

2021

The Class Action Struggle: Should Bristol-Myer's Limit on Personal Jurisdiction Apply to Class Actions?

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Recommended Citation

John Mikuta, *The Class Action Struggle: Should Bristol-Myer's Limit on Personal Jurisdiction Apply to Class Actions?*, 71 Emory L. J. 325 (2021).

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THE CLASS ACTION STRUGGLE: SHOULD *BRISTOL-MYERS*'S LIMIT ON PERSONAL JURISDICTION APPLY TO CLASS ACTIONS?

ABSTRACT

In Bristol-Myers Squibb Co. v. Superior Court of California, the Supreme Court held that, in a coordinated mass action, a court may not exercise specific personal jurisdiction over claims from non-resident plaintiffs who did not suffer their injuries in the forum state. The Court, however, did not explicitly state whether and how its holding would apply to class actions. In March 2020, federal appellate courts began to be confronted with the issue. While the D.C. Circuit in Molock v. Whole Foods Group, Inc. side-stepped the personal jurisdiction question, Judge Silberman's dissenting opinion argued that the logic of Bristol-Myers should apply to class actions as it does to mass actions. In Mussat v. IQVIA, the Seventh Circuit disagreed, concluding that the differences between class actions and mass actions are sufficient to distinguish the holding of Bristol-Myers as applied to the class action context.

This Comment will argue that Bristol-Myers should not be extended to class actions. Doing so would cause a momentous shift in class action law that is not supported by the Bristol-Myers opinion. In addition, as Mussat recognizes, mass actions are significantly different from class actions, as class action members are not true parties to a class action as mass action plaintiffs are to a mass action. Moreover, Federal Rule of Civil Procedure 23, which sets forth standards for appropriate certification of class actions, provides a sufficient procedural basis for protecting defendants' due process rights. Finally, applying Bristol-Myers to class actions would defeat the policy purposes of the class action device and harm the overall efficiency of the litigation system.

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INTRODUCTION

Class action lawsuits occupy a distinctive and important sphere in the American litigation landscape. An exception to the original concept of litigation as “strictly a two-party affair—one plaintiff against one defendant”—class actions allow groups of similarly situated plaintiffs to bring common claims through named representatives.¹ Some of the most famous cases in U.S. history, including *Brown v. Board of Education*² and *Roe v. Wade*,³ have been class actions. In addition, class actions have accounted for some of the largest settlements ever recorded, often numbering in the billions of dollars.⁴

Although the class action has effectively cemented its place as a tool for group litigation, it now faces a grave challenge to its effectiveness.⁵ In 2017, the U.S. Supreme Court decided *Bristol-Myers Squibb Co. v. Superior Court of California*, which held that California could not exercise specific personal jurisdiction over the claims of nonresident plaintiffs because “all the conduct giving rise to the nonresidents’ claims occurred” outside of California.⁶ *Bristol-Myers*, however, was not certified as a class action under California law, but instead was a coordinated mass action in which over 600 plaintiffs sued together under traditional joinder principles.⁷ As a result, *Bristol-Myers* did not expressly answer whether and how its holding would apply to class actions.⁸ Nevertheless, commentators did not hesitate in speculating that *Bristol-Myers* could require that a court have personal jurisdiction over the claims of every member of a class action.⁹

¹ 7A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1751 (3d ed. 2020).

² *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 (1954) (noting the cases at issue are premised on “a common legal question”).

³ *Roe v. Wade*, 410 U.S. 113, 120 (1973) (noting that a pregnant woman sued “‘on behalf of herself and all other women’ similarly situated”).

⁴ See Andy Gillin, *The Largest Class Action Lawsuits & Settlements*, GJEL (Oct. 4, 2021), <https://www.gjel.com/blog/largest-class-action-settlements.html>.

⁵ See Robert Channick & Becky Yerak, *Supreme Court Ruling Could Make It Harder to File Class-Action Lawsuits Against Companies*, CHI. TRIB. (June 22, 2017), <https://www.chicagotribune.com/business/ct-supreme-court-ruling-mass-actions-illinois-0625-biz-20170622-story.html> (stating that class action lawsuits are going to be “harder to bring and . . . harder to win” after *Bristol-Myers*).

⁶ *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1781–82 (2017).

⁷ See *id.* at 1778 (“A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other States—filed eight separate complaints . . .”).

⁸ *Id.* at 1789 n.4 (Sotomayor, J., dissenting).

⁹ See Andrew J. Pincus, Archis A. Parasharami & Matt Waring, *Supreme Court’s Decision in Bristol-Myers Squibb v. Superior Court Rejects Expansive View of Specific Jurisdiction*, CLASS DEF. BLOG (June 19, 2017), <https://www.classdefenseblog.com/2017/06/supreme-courts-decision-bristol-myers-squibb-v-superior-court-rejects-expansive-view-specific-jurisdiction/>; Channick & Yerak, *supra* note 5; Richard Levick, *The Game Changes: Is Bristol-Myers Squibb the End of an Era?*, FORBES (July 11, 2017, 2:21 PM), <https://www.forbes.com>.

On March 10, 2020, the D.C. Circuit decided *Molock v. Whole Foods Market Group, Inc.*,¹⁰ which was the first federal court of appeals case raising the issue of whether the *Bristol-Myers* rule applies to class actions. While the majority opinion resolved the case on other grounds, Judge Silberman's dissenting opinion reached the *Bristol-Myers* issue and concluded that *Bristol-Myers* should apply to class actions.¹¹ The very next day, the Seventh Circuit reached the opposite conclusion in *Mussat v. IQVIA, Inc.*¹² It is likely that this issue will continue to be addressed in federal courts of appeals and may eventually reach the U.S. Supreme Court.¹³

This Comment argues that the holding of *Bristol-Myers* should not extend to the class action context. The class action is a unique form of litigation with built-in protections to ensure that the due process rights of all parties are protected.¹⁴ There are significant, compelling differences between class action members and mass action plaintiffs that justify different standards for personal jurisdiction over their claims.¹⁵ Furthermore, application of *Bristol-Myers* to class actions would contravene the very policy purposes that the class action device serves and could render class actions ineffective.¹⁶ Without an effective class action tool available, litigants may be forced to inefficiently litigate the same issues in multiple jurisdictions and may obtain inconsistent judgments resolving those issues.¹⁷

Part I of this Comment examines the history and background of the class action device and traces its development to its modern form. It then discusses the three main policy purposes of class actions: (1) to promote judicial efficiency, (2) to ensure victims can be adequately compensated, and (3) to provide a means for deterring wrongdoing.

com/sites/richardlevick/2017/07/11/the-game-changes-is-bristol-myers-squibb-the-end-of-an-era/#7488e95c2e83.

¹⁰ 952 F.3d 293, 295 (D.C. Cir. 2020).

¹¹ *Id.* at 301 (Silberman, J., dissenting).

¹² 953 F.3d 441, 443 (7th Cir. 2020).

¹³ Wystan M. Ackerman, *Does Bristol-Myers Squibb Apply to Class Actions? D.C. and Seventh Circuit Issue New Decisions*, NAT'L L. REV. (Mar. 12, 2020), <https://www.natlawreview.com/article/does-bristol-myers-squibb-apply-to-class-actions-dc-and-seventh-circuit-issue-new>.

¹⁴ Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 417 (2011).

¹⁵ *Mussat*, 953 F.3d at 446–48.

¹⁶ *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974).

¹⁷ See FED. R. CIV. P. 23(b)(1)(A) (noting class actions may be certified when separate, individual actions would “create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct”).

Part II explores the Supreme Court's personal jurisdiction jurisprudence. First, it discusses the modern framework for personal jurisdiction established by *International Shoe Co. v. Washington*.¹⁸ Then, it provides an overview of the evolution of personal jurisdiction from 1945 to the present. Finally, this Part describes the *Bristol-Myers* opinion in detail.

Part III thoroughly examines Judge Silberman's dissent in *Molock* and the Seventh Circuit's opinion in *Mussat*, analyzing the arguments made in each opinion.

Part IV proceeds in four sections. Section A argues that applying *Bristol-Myers* to class actions would contradict the widespread consensus on this issue pre-*Bristol-Myers*, resulting in a groundbreaking shift in the law not justified by the text of *Bristol-Myers*. Section B highlights the differences between class actions and mass actions of the type at issue in *Bristol-Myers* and argues that these differences between class members and mass action plaintiffs are sufficient to distinguish the two for personal jurisdiction purposes. Section C argues that Federal Rule of Civil Procedure 23, which governs class action procedure, provides sufficient due process protections to defendants in class actions, ensuring that defendants are not unfairly harmed by not applying *Bristol-Myers* to class actions. Lastly, section D discusses the policy implications of extending *Bristol-Myers* to class actions and argues that the goals of the class action device would be impaired if *Bristol-Myers* were applied to class actions.

Finally, Part V addresses the broad implications that extending the holding of *Bristol-Myers* to class actions would have on the litigation system as a whole. This Part concludes that, in conjunction with the Court's continued narrowing of personal jurisdiction, these implications could result in aggregate litigation becoming unduly difficult, thus depriving society of the benefits that aggregate litigation models such as class actions provide.

I. THE DEVELOPMENT OF THE MODERN CLASS ACTION

To understand fully the complexities of how *Bristol-Myers*'s conception of personal jurisdiction could apply to class actions, it is important to discuss and understand general information regarding class actions. The class action is a unique tool of aggregate litigation that functions quite differently from ordinary litigation.¹⁹ In so doing, it plays an important role in the judicial system as a vehicle by which large classes of injured parties with substantially similar claims

¹⁸ 326 U.S. 310, 320 (1945).

¹⁹ *Mussat*, 953 F.3d at 446-47.

can seek recovery for their injuries.²⁰ Section A of this Part provides a brief background of the historical origins and development of class actions in the United States. Section B examines the most important policy purposes that class actions serve.

A. *The Beginnings of the Class Action*

Class action litigation was introduced as a feature of American jurisprudence by Justice Joseph Story through his 1820 opinion in *West v. Randall*.²¹ Justice Story's analysis was first adopted by the Supreme Court in *Smith v. Swormstedt*,²² which permitted a class suit to be brought on behalf of a group of preachers seeking a declaration of the rights that each sectional group of the Methodist Episcopal Church of the United States had regarding funds belonging to the church.²³ Story's writings also prompted the Supreme Court to promulgate Equity Rule 48,²⁴ which provided a cause of action for group representative litigation.²⁵ In 1938, this rule was modernized and adopted into Federal Rule of Civil Procedure 23.²⁶ While the new Rule 23 was "a substantial restatement" of the former Rule, it modernized the old Rule by more clearly defining what constituted a "common or general interest" capable of affording a similarly-situated class of persons a right of action.²⁷ An increasingly industrialized and developed economy demanded a more robust tool for class actions, and Rule 23 was seen as a necessary mechanism to promote the use of class actions.²⁸ The original Rule 23 divided class actions into three vague categories based upon the character of the right asserted: (1) "true" class actions involving "joint, common

²⁰ See Mullenix, *supra* note 14, at 417.

