by adding plaintiffs, for that matter – after complying with Rule 4(k)(1)(A) in [serving] their first filing." *Molock*, 952 F.3d at 309 (Silberman, J., dissenting); *see* A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction Over Absent Class Member Claims Explained*, 39 Rev. Litig. 31, 44 (2019).

The Supreme Court has recognized that Rule 4(k) incorporates the Fourteenth Amendment due process limitations on personal jurisdiction. 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. 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)). Accordingly, the Court evaluated the exercise of personal jurisdiction in that case under the Fourteenth Amendment. *Id.* *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.

This Court has applied the same analysis. For example, in *Axiom Foods, Inc. v. Acerchem International, Inc.*, 874 F.3d 1064 (9th Cir. 2017), a Copyright Act case, the Court applied the Supreme Court's Fourteenth Amendment precedents, including *BMS*, to evaluate personal jurisdiction over a foreign corporation sued in federal court in California. The Court explained that "[f]ederal courts apply state law to determine the bounds of their jurisdiction over a party" and applied *Walden* and *BMS*. *Id.* at 1067-68.

2. In this case, plaintiffs raise 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 California

personal jurisdiction rules, which are evaluated under the Due Process Clause of the Fourteenth Amendment.

Under the Fourteenth Amendment, a plaintiff asserting a violation of the TCPA must do more than establish that the defendant has sufficient contacts to the United States as a whole. The plaintiff must instead show that defendant's "suit-related conduct" creates a substantial connection with the *forum State*. *Walden*, 571 U.S. at 284. Many of the class members here cannot do so; they are not California residents and did not receive calls there. *See* Opening Br. 55.

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 a resident plaintiff, but also claims by class members throughout "the United States of America." ER 5-6. If the district court adjudicates all of those claims, it will be "reaching out beyond [its] limits," *World-Wide Volkswagen*, 444 U.S. at 292, to resolve matters over which many other States have legitimate interests. That could be permissible if California

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.[5]

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

If this Court held that only the named plaintiffs were required to establish specific personal jurisdiction, that rule would impose serious, unjustified burdens on the business community and the courts. These burdens provide an additional, compelling reason to reverse the decision below.

A. Requiring Only The Named Plaintiffs To Establish Specific Jurisdiction Would Encourage Abusive Forum Shopping

Not long ago, the plaintiffs' bar relied heavily on expansive theories of general jurisdiction to bring nationwide or multi-state suits in plaintiff-friendly "magnet jurisdictions." U.S. Chamber Inst. for Legal Reform, BMS *Battlegrounds: Practical Advice for Litigating*

[5] 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. *E.g.*, *BMS*, 137 S. Ct. at 1784. There is no need to address that question here, because the TCPA does not provide a federal service-of-process rule. Rule 4(k)(1)(A) thus applies, and the Fourteenth Amendment constrains the court's exercise of personal jurisdiction. *See Walden*, 571 U.S. at 283.

Personal Jurisdiction After Bristol-Myers 3-5 (June 2018), https://bit.ly/2TulA0d.

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

But if the district court's certification of nationwide classes based on the claims of the single California named plaintiff 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. As happened here, 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*, 2018 WL 461228, at *2 (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. 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*, a lawsuit brought in California, the district court noted "that 88% of the class members are not California residents," a number it characterized as "decidedly lopsided." 2017 WL 4224723, at *5. Yet that court still exercised personal jurisdiction "as to the putative nationwide class claims." *Id.*

Similarly, in *Braver v. Northstar Alarm Services, LLC*, the court permitted a single Oklahoma named plaintiff to represent a nationwide class of 239,630 people located "across most of the country." 329 F.R.D. 320, 332 (W.D. Okla. 2018). 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. Courts in the forum State can decide claims over which they have little legitimate interest, including claims based on conduct that occurred exclusively in other States. That substantially infringes

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, permitting nationwide classes to proceed even though most of the class members' claims lack the requisite connection to the forum 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. Requiring Only The Named Plaintiffs To Establish Specific Jurisdiction Would Make It Exceedingly Difficult For Businesses To Predict Where They Could Be Sued

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 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" by knowing where their 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 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 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. 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. 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 these harmful consequences. 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 district court's decision should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and Circuit Rule 32-1(e), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(5) and Circuit Rule 32-1(a) because it contains 6,910 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.

Dated: September 21, 2020

/s/ *Nicole A. Saharsky*
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CERTIFICATE OF FILING AND 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 Ninth Circuit by using the appellate CM/ECF system on September 21, 2020. 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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