²¹ 29 F. Cas. 718, 721 (C.C.D.R.I. 1820) ("It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be.").

²² 57 U.S. 288 (1853).

²³ *Id.* at 302.

²⁴ WRIGHT & MILLER, *supra* note 1. The original Equity Rule 48 was later replaced by Equity Rule 38. *Id.*

²⁵ *Id.* Rule 38 altered procedure:

In the former rules there was no provision requiring that every action should be prosecuted in the name of the real party in interest. When the question is of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

Robert E. Bunker, *The New Federal Equity Rules*, 11 MICH. L. REV. 435, 448 (1913).

²⁶ See FED. R. CIV. P. 23 advisory committee's note to 1937 adoption ("This is a substantial restatement of former Equity Rule 38 . . .") (alterations omitted).

²⁷ See *id.* ("The rule adopts the test of former Equity Rule 38, but defines what constitutes 'a common or general interest.'") (alterations omitted).

²⁸ See WRIGHT & MILLER, *supra* note 1, § 1752.

or secondary rights,” (2) “hybrid” class actions involving “rights related to ‘specific property,’” and (3) “spurious” class actions involving “rights affected by a common question and related to common relief.”²⁹

This original 1938 version of Rule 23 proved to be “obscure and uncertain,” and was thus replaced in 1966 by a rule that described “in more practical terms the occasions for maintaining class actions.”³⁰ The revised rule ushered in the modern era of class action litigation in the United States.³¹ The new rule proclaimed that judgments in class actions were final as to all members of the class and set forth the modern requirements for certifying a class action.³² While courts initially remained cautious about certifying class actions, class actions eventually became much more widespread and effective by the mid-1980s.³³

Under Rule 23 as it stands today, a class action must meet each of the four prerequisites stated in Rule 23(a) and at least one of the bases set forth in Rule 23(b).³⁴ The 23(a) requirements are commonly referred to as the elements of “numerosity, commonality, typicality, and adequate representation.”³⁵ Assuming each of the four Rule 23(a) requirements are met, a putative class action must then comport with at least one of the three types of class actions laid

²⁹ FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment. The class action categories provided in the original Rule 23 were the following:

- (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
- (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
- (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

WRIGHT & MILLER, *supra* note 1, § 1752.

³⁰ FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

³¹ See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH U. L. REV. 729, 736 (2013) (“Modern Rule 23 . . . originated in 1966 . . .”).

³² See FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (“*The amended rule . . . provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class.*”).

³³ Klonoff, *supra* note 31, at 736.

³⁴ FED. R. CIV. P. 23(a)–(b). Rule 23(a) states the following:

- One or more members of a class may sue or be sued as representative parties on behalf of all members only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

³⁵ *E.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011).

out in Rule 23(b).³⁶ The first type of class action identified in Rule 23(b)(1)³⁷ is the “prejudice” class action. These actions comprise claims “made by numerous persons against a fund insufficient to satisfy all claims.”³⁸ This type of class action may be brought when (1) separate actions would create inconsistent standards among the members of the class, or (2) separate actions would impede the interests of class members not party to the individual action.³⁹ The second type of class action identified, a Rule 23(b)(2) class action, may be brought when a class is seeking injunctive or declaratory relief.⁴⁰ Third and finally, Rule 23(b)(3) permits a class action to be maintained when (1) issues common to the class predominate over individual issues, and (2) a class action would be the most efficient means of adjudicating the case.⁴¹ If the class action falls within one of these categories and Rule 23(a) is satisfied, then the court may determine by order to certify the case as a class action.⁴²

B. *Policy Purposes of Class Actions*

Class actions are “an important and valuable part of the legal system”⁴³ for multiple reasons. First, a “principal purpose” of the class action is to promote

³⁶ FED. R. CIV. P. 23(b). The rule states the following:

A class action may be maintained if Rule 23(a) is satisfied and if

- (1) prosecuting separate actions by or against individual class members would create a risk of (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of their interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
- (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Id.

³⁷ *Id.* at (b)(1).

³⁸ *Id.* advisory committee’s note to 1966 amendment.

³⁹ *Id.* at (b)(1)(a)–(b).

⁴⁰ *Id.* at (b)(2).

⁴¹ *Id.* at (b)(3).

⁴² *Id.* at (c)(1)(A).

⁴³ Class Action Fairness Act (CAFA), 28 U.S.C. § 1711(a)(1).

efficiency and judicial economy.⁴⁴ Second, class actions serve the purpose of ensuring that plaintiffs with small claims have the ability to obtain recovery for their injuries.⁴⁵ Finally, class actions prevent defendants from being able to escape liability for their harms for the mere reason that it would not be economical for a singular injured party to bring suit.⁴⁶ The relationship between these policy goals and the overarching question of whether *Bristol-Myers* should apply to class actions is discussed in Part IV.D.

1. *Judicial Efficiency*

By aggregating individuals' claims into a single lawsuit, class actions "avoid . . . unnecessary filing of repetitious papers and motions,"⁴⁷ saving both time and "the enormous costs of piecemeal litigation."⁴⁸ Without the class action device, courts would be faced with "days of the same witnesses, exhibits and issues from trial to trial."⁴⁹ Devoting "the efforts of judges, clerks, witnesses," and jurors to "repeated examination of the issues raised by a single transaction" would be a waste.⁵⁰ Class actions serve a significant benefit in "[saving] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."⁵¹ Class actions also prevent the possibility of inconsistent judgments among various claims brought by individual plaintiffs.⁵² Consistent judgments not only ensure that similarly situated claimants are treated equally, but also help to maintain public confidence in the integrity of the court system.⁵³ Thus, class actions further the judicial system's preference for similar issues of law and fact to be efficiently resolved in the same way with respect to each claimant.⁵⁴

⁴⁴ *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

⁴⁵ *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("[A]ggrieved persons may be without effective redress unless they may employ the class-action device.").

⁴⁶ *See Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (noting "the class action [was] more likely to proceed, thereby helping to deter future violations").

⁴⁷ *Am. Pipe*, 414 U.S. at 550.

⁴⁸ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 (1999).

⁴⁹ *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986).

⁵⁰ John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 707 (1976).

⁵¹ *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

⁵² *See* FED. R. CIV. P. 23(b)(1)(A) (noting class actions may be certified when separate, individual actions would "create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct").

⁵³ *Louen v. Twedt*, No. CV-F-04-6556, 2007 WL 2688851, at *8 (E.D. Cal. Sept. 13, 2007).

⁵⁴ *See Sueoka v. United States*, 101 F. App'x 649, 654-55 (9th Cir. 2004) ("Addressing [a claim] in a single, rather than multiple, action, is the preferable approach . . .").

2. *Compensation of Victims*

Another purpose that class actions serve is to allow plaintiffs with small claims to obtain recovery through a negative value suit.⁵⁵ A negative value class action is made up of a multitude of individual claims of very small value.⁵⁶ Without the class action tool available, negative value plaintiffs would have no incentive to pursue time-intensive and costly litigation.⁵⁷ Moreover, even if a plaintiff wanted to pursue the case, he would have difficulty finding a competent attorney to take the case when the potential payoff is minimal.⁵⁸ The class action tool provides a unique solution to this problem by “aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.”⁵⁹ Thus, class actions allow a large number of plaintiffs whose individual claims are very small to combine their claims into one lawsuit, enabling each of them to recover.⁶⁰

3. *Deterrence*

While ensuring recovery of what will often be minimal damages may not seem like a compelling priority for the legal system, allowing recovery serves deterrence interests by ensuring that defendants cannot escape liability simply because no plaintiff has incentive to sue.⁶¹ Without the availability of a class action, defendants who cause small but widespread harm to a large number of people would likely not have to compensate their victims.⁶² A class action, however, could result in defendants’ being forced to pay a large sum of compensatory damages consisting of small payments to many plaintiffs, which would “have a potent deterrent effect.”⁶³ Thus, the class action structure is critical in that it encourages defendants “to take greater care in the future to comply” with the law.⁶⁴

⁵⁵ See *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“[A]ggravated persons may be without effective redress unless they may employ the class-action device.”).

⁵⁶ See RICHARD D. FREER, *CIVIL PROCEDURE* 816 (4th ed. 2017).

⁵⁷ See *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (“[S]mall recoveries do not provide the incentive for an individual to bring a solo action prosecuting his or her rights.”).

⁵⁸ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

⁵⁹ *Mace*, 109 F.3d at 344.

⁶⁰ *Id.*

⁶¹ See *id.* (noting a class action “help[s] to deter future violations”).

⁶² See FREER, *supra* note 56, at 816.

⁶³ *Globus v. L. Rsch. Serv., Inc.*, 418 F.2d 1276, 1285 (2d Cir. 1969).

⁶⁴ *Hughes v. Kore of Ind. Enter.*, 731 F.3d 672, 678 (7th Cir. 2013).

II. THE SUPREME COURT'S PERSONAL JURISDICTION JURISPRUDENCE

Under the Fourteenth Amendment's Due Process Clause,⁶⁵ courts must have jurisdiction over the defendant to render binding judgments that resolve a case.⁶⁶ Courts may exercise personal jurisdiction over a defendant when the defendant is served process while in the forum state,⁶⁷ does not object to the exercise of jurisdiction,⁶⁸ or has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁶⁹ This personal jurisdiction requirement serves two main purposes. First, it "protects the defendant against the burdens of litigating in a distant or inconvenient forum."⁷⁰ Second, it promotes federalism by ensuring that states do not exceed "the limits imposed on them by their status as coequal sovereigns in a federal system."⁷¹

⁶⁵ Although the personal jurisdiction powers of federal courts are constitutionally limited by the Fifth Amendment's Due Process Clause, Rule 4(k) authorizes personal jurisdiction only to the extent that a state court in the state where the federal court is located would have personal jurisdiction. FED. R. CIV. P. 4(k)(1)(A). As a result, the Fourteenth Amendment generally governs the limits on federal courts' exercise of personal jurisdiction. See A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979, 985 n.33, 986–87, 996 (2019) (stating "federal courts have been largely confined to the jurisdictional reach of their host states").

⁶⁶ See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878) ("[T]he validity of such judgments may be directly questioned . . . on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").

⁶⁷ See *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 619 (1990) (plurality opinion); *id.* at 628–29 (Brennan, J., concurring).

⁶⁸ See FED. R. CIV. P. 12(h)(1)(B) (noting a party waives its personal jurisdiction defense by failing to make it in a motion or raise it in a responsive pleading).

⁶⁹ *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁷⁰ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

⁷¹ *Id.*; see also *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (stating personal jurisdiction restrictions "are a consequence of territorial limitations on the power of the respective States"). The relevance of interstate federalism in personal jurisdiction disputes has been subject to inconsistent interpretation by the Supreme Court. Just two years after *World-Wide Volkswagen*, the Court stated the following:

The restriction on state sovereign power described in *World-Wide Volkswagen* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.

Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982). Nevertheless, the Court's decisions have continued to recognize interstate federalism as an important principle underlying personal jurisdiction protections. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion) ("[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States."). This federalism rationale was principally relied upon by the Court in *Bristol-Myers*. See *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017).

Of course, to assess how personal jurisdiction requirements should be applied to the unique setting of a class action, a discussion of the underlying framework and development of personal jurisdiction doctrine is necessary. Section A of this Part discusses the beginnings of the modern understanding of personal jurisdiction, including the famous 1945 case, *International Shoe Co. v. Washington*. Section B examines the Court's gradual narrowing of personal jurisdiction post-*International Shoe* and offers context for the *Bristol-Myers* decision. Section C analyzes *Bristol-Myers* itself and introduces the resulting personal jurisdiction problem in the class action context.

A. *Establishing the Modern Personal Jurisdiction Framework*

Under the traditional approach to personal jurisdiction that predominated in the nineteenth and early twentieth centuries, proper exercise of personal jurisdiction required serving process on a defendant physically located in the state.⁷² In the foundational case of *International Shoe*, the Court departed from the traditional approach. The *International Shoe* Court introduced the concept of “minimum contacts” as the primary test for determining whether the exercise of jurisdiction comported with due process.⁷³ In its decision, the Court introduced a distinction between two types of personal jurisdiction,⁷⁴ referred to today as “general jurisdiction” and “specific jurisdiction.”⁷⁵

General jurisdiction is exercised when a defendant is made to answer for claims that are entirely unrelated to that defendant's activities in the state in which the claim is brought.⁷⁶ As described by the Court in *International Shoe*, a court may exercise general jurisdiction over a defendant based upon that defendant's continuous and systematic activities in the forum state.⁷⁷ The Court defines continuous and systematic activities as activities “so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely distinct from those activities.”⁷⁸ General jurisdiction may be conferred through the traditional methods of in-state service of process⁷⁹ and consent, because these methods permit jurisdiction over causes of action that do

⁷² See *Pennoyer v. Neff*, 95 U.S. 714, 724 (1878).

⁷³ *Int'l Shoe*, 326 U.S. at 316.

⁷⁴ See *id.* at 318.

⁷⁵ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923–24 (2011).

⁷⁶ See *id.*

⁷⁷ *Int'l Shoe*, 326 U.S. at 318.

⁷⁸ *Id.*

⁷⁹ This form of jurisdiction applies to individuals served process in a state, but under current law, does not apply to corporations whose officers are served process in a state. Cody J. Jacobs, *If Corporations are People, Why Can't They Play Tag?*, 46 N.M.L. REV. 1, 2 (2016).

not arise from the defendant's contacts with the forum state.⁸⁰ In addition, general jurisdiction may be exercised when the defendant is domiciled in the forum state.⁸¹

In contrast, specific jurisdiction may be exercised over a defendant when the claim is related to the defendant's activities in the forum state, regardless of whether the contacts are widespread or minimal.⁸² As the Court in *International Shoe* described, some activities "because of their nature and quality and the circumstances of their commission, may be deemed sufficient," regardless of whether the activities are continuous and systematic.⁸³ In these instances, the defendant's activities are such that the defendant is said to have "minimum contacts" with the forum state, and it is always sufficient for that state to exercise jurisdiction over the defendant.⁸⁴

B. *The Gradual Narrowing of Personal Jurisdiction*

The limits of a court's exercise of both general and specific jurisdiction over defendants has been narrowed significantly by the Supreme Court in the years since *International Shoe* was decided seventy-five years ago. Today, the Court has effectively replaced its original standards of personal jurisdiction with a narrower, rule-based approach that more clearly delineates when personal jurisdiction may and may not be exercised.⁸⁵ The "continuous and systematic" test has been replaced by an at home standard to establish general jurisdiction,⁸⁶ and the Court has introduced additional metrics for determining whether specific jurisdiction is appropriate.

The first case that significantly narrowed the Court's conception of general jurisdiction was the Court's 1984 decision in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.⁸⁷ In *Helicopteros*, the defendant, over an eight year period, purchased products and accessories from the forum state and sent prospective employees to the forum state for training.⁸⁸ The Court concluded

⁸⁰ See *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 619 (1990) (plurality opinion) (concluding "jurisdiction based on physical presence alone" is sufficient regardless of the defendant's minimum contacts); FED. R. CIV. P. 12(h)(1)(B) (determining whether a party is considered to have consented to personal jurisdiction does not require consideration of contacts with the forum state).

⁸¹ *Goodyear*, 564 U.S. at 924.

⁸² *Int'l Shoe*, 326 U.S. at 318–19.

⁸³ *Id.* at 318.

⁸⁴ *Id.* at 316–18.

⁸⁵ See, e.g., *Goodyear*, 564 U.S. at 924.

⁸⁶ *Id.*

⁸⁷ 466 U.S. 408, 415–16, 418 (1984).

⁸⁸ *Id.* at 411.

that these contacts did not constitute “the kind of continuous and systematic general business contacts” that would subject the defendant to general jurisdiction.⁸⁹ In supporting its conclusion, the Court contrasted “purchases and related trips, standing alone” with activities such as applying for a business license, “establish[ing] a place of business,” and “regularly [carrying] on business” in the forum state.⁹⁰ This decision constituted a significant contraction of the Court’s general jurisdiction doctrine, as the Court had previously permitted broad exercise of general jurisdiction under *International Shoe’s* “continuous and systematic standard,” even suggesting that a defendant with nationwide contacts could be subject to general jurisdiction almost anywhere.⁹¹

The Court decided *Goodyear Dunlop Tires Operations, S.A. v. Brown* in 2011,⁹² and *Daimler AG v. Bauman* three years later.⁹³ In these cases, the Court fashioned a new standard for when general jurisdiction may be exercised over a corporation.⁹⁴ In *Goodyear*, the Court found that courts may exercise general jurisdiction over corporate defendants when their contacts with the forum state are “so ‘continuous and systematic’ as to render them essentially at home” in that state.⁹⁵ In *Daimler*, the Court clarified further that a corporation’s “place of incorporation and principal place of business are [the] ‘paradigm . . . bases’” for when a corporation is “fairly regarded as at home.”⁹⁶ This shift marked a sweeping restriction on general jurisdiction, as large national corporations that once could have been subject to general jurisdiction in a number of states are now subject to general jurisdiction only in the few forums where they are “essentially at home.”⁹⁷

The Supreme Court has also narrowed the scope of courts’ ability to exercise specific jurisdiction over both individuals and corporate defendants, beginning

⁸⁹ *Id.* at 415–16.

⁹⁰ *Id.* at 417.

⁹¹ *See id.* at 415–16.

⁹² 564 U.S. 915 (2011).

⁹³ 571 U.S. 117 (2014).

⁹⁴ *See Goodyear*, 564 U.S. at 919; *Daimler*, 571 U.S. at 137.

⁹⁵ *Goodyear*, 564 U.S. at 919 (quoting *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945)).

⁹⁶ *Daimler*, 571 U.S. at 137 (alterations omitted) (citations omitted).

⁹⁷ *Goodyear*, 564 U.S. at 919. Initially, the Court did not categorically limit general jurisdiction to the “paradigm” states. *See Daimler*, 571 U.S. at 137 (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business . . .”). However, since establishing the at home standard, the Court has yet to subject a corporation to general jurisdiction unless one of the paradigm bases is satisfied. *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1560 (2017) (Sotomayor, J., concurring in part and dissenting in part) (“[I]t is virtually inconceivable that . . . corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation.”).

with *Hanson v. Denckla*⁹⁸ in 1958. In *Hanson*, the Court added to the “certain minimum contacts” requirement from *International Shoe*⁹⁹ that “there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”¹⁰⁰ In other words, the unilateral activity of a third party “cannot satisfy the requirement of contact with the forum State,” and the defendant itself must purposefully act in the forum state.¹⁰¹ Activities by defendants that have been found to constitute purposeful availment of specific jurisdiction include soliciting business in the forum state,¹⁰² purposefully distributing a product in the forum state,¹⁰³ committing an out-of-state tortious act that causes harmful effects in the forum state,¹⁰⁴ and initiating a contractual relationship with a party in the forum state.¹⁰⁵

Another limitation on the exercise of specific jurisdiction is the requirement that events giving rise to a claim must “relate[] to or ‘arise[] out of’” the defendant’s contacts with the forum state.¹⁰⁶ Minimum contacts and purposeful availment alone are not sufficient; for specific jurisdiction to be exercised consistent with due process, the Court has held that “the defendant’s suit-related conduct must create a substantial connection with the forum State.”¹⁰⁷ The precise extent of relatedness required between the defendant’s contacts and the events giving rise to the claim generated multiple proposed tests in the lower courts.¹⁰⁸ In 2021, however, the Supreme Court declined to further constrain

⁹⁸ 357 U.S. 235, 251–54 (1958).

⁹⁹ *Int’l Shoe*, 326 U.S. at 316.

¹⁰⁰ *Hanson*, 357 U.S. at 253 (citation omitted).

¹⁰¹ *Id.*; see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (rejecting assertion of specific jurisdiction in Oklahoma over a New York defendant who carried on no business activities in Oklahoma). Furthermore, the plurality opinion in *J. McIntyre Mach., Ltd. v. Nicastro* found that purposeful availment of the United States as a whole was insufficient—defendants must purposefully avail themselves of the forum state itself for personal jurisdiction to be exercised. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 886 (2011) (plurality opinion).

¹⁰² *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957); see also *Hanson*, 357 U.S. at 251–52 (distinguishing *McGee* on the basis that the defendant in *McGee* solicited an insurance agreement with a resident of the forum state, which was a sufficient contact to support jurisdiction).

¹⁰³ *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774–75 (1984).

¹⁰⁴ *Calder v. Jones*, 465 U.S. 783, 788–90 (1984).

¹⁰⁵ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985).

¹⁰⁶ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (citation omitted).

¹⁰⁷ *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

¹⁰⁸ *Compare Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 443 P.3d 407, 416 (Mont. 2019), *aff’d*, 141 S. Ct. 1017, 1026 (2021) (holding that relatedness is met when a “nexus” exists between the injury and the defendant’s in-state activity and the defendant could have reasonably foreseen the injury occurring in the state), *with Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 585, 588 (Tex. 2007) (holding that “there must be a substantial connection between [defendant’s] contacts and the operative facts of the litigation,” and that in-state advertising is not a sufficient link to satisfy this test). See generally *Moki Mac*, 221 S.W.3d at 579–85

specific jurisdiction, holding that a direct causal link between the defendant's conduct and the plaintiff's claims is not required to show relatedness.¹⁰⁹ Instead, the "arise out of *or relate to*" formulation "contemplates that some relationships will support jurisdiction without a causal showing."¹¹⁰ Nevertheless, "the phrase 'relate to' incorporates real limits,"¹¹¹ as the "relationship among the defendant, the forum, and the litigation" must be strong enough to support specific jurisdiction.¹¹²

Finally, even when minimum contacts, purposeful availment, and relatedness have been shown, a court must ensure that the assertion of jurisdiction over the defendant comports with "traditional notions of fair play and substantial justice."¹¹³ In *Burger King Corp. v. Rudzewicz*,¹¹⁴ the Court listed five factors for courts to consider in determining whether it would be fair to subject the defendant to jurisdiction: (1) "the burden on the defendant," (2) "the forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) "the shared interest of the several States in furthering fundamental substantive social policies."¹¹⁵

Application of these factors can both "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required" and "defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities."¹¹⁶ The purpose of this additional requirement is to prevent personal jurisdiction rules from "[making] litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent."¹¹⁷ This "fairness" inquiry, along with the narrowing of general jurisdiction and the addition of the "purposeful availment" and "relatedness" requirements, demonstrate the additional

(describing other relatedness tests applied by various courts).

¹⁰⁹ *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021).

¹¹⁰ *Id.* (citation omitted).

¹¹¹ *Id.*

¹¹² *Id.* at 15 (citation omitted).

¹¹³ *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹¹⁴ 471 U.S. 462 (1985).

¹¹⁵ *Id.* at 476–77 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

¹¹⁶ *Id.* at 477–78.

¹¹⁷ *Id.* at 478 (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957)).

constraints that the Court placed on personal jurisdiction after *International Shoe* and leading up to *Bristol-Myers*.¹¹⁸

C. *The Bristol-Myers Decision*

In *Bristol-Myers Squibb Co. v. Superior Court of California*, the Court continued to narrow its personal jurisdiction doctrine by holding that, in a mass tort action, a court must have personal jurisdiction over a defendant with respect to the claims of every plaintiff.¹¹⁹ In *Bristol-Myers*, 678 plaintiffs, including 86 California residents and 592 residents of thirty-three other states, filed a mass tort suit against defendant Bristol-Myers Squibb Co. (BMS) in California Superior Court.¹²⁰ Asserting thirteen claims under California law, the plaintiffs alleged that they were injured by taking Plavix, a prescription drug manufactured and sold by BMS.¹²¹ The non-California plaintiffs did not claim to have acquired Plavix from “California physicians or . . . any other California source,” or that they were injured or treated for their injuries in California.¹²² Furthermore, “BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California.”¹²³

BMS was incorporated in Delaware with its principal place of business in New York, and “maintain[ed] substantial operations in New York and New Jersey,” where Plavix was developed and produced.¹²⁴ However, BMS engaged in activities in California, five research facilities were located in the state, and about 400 company employees were located there.¹²⁵ At the time of the case, BMS had sold about 187 million Plavix pills in California, generating over \$900 million in revenue.¹²⁶

BMS asserted a lack of personal jurisdiction with respect to the nonresidents’ claims in the California Superior Court.¹²⁷ The court denied the motion, finding that BMS was subject to general jurisdiction due to its “extensive activities” in California.¹²⁸ In light of *Daimler AG v. Bauman*, which confined general

¹¹⁸ See *id.* at 477–78.

¹¹⁹ *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1781–82 (2017).

¹²⁰ *Id.* at 1778.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 1777–78.

¹²⁵ *Id.* at 1778.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

jurisdiction to fora in which the defendant can be “fairly regarded as at home,”¹²⁹ the California Court of Appeal reversed the California Superior Court with respect to general jurisdiction because BMS neither was incorporated in California nor had its principal place of business in California.¹³⁰ Nonetheless, the California Court of Appeal found that California had specific jurisdiction over the nonresidents’ claims by virtue of BMS’s “extensive, longstanding business activities in California,” which were “far more than the minimum contacts necessary.”¹³¹

The Supreme Court of California affirmed the finding of specific jurisdiction.¹³² The court found that BMS, through its extensive activities in California, clearly had minimum contacts with the state and had purposefully availed itself of the benefits and protection of the state.¹³³ With respect to relatedness, the court applied a “sliding scale approach to specific jurisdiction” in which “the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim.”¹³⁴ Under this test, the court determined that “BMS’s extensive contacts with California establish minimum contacts based on a less direct connection between BMS’s forum activities and plaintiffs’ claims than might otherwise be required.”¹³⁵

In an 8–1 decision authored by Justice Alito, the U.S. Supreme Court reversed the Supreme Court of California,¹³⁶ stating that “settled principles regarding specific jurisdiction control this case.”¹³⁷ The Court based its analysis in federalism, emphasizing that restrictions on the exercise of personal jurisdiction are essential to ensure state sovereignty.¹³⁸ As the Court stated, “States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each state

¹²⁹ Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (citation omitted).

¹³⁰ Bristol-Myers Squibb Co. v. Super. Ct., 175 Cal. Rptr. 3d 412, 424 (Cal. Ct. App. 2014).

¹³¹ *Id.* at 433.

¹³² Bristol-Myers Squibb Co. v. Super. Ct., 377 P.3d 874, 894 (Cal. 2016).

¹³³ *Id.* at 886.

¹³⁴ *Id.* at 889 (citation omitted). *But see* Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 583–84 (Tex. 2007) (describing and rejecting the “sliding scale” approach).

¹³⁵ *Bristol-Myers*, 377 P.3d at 889.

¹³⁶ Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1784 (2017).

¹³⁷ *Id.* at 1781.

¹³⁸ *See id.* at 1780 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)); *see also id.* at 1788 (Sotomayor, J., dissenting) (“The majority’s animating concern, in the end, appears to be federalism: ‘[T]erritorial limitations on the power of the respective States.’”).

. . . implies a limitation on the sovereignty of all its sister States.”¹³⁹ The Court went so far as to state that “at times, this federalism interest may be decisive.”¹⁴⁰

The Court then rejected the “sliding scale” test as insufficient to show that the claims relate to BMS’s contacts in California.¹⁴¹ The nonresident plaintiffs “were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California.”¹⁴² As a result, there was no “adequate link” between the nonresident plaintiffs and California; the “mere fact that *other* plaintiffs were . . . [injured] in California” does not support jurisdiction over the nonresident plaintiffs’ claims.¹⁴³ Because “[t]he relevant plaintiffs are not California residents and do not claim to have suffered harm in that State,” the Court rejected the Supreme Court of California’s “sliding scale” relatedness test as constitutionally inadequate.¹⁴⁴ The Court noted that the nonresident plaintiffs could bring an action against BMS in a state that has general jurisdiction, which in this case would have been Delaware and New York.¹⁴⁵ Additionally, the Court recognized that plaintiffs from each individual state could sue BMS in that state.¹⁴⁶ Justice Alito’s majority opinion did not mention or apply the *Burger King* fairness factors.¹⁴⁷

Justice Sotomayor dissented and would have found that California could exercise specific jurisdiction over BMS with respect to the nonresidents’ claims.¹⁴⁸ Justice Sotomayor argued that the claims “relate[d] to” BMS’s contacts with California because BMS advertised and distributed the drugs across all fifty states, and each plaintiff alleged injury by the “same essential acts” undertaken by BMS.¹⁴⁹ Furthermore, it would be reasonable and consistent with a fairness analysis to subject BMS to specific jurisdiction in California.¹⁵⁰

¹³⁹ *Id.* at 1780 (majority opinion) (alterations omitted) (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1781.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1782.

¹⁴⁵ *Id.* at 1783.

¹⁴⁶ *Id.* (“[T]he plaintiffs who are residents of a particular state—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States.”).

¹⁴⁷ See Matthew P. Demartini, Comment, *Stepping Back to Move Forward: Expanding Personal Jurisdiction by Reviving Old Practices*, 67 EMORY L.J. 809, 837–38 (2018) (noting the *Bristol-Myers* opinion took an exclusively contacts-focused approach at the expense of fairness).

¹⁴⁸ *Bristol-Myers*, 137 S. Ct. at 1786 (Sotomayor, J., dissenting).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1786–87.

Justice Sotomayor expressed concerns about the effects of the Court’s decision, noting that the Court’s rule “forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.”¹⁵¹ Moreover, Justice Sotomayor argued that the Court’s rule “will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone,” “will make it impossible to bring a nationwide mass action in state court against defendants who are ‘at home’ in different States,” and “will result in piecemeal litigation and the bifurcation of claims.”¹⁵²

Most importantly, Justice Sotomayor noted that the majority opinion did not resolve the question of whether its holding would apply to a class action suit.¹⁵³ In addition, during oral argument, multiple justices raised the issue of how the case may relate to class actions.¹⁵⁴ *Bristol-Myers* was a mass tort action “in which hundreds of plaintiffs joined together in court but maintained their identity as individual parties.”¹⁵⁵ In a mass action, “each plaintiff is a real party in interest” and therefore must individually effect service and file claims in a forum in which the defendant is subject to personal jurisdiction.¹⁵⁶ Unlike class actions, each plaintiff in a mass action is “personally named” in the complaint and must independently make out their own claim.¹⁵⁷ In a class action, by contrast, a small number of representatives represent the interests of the unnamed, absent class members.¹⁵⁸ Moreover, mass actions do not need to satisfy the procedural hurdles of Rule 23 to be certified by the court.¹⁵⁹ Whether these differences should distinguish class actions from mass actions with regard to personal jurisdiction requirements remained unresolved in *Bristol-Myers*. This ongoing question forms the basis of this Comment.

¹⁵¹ *Id.* at 1789.

¹⁵² *Id.* at 1784.

¹⁵³ *Id.* at 1789 n.4.

¹⁵⁴ Transcript of Oral Argument at 17, 42, *Bristol-Myers Squibb v. Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017) (No. 16-466) (Breyer, J.) (“[W]hat do we do to . . . the class actions . . . ?”) (Ginsburg, J.) (“[C]ould the Plavix claim have been brought as a class action?”).

¹⁵⁵ Daniel Wilf-Townsend, *Did Bristol-Myers Squibb Kill the Nationwide Class Action?*, 129 *YALE L.J.* F. 205, 210 (2019).

¹⁵⁶ *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1365 (N.D. Ga. 2018).

¹⁵⁷ *See id.* at 1365–66 (“[A] mass action . . . may—and likely would—present significant variations in the plaintiffs’ claims . . .”).

¹⁵⁸ *Id.* at 1365.

¹⁵⁹ *See Jones v. Depuy Synthes Prods., Inc.*, 330 F.R.D. 298, 312 (N.D. Ala. 2018) (distinguishing mass actions from class actions on the grounds that “the certification procedures set forth in Rule 23 . . . protect absent class members’ due process rights”).

III. THE DIFFERENCE OF OPINION FORMS

Almost immediately, commentators began to ponder whether *Bristol-Myers* would require a court to have personal jurisdiction over a class action defendant with respect to all class members. The very same day that *Bristol-Myers* was decided, renowned litigator Andrew J. Pincus¹⁶⁰ speculated that *Bristol-Myers* would have a significant impact on class action litigation, noting that *Bristol-Myers* “provides class action defendants with powerful arguments to challenge class actions filed in states that cannot exercise personal jurisdiction with respect to absent class members’ claims.”¹⁶¹ Another article proclaimed that “the days of a nationwide class action being filed against a California company in [Illinois] . . . are over.”¹⁶² In another piece, the author noted that “[i]t remains to be seen how class actions will in turn be affected by *Bristol-Myers*” and predicted that class action defendants would cite the decision in seeking dismissal of nonresident class members.¹⁶³

It did not take long for the issue of *Bristol-Myers*’s application to class actions to be raised in the federal district courts.¹⁶⁴ Three months after the Supreme Court decided *Bristol-Myers*, a federal district court reached the merits of *Bristol-Myers*’s application to class actions for the first time.¹⁶⁵ Just a couple of weeks later, a difference of opinion emerged among district courts.¹⁶⁶ By September 2019, fifty-six judges in twenty-four different districts had rendered sixty-four federal district court decisions on the merits of *Bristol-Myers*’s application to nationwide class actions.¹⁶⁷ The large majority of these rulings

¹⁶⁰ Andrew J. Pincus is an experienced litigator who has argued thirty cases in front of the U.S. Supreme Court and frequently speaks and writes on legal issues, including class action law. *See generally* Andrew J. Pincus, MAYER BROWN, <https://www.mayerbrown.com/en/people/p/pincus-andrew-j?tab=overview> (last visited Nov. 11, 2021) (providing a brief summary of Mr. Pincus’s background).

¹⁶¹ Pincus et al., *supra* note 9.

¹⁶² Channick & Yerak, *supra* note 5.

¹⁶³ Levick, *supra* note 9.

¹⁶⁴ *See, e.g.,* Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., No. 17-cv-00564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017) (addressing *Bristol-Myers*’s application to class actions three months after *Bristol-Myers* was decided).

¹⁶⁵ *Id.*

¹⁶⁶ *Compare id.* at *5, *6 (refusing to extend *Bristol-Myers* to a nationwide class action in which each named plaintiff was a California resident harmed in California, while eighty-eight percent of the total class members were not California residents), with *Wenokur v. AXA Equitable Life Ins. Co.*, No. CV-17-00165-PHX, 2017 WL 4357916, at *4 n.4 (D. Ariz. Oct. 2, 2017) (“The Court also notes that it lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class.”). *See generally* Wilf-Townsend, *supra* note 155, at 229–37 (surveying district court decisions on the application of *Bristol-Myers* to nationwide class actions between September 2017 and September 2019).

¹⁶⁷ Wilf-Townsend, *supra* note 155, at 212–13.

declined to extend *Bristol-Myers* and permitted the class action to proceed; only fourteen of the sixty-four rulings held that *Bristol-Myers* precluded specific jurisdiction over the nonresident class members.¹⁶⁸ However, it was not until March 2020 that federal courts of appeals began issuing rulings on the issue.¹⁶⁹

This Part will discuss the growing weight of authority that has answered the question of whether *Bristol-Myers* applies to class actions, focusing in particular on *Molock v. Whole Foods Market Group, Inc.*¹⁷⁰ and *Mussat v. IQVIA, Inc.*¹⁷¹ In these cases, a difference of opinion on the *Bristol-Myers* issue formed at the federal appellate level.¹⁷²

A. *Molock v. Whole Foods Market Group, Inc.*

The first federal appellate court to consider the question of whether *Bristol-Myers* applies to class actions was the D.C. Circuit. In *Molock v. Whole Foods Market Group, Inc.*, a group of current and former employees of Whole Foods sought to bring a class action against Whole Foods in the U.S. District Court for the District of Columbia.¹⁷³ Plaintiffs, asserting diversity jurisdiction, brought state law claims alleging that Whole Foods “manipulated its incentive-based bonus programs, resulting in employees losing wages otherwise owed to them.”¹⁷⁴ Whole Foods is incorporated in Delaware and maintains its principal place of business in Texas.¹⁷⁵ Plaintiffs brought the case on behalf of themselves, other employees of Whole Foods in the District of Columbia, and employees in other states such as Georgia, Maryland, North Carolina, Oklahoma, and Virginia.¹⁷⁶ Citing *Bristol-Myers*, Whole Foods moved to dismiss on grounds that the district court did not have personal jurisdiction over it with respect to the putative class members who were not employed in the District of Columbia.¹⁷⁷

¹⁶⁸ *Id.* at 213.

¹⁶⁹ *See Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447–49 (7th Cir. 2020) (declining to extend the holding of *Bristol-Myers* to class actions).

¹⁷⁰ 952 F.3d 293, 295 (D.C. Cir. 2020).

¹⁷¹ 953 F.3d at 443.

¹⁷² *Compare Molock*, 952 F.3d at 300–01 (Silberman, J., dissenting) (arguing the court should have reached the *Bristol-Myers* issue and class claims unrelated to defendant’s contacts cannot proceed), *with Mussat*, 953 F.3d at 447–49 (holding that *Bristol-Myers* does not warrant a major change in the law of personal jurisdiction and class actions).

¹⁷³ 952 F.3d at 295.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 120 (D.D.C. 2018).

¹⁷⁷ *Molock*, 952 F.3d at 295–96.

The district court sided with the plaintiffs and denied Whole Foods' motion to dismiss for lack of personal jurisdiction.¹⁷⁸ The court based its decision on "the material distinctions between a class action and a mass tort action."¹⁷⁹ Specifically, the court noted that in a class action, named plaintiffs represent the interests of the class members, whereas in mass tort actions, each plaintiff is a "real party in interest."¹⁸⁰ In addition, the court reasoned that Rule 23's requirements for certification of a class action provide procedural safeguards that do not apply in the context of a mass tort action.¹⁸¹ For these reasons, the court denied Whole Foods' motion.¹⁸²

On appeal, the D.C. Circuit declined to reach the merits of the *Bristol-Myers* issue.¹⁸³ Instead, in a 2–1 decision, the D.C. Circuit affirmed the district court on the basis that Whole Foods' motion to dismiss the nonresident putative class members was premature because the case had not been certified as a class action under Rule 23.¹⁸⁴ As the court articulated, class certification is the mechanism by which unnamed class members are brought into the lawsuit and any personal jurisdiction restrictions that may apply are not triggered until certification.¹⁸⁵ Therefore, while the district court was correct to deny Whole Foods' motion, it did so for the wrong reason; the district court should not have ruled on the *Bristol-Myers* issue because it was not yet ripe for review.¹⁸⁶

While the majority did not express an opinion on the merits of the *Bristol-Myers* issue, Judge Silberman argued in his dissent that the court should have reached the issue and found that the logic of *Bristol-Myers* does extend to class actions.¹⁸⁷ Judge Silberman would not have barred Whole Foods' motion as premature because (1) "the issue was forfeited by the plaintiffs by never raising it below,"¹⁸⁸ and (2) the motion sought dismissal of claims, not putative class

¹⁷⁸ *Molock*, 297 F. Supp. 3d at 126–27.

¹⁷⁹ *Id.* at 126.

¹⁸⁰ *Id.* A "real party in interest" is simply a party that was named as such in the complaint. *See id.* In a class action, only the named representatives are named in the complaint; class members are not named. *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-cv-00564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017).

¹⁸¹ *Molock*, 297 F. Supp. 3d at 126.

¹⁸² *Id.* at 126–27.

¹⁸³ *See Molock v. Whole Foods Mkt., Inc.*, 952 F.3d 293, 295, 298 (D.C. Cir. 2020).

¹⁸⁴ *Id.* at 295, 298.

¹⁸⁵ *Id.* at 298.

¹⁸⁶ *See id.* ("Any decision purporting to dismiss putative class members before [certification] would be purely advisory.")

¹⁸⁷ *Id.* at 300–01 (Silberman, J., dissenting).

¹⁸⁸ *Id.*

members.¹⁸⁹ Thus, the dissenting opinion would have confronted the *Bristol-Myers* issue as the district court did.¹⁹⁰

Upon reaching the *Bristol-Myers* issue, Judge Silberman would have reversed the district court and concluded that, while the *Bristol-Myers* Court did not explicitly apply its holding to class actions, the logic of the Court's decision supports such an application.¹⁹¹ The dissent rejected the idea that the distinction between class actions and mass tort actions is critical, arguing "a class action is just a species of joinder, which 'merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.'"¹⁹² The dissent refuted the argument that Rule 23 provides adequate protections for due process, noting "the Rule primarily focuses on the relationship between the claims of the named representatives and the absent class members."¹⁹³ However, Judge Silberman noted that the Court in *Bristol-Myers* did not allow the assertion of personal jurisdiction on the basis that the plaintiffs' claims were similar.¹⁹⁴ To adequately protect the defendant's due process rights, Judge Silberman would have applied "normal limits on personal jurisdiction," rather than rely on any inherent difference between class actions and mass actions.¹⁹⁵

Furthermore, the dissent stated that the district court's focus on whether the class members were "real parties in interest" was misguided.¹⁹⁶ Judge Silberman argued that "[t]he Court's focus in *Bristol-Myers* was on whether limits on personal jurisdiction protect a defendant from out-of-state *claims*."¹⁹⁷ When a court adjudicates a claim, it exercises binding authority on both parties. Thus, Judge Silberman argued, a court that adjudicates claims of class members whose claims do not arise out of the forum state exercises the same "coercive power over a defendant" that it would in the case of plaintiffs in a mass action.¹⁹⁸

Finally, Judge Silberman refuted the plaintiffs' arguments that applying *Bristol-Myers* in this context "would have a devastating impact on the viability of class actions."¹⁹⁹ The dissent noted that a nationwide class action could be

¹⁸⁹ *Id.* at 302.

¹⁹⁰ *See id.* at 301, 305 (noting the *Bristol-Myers* question was "[t]he issue that actually divided the parties below" and "the subject of the order that the district court certified").

¹⁹¹ *Id.* at 306.

¹⁹² *Id.* (citation omitted).

¹⁹³ *Id.* at 307.

¹⁹⁴ *Id.* at 308.

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* at 306–07 ("[T]he party status of absent class members seems to me to be irrelevant.").

¹⁹⁷ *Id.* at 307.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 309.

filed in states in which the defendant is subject to general jurisdiction.²⁰⁰ Any limits that would result from the application of *Bristol-Myers* to class actions, Judge Silberman argued, are no different than limits on both mass actions and suits by individual plaintiffs and “must be tolerated under current law.”²⁰¹

B. Mussat v. IQVIA, Inc.

One day after the D.C. Circuit issued its decision in *Molock*, the Seventh Circuit decided *Mussat v. IQVIA, Inc.*²⁰² The representative in the case, Florence Mussat, received a junk fax that did not include an opt-out notice as required under federal law.²⁰³ The fax was sent by IQVIA, an organization incorporated in Delaware and that maintained its principal place of business in Pennsylvania.²⁰⁴ Plaintiffs sought to bring a nationwide class action in the Northern District of Illinois on behalf of all other persons who had received the junk faxes.²⁰⁵ Relying on *Bristol-Myers*, IQVIA sought to dismiss the putative class members who had allegedly received a junk fax in a state other than Illinois.²⁰⁶

The district court granted IQVIA’s motion,²⁰⁷ holding that *Bristol-Myers* requires that a court have personal jurisdiction over the defendant with respect to all class members, named and unnamed.²⁰⁸ The court reasoned that exercising jurisdiction over IQVIA would violate its due process rights in that the nonresidents’ claims regarding the junk faxes did not “arise out of or relate to” the forum state of Illinois.²⁰⁹ Without relatedness, *Bristol-Myers* categorically does not permit the exercise of specific jurisdiction, “[w]hether it be an individual, mass, or class action.”²¹⁰ Under the district court’s interpretation of *Bristol-Myers*, “nationwide class actions in fora where the defendant is not subject to general jurisdiction” cannot proceed.²¹¹

²⁰⁰ See *id.* at 305 (“It is worth noting that the plaintiffs could have avoided this whole personal jurisdiction imbroglio simply by driving 110 miles down the road and filing this class action in Wilmington.”).

²⁰¹ *Id.* at 310.

²⁰² 953 F.3d 441 (7th Cir. 2020).

²⁰³ *Id.* at 443.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Mussat v. IQVIA, Inc.*, No. 17 C 8841, 2018 WL 5311903, at *1 (N.D. Ill. Oct. 26, 2018).

²⁰⁸ *Id.* at *4.

²⁰⁹ *Id.* at *5.

²¹⁰ *Id.*

²¹¹ *Id.*

The Seventh Circuit unanimously reversed the district court, becoming the first appellate court to issue binding law on the issue.²¹² The court noted that the longstanding general consensus before *Bristol-Myers* was decided provided that a court did not need to have specific jurisdiction over each member of a nationwide class action.²¹³ Because *Bristol-Myers* purported to be a mere “straightforward application . . . of settled principles of personal jurisdiction,”²¹⁴ the court argued that it was not intended to bring about such a drastic change in class action procedure.²¹⁵ The court also argued that the “critical distinction” between mass actions and class actions precludes the application of *Bristol-Myers* in this case.²¹⁶ The court noted that class members are not considered to be full parties at interest when determining diversity jurisdiction and venue, and thus should not be considered parties for the purposes of personal jurisdiction.²¹⁷

C. Summary

Although there is not yet a full circuit split on the issue of whether *Bristol-Myers* applies to class actions, there is a clear division of opinion between Judge Silberman’s dissent in *Molock* and the Seventh Circuit’s decision in *Mussat*. In a third case, *Cruson v. Jackson National Life Insurance Company*,²¹⁸ the Fifth Circuit declined to reach the personal jurisdiction issue,²¹⁹ holding instead that because the defendant’s personal jurisdiction motion was not raised until after the plaintiffs moved for class certification—and after the defendant had filed a separate motion to dismiss under Rule 12(b)(6)—the defendant had not waived any personal jurisdiction defense.²²⁰

Moreover, even though no court of appeals has yet held that *Bristol-Myers* applies to class actions, numerous district courts have so held.²²¹ It is likely that federal courts of appeals will continue to confront this issue in the months and

²¹² *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 448–49 (7th Cir. 2020).

²¹³ *Id.* at 445.

²¹⁴ *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1783 (2017).

²¹⁵ *See Mussat*, 953 F.3d at 446 (stating that application of *Bristol-Myers* to nationwide class actions “would have been far from the routine application of personal-jurisdiction rules that *Bristol-Myers* said it was performing”).

²¹⁶ *Id.* at 446–47.

²¹⁷ *Id.* at 447.

²¹⁸ 954 F.3d 240 (5th Cir. 2020).

²¹⁹ *Id.* at 247 n.4, 249 n.7 (describing the *Bristol-Myers* issue while giving no opinion on the merits).

²²⁰ *Id.* at 249–50.

²²¹ *See Mussat v. IQVIA, Inc.*, No. 17 C 8841, 2018 WL 5311903, at *4 (N.D. Ill. Oct. 26, 2018); *Wenokur v. AXA Equitable Life Ins. Co.*, No. CV-17-00165-PHX, 2017 WL 4357916, at *4 n.4 (D. Ariz. Oct. 2, 2017). *See generally* Wilf-Townsend, *supra* note 155, at 229–37 (listing district court decisions holding that *Bristol-Myers* applies in the class action context).

years to come.²²² The Supreme Court could also address this issue at some point in the near future.²²³ *Bristol-Myers*'s application to nationwide class actions is a critical issue in the realm of complex litigation because it has the potential to result in significant changes to the class action landscape through the limitation of fora available to plaintiffs and the possibility of review by the Supreme Court.

IV. NONNAMED CLASS MEMBERS SHOULD NOT BE REQUIRED TO SHOW PERSONAL JURISDICTION OVER THE DEFENDANT WITH RESPECT TO HEIR CLAIMS

This Part argues that courts, when confronted with this question, should adopt the position taken in *Mussat* and decline to extend the holding in *Bristol-Myers* to personal jurisdiction challenges to nonresident members in putative class actions. Section A analyzes pre-*Bristol-Myers* case law and finds that extending *Bristol-Myers* to class actions would be inconsistent with the longstanding consensus regarding personal jurisdiction in class action suits. Section B highlights the differences between class members and representatives in class actions, arguing that these differences are sufficient to support a distinction between how personal jurisdiction principles apply to class members and mass action plaintiffs. Section C argues that Rule 23 provides sufficient procedural protections to class action defendants, ensuring that defendants are not unduly harmed. Finally, section D argues that extending *Bristol-Myers* to the class action context would contravene the policy goals of the class action device, as well as impair the efficiency of the court system as a whole.

A. *The General Consensus Before Bristol-Myers*

From the inception of the class action device until 2017, courts were in broad agreement that class action plaintiffs could file a nationwide class action in a federal court without regard for whether that court had personal jurisdiction over each class member's claims.²²⁴ Thus, in certified class actions, personal jurisdiction over the defendant was only required to be satisfied with respect to the named members' claims.²²⁵ Even when the relationship between class members and the defendant was confined to the plaintiffs' home states and did

²²² Ackerman, *supra* note 13.

²²³ *Id.*

²²⁴ See *Mussat v. IQVIA*, 953 F.3d 441, 445 (7th Cir. 2020) ("Before the Supreme Court's decision in *Bristol-Myers*, there was a general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court, even if the federal court did not have general jurisdiction over the defendant.").

²²⁵ *Id.*

not extend to the forum state, the exercise of personal jurisdiction over the defendant was not traditionally affected.²²⁶ Courts have looked to Rule 23 to assess limitations on the exercise of class actions,²²⁷ rather than the Fourteenth Amendment Due Process Clause, which governs restrictions on personal jurisdiction.²²⁸

This longstanding consensus is important to the question of whether *Bristol-Myers*'s holding should apply to class actions because *Bristol-Myers* purported to be a mere “straightforward application . . . of settled principles of personal jurisdiction.”²²⁹ Requiring personal jurisdiction to be shown with respect to every class member’s claims would be far from a simple application of settled precedent.²³⁰ Extending *Bristol-Myers* to class actions would be inconsistent with the logic of two prominent U.S. Supreme Court decisions governing class actions: *Califano v. Yamasaki*²³¹ and *Phillips Petroleum Co. v. Shutts*.²³² While *Califano* and *Shutts* do not arise directly from personal jurisdiction challenges to class actions,²³³ their holdings and the Court’s reasoning provide significant insight into the personal jurisdiction issue.

Califano involved two class actions brought against the Secretary of the Department of Health, Education, and Welfare arising out of social security disputes²³⁴ consolidated for review.²³⁵ The first class action was brought in the U.S. District Court for the District of Hawaii²³⁶ and included “all social security old age and disability benefit recipients resident in the State of Hawaii.”²³⁷ A second class action was brought in the Western District of Washington, in which the district court certified a nationwide class including “all individuals . . . whose [social security] benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing[,]” and excluding members of

²²⁶ *Id.*

²²⁷ *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 901 (2008) (rejecting “virtual representation” as insufficient under Rule 23 procedural protections, which are “grounded in due process”).

²²⁸ Pennoyer v. Neff, 95 U.S. 714, 733 (1878).

²²⁹ *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1783 (2017).

²³⁰ *See generally Mussat*, 953 F.3d at 445 (noting before *Bristol-Myers* “there was a general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court”).

²³¹ 442 U.S. 682, 702 (1979).

²³² 472 U.S. 797, 811 (1985) (noting “the Due Process Clause . . . does not afford [absent class plaintiffs] as much protection from state-court jurisdiction” as it does absent defendants in non-class suits).

²³³ *See Califano*, 442 U.S. at 684 (listing the primary questions to be addressed in the case); *Shutts*, 472 U.S. at 803–04 (finding the threshold matter to be “whether petitioner ha[d] standing”).

²³⁴ *Califano*, 442 U.S. at 684.

²³⁵ *Id.* at 690.

²³⁶ *Id.* at 687.

²³⁷ *Id.* at 688 (citation omitted).

both the Hawaii class and a separate class in the Eastern District of Pennsylvania.²³⁸ The Secretary argued that the Washington court erred in certifying a nationwide class because it foreclosed consideration of the issue in other courts and provided an overly burdensome form of relief that was unnecessary to provide the plaintiffs complete relief.²³⁹

The Court rejected the Secretary's arguments, finding that the nationwide class was consistent with Rule 23.²⁴⁰ Because the nationwide class was certified consistent with Rule 23(b)(2), the decision to certify a nationwide class was within the discretion of the district court.²⁴¹ Thus, the district court was free to weigh the benefits and drawbacks of certifying a nationwide class, and its determination could only be reversed if it abused its discretion.²⁴² The Court did not consider whether personal jurisdiction would have been proper with respect to the claims of any or all of the putative members of the nationwide class.²⁴³ Indeed, the Court noted that “[n]othing . . . limits the geographic scope” of a properly brought class action.²⁴⁴ While personal jurisdiction was not at issue in *Califano*,²⁴⁵ the Court's language suggests that class actions should be reviewed in accordance with the procedural protections provided by Rule 23.²⁴⁶

In *Shutts*, plaintiffs brought a nationwide class action in Kansas against the defendant, a Delaware corporation with its principal place of business in Oklahoma.²⁴⁷ Class members included residents of all fifty states, the District of Columbia, and multiple foreign countries.²⁴⁸ Defendant challenged the class certification, arguing that Kansas had no jurisdiction over the claims of the out-of-state plaintiffs unless they affirmatively consented to join the class or they had sufficient minimum contacts to support the exercise of personal jurisdiction.²⁴⁹ The defendant argued that without consent or a showing of

²³⁸ *Id.* at 689 (citation omitted).

²³⁹ *Id.* at 701–02.

²⁴⁰ *See id.* at 702–03 (“Nothing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule.”).

²⁴¹ *Id.*

²⁴² *See id.* at 703 (“[W]e cannot conclude that the District Court . . . abused [its] discretion . . .”).

²⁴³ *See id.* at 702 (noting “[n]othing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule”).

²⁴⁴ *Id.*

²⁴⁵ *See id.* at 684 (listing the primary questions to be addressed in the case).

²⁴⁶ *See id.* at 702.

²⁴⁷ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799 (1985).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 806.

minimum contacts, the due process rights of the class members would be violated.²⁵⁰

The Court declined to adopt defendant's argument, instead holding that so long as the class members are given notice of the litigation and an opportunity to opt out, the exercise of jurisdiction over them does not violate due process.²⁵¹ The Court noted that class members cannot be joined as plaintiffs unless they meet the requirements of Rule 23.²⁵² Moreover, class members do not face the burdens that defendants face—they do not need to hire counsel, appear in court, face crossclaims, or incur fees and costs.²⁵³ A class member “may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.”²⁵⁴ Thus, the Court drew a distinction between class members and defendants, stating that the Due Process Clause does not afford class members the same protections defendants are afforded.²⁵⁵ The Court concluded that notice and an opportunity to opt out is sufficient because class members must be similarly situated with the class representatives, bear no burdens of litigation, and are fully represented by the named plaintiffs.²⁵⁶

In his *Molock* dissent, Judge Silberman emphasized that *Shutts* cannot be relevant because it discussed a court's exercise of personal jurisdiction over class members themselves, instead of a court's exercise of personal jurisdiction over a class action defendant with respect to the class members' claims.²⁵⁷ Judge Silberman noted that the *Bristol-Myers* Court distinguished *Shutts* from the case at issue.²⁵⁸ As the *Bristol-Myers* Court stated, “the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant,” and therefore *Shutts* “[had] no bearing on the question presented.”²⁵⁹ Judge Silberman is correct that *Shutts* does not require that courts find *Bristol-Myers* inapplicable to class actions. However, while *Shutts* held that courts do not violate due process in exercising personal jurisdiction over class action plaintiffs rather than

²⁵⁰ *Id.*

²⁵¹ *Id.* at 810–11.

²⁵² *Id.* at 809.

²⁵³ *Id.* at 810.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 811.

²⁵⁶ *Id.* at 810–11.

²⁵⁷ *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 305 (D.C. Cir. 2020) (Silberman, J., dissenting).

²⁵⁸ *Id.*

²⁵⁹ *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773, 1783 (2017).

defendants, its observations illustrate important factors that differentiate class actions from other types of litigation.²⁶⁰

From 1985, when *Shutts* was decided, to 2017, when *Bristol-Myers* was decided, the Court did not give any indication that *Califano* and *Shutts* were no longer good law. Moreover, the Court did not identify or discuss the issue of personal jurisdiction with respect to the claims of nonresident class members in nationwide class actions. In *Wal-Mart Stores, Inc. v. Dukes*,²⁶¹ a Supreme Court decision that garnered widespread national publicity,²⁶² the Court was faced with a nationwide employment discrimination class action brought in California against a defendant incorporated in Delaware with its principal place of business in Arkansas.²⁶³ The Court made no mention of any personal jurisdiction problem.²⁶⁴ Indeed, in *Shutts* itself, the Court did not identify a personal jurisdiction problem in a nationwide class action brought in Kansas against a defendant incorporated in Delaware with its principal place of business in Oklahoma.²⁶⁵ Additionally, in the years prior to the *Bristol-Myers* decision, lower courts faithfully applied *Califano* and *Shutts* and did not discuss the alleged personal jurisdiction problem.²⁶⁶

Pre-*Bristol-Myers* caselaw shows that the issue of personal jurisdiction with respect to the claims of nonresident class members has not been in serious dispute. Moreover, *Bristol-Myers* directly describes its holding as a “straightforward application . . . of settled principles of personal jurisdiction.”²⁶⁷

²⁶⁰ For a full discussion on the differences between class actions and mass actions, and why these differences matter in determining whether *Bristol-Myers* applies to class actions, see *infra* Part IV.B.

²⁶¹ 564 U.S. 338 (2011).

²⁶² See Adam Liptak, *Justices Rule for Wal-Mart in Class-Action Bias Case*, N.Y. TIMES (June 20, 2011), <https://www.nytimes.com/2011/06/21/business/21bizcourt.html> (illustrating that the case made national news).

²⁶³ See Walmart Inc., Annual Report (Form 10-K) (Mar. 19, 2021) (stating that Wal-Mart is incorporated in Delaware and has its principal place of business in Arkansas).

²⁶⁴ *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020).

²⁶⁵ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799, 801, 803 (1985). The parties did not raise, and the Court did not consider, whether personal jurisdiction was proper over the defendant with respect to each class member. However, Phillips Petroleum was not subject to general jurisdiction in Kansas (by the modern at home standard), and it is highly unlikely that each class member, from all different states and countries, was allegedly injured in Kansas. See *id.* at 803. Thus, if *Bristol-Myers* was extended to class actions, this class action would likely not have been able to be brought in Kansas.

²⁶⁶ See, e.g., *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1324 (11th Cir. 2013) (citing *Shutts*, 472 U.S. at 811) (“[A]bsent class members do not have the same constitutional interest in the conduct of litigation as a named party.”); *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)) (“[T]here is no bar against class-wide, and nationwide relief in federal district court or circuit court when it is appropriate.”); *Garcia v. Johnson*, No. 14-cv-01775, 2014 WL 6657591, at *15–*16 (N.D. Cal. Nov. 21, 2014) (citing *Califano*, 442 U.S. at 702) (certifying nationwide class action when defendant was not subject to general jurisdiction in the district).

²⁶⁷ *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1783 (2017).

It is clear that the holding of *Bristol-Myers* does not overrule *Califano, Shutts*, or any other previous class action case permitting the certification of a nationwide class. Nothing in the *Bristol-Myers* opinion explicitly compels courts to extend its holding to the class action context.

B. Class Members Are Not Full Parties to a Class Action

Although *Bristol-Myers* did not expressly apply its holding to class actions, Judge Silberman's dissent in *Molock* argues that the logic of the decision dictates that result.²⁶⁸ Judge Silberman compared class actions to the mass action in *Bristol-Myers*, describing each as a "species of joinder, which 'merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.'"²⁶⁹ Judge Silberman characterized any differences that may exist between the role of plaintiffs in a mass action and that of class members as irrelevant, and as a result, concluded that *Bristol-Myers* must be applicable to class actions.²⁷⁰ Conversely, *Mussat* stated that "[c]lass actions . . . are different from many other types of aggregate litigation, and that difference matters in numerous ways for the unnamed members of the class."²⁷¹ The Seventh Circuit in *Mussat* concluded that, because the status of class members is materially different from mass action plaintiffs, *Bristol-Myers* should not apply.²⁷² Thus, the differences between class members and mass action plaintiffs and the relevance of these differences is critical to determining *Bristol-Myers*'s application to class actions. In explaining why *Bristol-Myers* should not apply to class actions, this section will first argue that class members and mass action plaintiffs are differently situated. Then, it will argue that the differences are sufficient to support a distinction between class members and mass action plaintiffs for personal jurisdiction purposes.

1. Inherent Differences Between Class Members and Mass Action Plaintiffs

In a mass action, each plaintiff is an active, named party with a claim that must be proven individually, as if each plaintiff was filing a separate lawsuit.²⁷³ Each plaintiff's case is consolidated into a coordinated action for efficient

²⁶⁸ *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 306 (D.C. Cir. 2020) (Silberman, J., dissenting).

²⁶⁹ *Id.* (citation omitted).

²⁷⁰ *See id.* at 306–07 (“[T]he party status of absent class members seems to me to be irrelevant.”).

²⁷¹ *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 446–47 (7th Cir. 2020).

²⁷² *Id.* at 447 (noting “absent class members are not full parties to the case,” unlike plaintiffs in a coordinated mass action).

²⁷³ *See id.* (“[A] coordinated mass action . . . does not involve any absentee litigants. . . . [A]ll of the plaintiffs are named parties to the case.”).

resolution of the common legal issues among their claims.²⁷⁴ Throughout the proceedings, each mass action plaintiff is a full party to the case,²⁷⁵ and *Bristol-Myers* holds that personal jurisdiction must be satisfied over the defendant with respect to each of the plaintiffs' claims.²⁷⁶ Unlike mass action plaintiffs, class members are not automatically full parties to the litigation—they “may be parties for some purposes and not for others.”²⁷⁷ Class members do not prove their claims individually; the entire class is bound by the judgment rendered in the class action “even though [the class members] are not parties to the suit.”²⁷⁸

In addition to these differences, class members carry a minimal burden compared to the burdens that mass action plaintiffs bear.²⁷⁹ As *Shutts* described, class members are not required to do anything.²⁸⁰ They are “given a ‘free ride’ under Rule 23 and [have] no duty to actively engage in the prosecution of the action.”²⁸¹ Class members are under no obligation to retain counsel or make an appearance in court, and are not subject to any of the liabilities that ordinary plaintiffs face in pursuing litigation.²⁸² Class members “are almost never subject to counterclaims, crossclaims, or liability for fees and costs,” and “are not subject to coercive or punitive remedies.”²⁸³ They are subject to discovery only in limited circumstances.²⁸⁴ Generally, the worst outcome that can occur to a class member is the extinguishment of any of their potential legal claims that were litigated by the representatives in the class action.²⁸⁵

Additionally, unlike in mass actions and ordinary lawsuits, the fact that additional class members are a part of the litigation does not significantly increase the litigation burden faced by the defendant.²⁸⁶ In a class action, the

²⁷⁴ *Id.*

²⁷⁵ *See Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1365 (N.D. Ga. 2018) (“In a mass tort action such as *Bristol-Myers*, each plaintiff is a real party in interest . . .”).

²⁷⁶ *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017).

²⁷⁷ *Devlin v. Scardelleti*, 536 U.S. 1, 9–10 (2002).

²⁷⁸ *Smith v. Bayer Corp.*, 564 U.S. 299, 314 (2011).

²⁷⁹ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

²⁸⁰ *Id.*

²⁸¹ *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1005 (7th Cir. 1971).

²⁸² *Shutts*, 472 U.S. at 810.

²⁸³ *Id.*

²⁸⁴ *See Dellums v. Powell*, 566 F.2d 167, 187 (D.C. Cir. 1977) (noting “discovery against absentee class members . . . cannot be had as a matter of course” but may be available under certain circumstances); *Brennan*, 450 F.2d at 1005 (noting “absent class members should not be required to submit to discovery as a matter of course,” but may be required to do so if ordered by the court).

²⁸⁵ *Shutts*, 472 U.S. at 810.

²⁸⁶ *See id.* This is not to say that defendants face no special burden whatsoever by the certification of a class action. Any class action certification threatens to subject the defendant to the aggregate liability of the class action. *See Globus v. L. Rsch. Serv., Inc.*, 418 F.2d 1276, 1285 (2d Cir. 1969) (“Compensatory damages,

class members are represented in full by the named parties.²⁸⁷ The defendant is not confronted with any additional or different claims by the class members,²⁸⁸ does not have to hire additional counsel or travel to another forum to litigate the class members' claims,²⁸⁹ and does not have to participate in additional discovery with respect to the class members.²⁹⁰ Thus, the certification of a class action does not heighten the litigation burden on the defendant as the joinder of an additional mass action plaintiff does.

2. *Class Members Are Not "Parties" for Personal Jurisdiction Purposes*

Again, while mass action plaintiffs are full parties to their case,²⁹¹ class members are not, by definition, full parties to a class action.²⁹² Recognizing the unique role possessed by class members, the Supreme Court has stated that class members "may be parties for some purposes and not for others."²⁹³ The "party" label refers to a determination of the proper procedural rule to apply to the class members.²⁹⁴ Thus, in the context of *Bristol-Myers's* application to class actions, the issue to be determined is whether class members are "parties" for the purposes of determining personal jurisdiction. If the class members are "parties," then *Bristol-Myers* would apply, and the court would need to have personal jurisdiction over the defendant with respect to each class members' claim. If the class members are not "parties," then *Bristol-Myers* would not apply and only the class representatives would need to demonstrate personal jurisdiction.²⁹⁵

Class members have been held to not be full parties in many, if not most, contexts in which the question has been raised. For example, with respect to federal diversity jurisdiction, class members are not considered "parties" for the

especially when multiplied in a class action, have a potent deterrent effect."). However, since class members bear essentially no burden during litigation, and are under no obligation to do anything, the defendant *also* does not have to do anything *in response* to the additional class members' presence.

²⁸⁷ See *Shutts*, 472 U.S. at 809 ("The court and named plaintiffs protect [absent class members'] interests.").

²⁸⁸ See FED. R. CIV. P. 23(a)(3) (requiring that the claims of the named parties be "typical of the claims or defenses of the class").

²⁸⁹ See *Shutts*, 472 U.S. at 808 (stating that defendants "must generally hire counsel and travel to the forum," while class members do not bear burdens "of the same order or magnitude").

²⁹⁰ See *Dellums v. Powell*, 566 F.2d 167, 187 (D.C. Cir. 1977); *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1005 (7th Cir. 1971).

²⁹¹ See *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1365 (N.D. Ga. 2018) ("In a mass tort action such as *Bristol-Myers*, each plaintiff is a real party in interest . . .").

²⁹² *Devlin v. Scardelleti*, 536 U.S. 1, 9–10 (2002).

²⁹³ *Id.*

²⁹⁴ See *id.* at 10 ("The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.").

²⁹⁵ See *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020).

purposes of the complete diversity rule.²⁹⁶ This result is justified by the difficulty that would arise if courts were forced to ascertain both the citizenship of every party to a class action and the likelihood that application of the complete diversity rule would “destroy diversity in almost all class actions.”²⁹⁷ In addition, class members are not “parties” that are independently required to meet the amount-in-controversy requirement.²⁹⁸ In a class action, only the named representatives must allege a sufficient amount-in-controversy.²⁹⁹

Furthermore, class members are not “parties” for the purposes of determining the proper venue for a class action.³⁰⁰ As with diversity jurisdiction, requiring venue to be shown with respect to every class member would drastically diminish the effectiveness of the class action device.³⁰¹ Moreover, class members are not “parties” in the sense that they must be served process.³⁰² Finally, class members are not considered to be “parties” in that a magistrate judge may issue a judgment under 28 U.S.C. § 636³⁰³ without the consent of every class member.³⁰⁴ Because “the named party ‘is the “party” to the lawsuit who acts on behalf of the entire class,’” class members “do not have the same constitutional interest in the conduct of litigation.”³⁰⁵

²⁹⁶ *Devlin*, 536 U.S. at 9. Diversity jurisdiction may be exercised when both the plaintiff and the defendant are citizens of different U.S. states, or of a state and a foreign country, and the amount in controversy exceeds \$75,000. *See* 28 U.S.C. § 1332(a).

²⁹⁷ *Devlin*, 536 U.S. at 10. In federal class actions, diversity is satisfied when any member of a class is diverse from any defendant, and the amount in controversy exceeds \$5,000,000. 28 U.S.C. § 1332(d)(2).

²⁹⁸ *See Snyder v. Harris*, 394 U.S. 332, 340 (1969) (holding that class action members may not aggregate their claims to meet the amount-in-controversy requirement); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566–67 (2005) (recognizing that under 28 U.S.C. § 1367, courts have supplemental jurisdiction over diversity claims when some, but not all, plaintiffs meet the amount-in-controversy requirement).

²⁹⁹ *See Allapattah*, 545 U.S. at 566–67.

³⁰⁰ *See Curley v. Brignoli, Curley & Roberts Assocs.*, 915 F.2d 81, 87 (2d Cir. 1990) (“[C]lass status may expand the number of districts where venue is proper.”).

³⁰¹ *See Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 140 (7th Cir. 1974) (“[T]o require the establishment of venue for nonrepresentative-party class members ‘would eliminate the use of the class-action route in all cases where a defendant class is appropriate.’” (citation omitted)).

³⁰² *Coleman v. Lab. & Indus. Rev. Comm’n of Wis.*, 860 F.3d 461, 474 (7th Cir. 2017) (“Unnamed class members, for instance, are not full-fledged parties, and so they need not be served with process”); *see also United States v. Trucking Emp., Inc.*, 72 F.R.D. 101, 105 (D.D.C. 1976) (“Class actions are the only significant exception to the general rule that one is not bound by a judgment *in personam* in litigation to which he/she has not been made a party by service of process.”).

³⁰³ Under 28 U.S.C. § 636, magistrate judges are granted authority, with the authorization and consent of the parties and the district court, to “conduct any or all proceedings . . . and order the entry of judgment in the case.” 28 U.S.C. § 636(c)(1).

³⁰⁴ *Koby v. ARS Nat’l Servs., Inc.*, 846 F.3d 1071, 1076 (9th Cir. 2017); *see Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1324 (11th Cir. 2013); *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 181 (3d Cir. 2012); *Williams v. Gen. Elec. Cap. Auto Lease, Inc.*, 159 F.3d 266, 269 (7th Cir. 1998).

³⁰⁵ *Day*, 729 F.3d at 1324 (citation omitted).

In a few instances, courts have held that class action members *are* “parties” to a class action.³⁰⁶ When this has occurred, the “major goals of class action litigation” have justified the categorization of class members as “parties” for the purpose at issue.³⁰⁷ For example, class members are “parties” in the sense that they are bound by the judgment in a class action as if they were full plaintiffs.³⁰⁸ This, of course, goes to one of the central purposes of the class action device—to allow a class of injured parties to litigate collectively to ensure recovery when each injured class member’s damages are too small to justify independent litigation.³⁰⁹ Preventing class members from being bound by the judgment would allow class members to re-litigate the dispute in a subsequent action, defeating the principal purposes of class action litigation. As the Supreme Court has described, “[t]o hold to the contrary would frustrate the principal function of a class suit” because it would incentivize class members “to file earlier individual motions or intervene as parties—precisely the multiplicity of activity which Rule 23 was designed to avoid.”³¹⁰

In *American Pipe & Construction Co. v. Utah*, the Supreme Court held that class members are “parties” in the sense that the filing of a class action satisfies the statute of limitations with respect to the class members as well as the named parties.³¹¹ This result is another instance in which if class members were not considered “parties,” the whole purpose of the class action device would be frustrated.³¹² Moreover, in *Devlin v. Scardelleti*, the Court held that a class member who objects to the settlement of a class action is a “party” that may bring an appeal.³¹³ This is a function of the fact that class members are bound by the judgment, as “this feature of class action litigation . . . requires that class members be allowed to appeal the approval of a settlement when they have objected.”³¹⁴

The main takeaway from these determinations about whether class members are parties is that the proper determination depends on the context at issue.³¹⁵

³⁰⁶ See *Devlin v. Scardelleti*, 536 U.S. 1, 10 (2002); *Rsch. Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497, 503 (N.D. Ill. 1969).

³⁰⁷ *Devlin*, 536 U.S. at 10.

³⁰⁸ *Id.*

³⁰⁹ See, e.g., *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“[A]grieved persons may be without effective redress unless they may employ the class-action device.”).

³¹⁰ *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974).

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Devlin*, 536 U.S. at 9.

³¹⁴ *Id.* at 10.

³¹⁵ See *id.* (“The label ‘party’ . . . may differ based on context.”).

When the essential character of class action litigation necessitates finding that class members are parties, courts have recognized them as such. However, when classification of class members as parties is not supported by the “major goals of class action litigation,”³¹⁶ or even contradicts those goals, then class members will not be considered parties. In the personal jurisdiction context, classifying class members as parties such that *Bristol-Myers* would require a court to have personal jurisdiction over each member’s claim would not further the goals of class action litigation—it would be more likely to impede them.³¹⁷ Instead, treating personal jurisdiction the same way as subject matter jurisdiction, service of process, and venue would be more sensible and consistent.³¹⁸ Thus, class members should likewise not be considered parties for personal jurisdiction purposes, and therefore should not be subject to the same personal jurisdiction requirements that *Bristol-Myers* articulated for mass actions.

C. Rule 23 Provides Sufficient Procedural Protections to Defendants by Ensuring that Each Class Member Is Similarly Situated and Is Bringing Essentially the Same Claim

In *Molock*, Judge Silberman argued that it is “irrelevant whether the class members were “parties.”³¹⁹ Instead, the relevant inquiry established by *Bristol-Myers* should be “whether limits on personal jurisdiction protect a defendant from out-of-state claims.”³²⁰ However, unlike in a mass action, where each plaintiff is free to levy individual and independent claims,³²¹ a class action’s claims are “unitary” and “coherent.”³²² The class members’ claims are merged with the named representatives’ claims, such that the defendant need only respond to the overall claim of the class.³²³ Rule 23’s requirements for the certification of a class action provide a barrier ensuring that the class claim is in fact unitary and coherent, thus erecting a safeguard to protect the rights of class action defendants—a safeguard that does not exist with respect to mass

³¹⁶ *Id.*

³¹⁷ For a discussion on the policy problems that would arise if *Bristol-Myers* were applied to class actions, see *infra* Part IV.D.

³¹⁸ See *Mussat v. IQVIA, Inc.* 953 F.3d 441, 447 (7th Cir. 2020).

³¹⁹ *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 307 (D.C. Cir. 2020) (Silberman, J., dissenting).

³²⁰ *Id.*

³²¹ See, e.g., *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018) (“[A] mass action . . . may—and likely would—present significant variations in the plaintiffs’ claims.”).

³²² *Id.* at 1366.

³²³ See FED. R. CIV. P. 23(a)(2)–(3).

actions.³²⁴ As a result, Rule 23's requirements to certify a class action are an adequate vehicle to ensure the due process rights of defendants are not infringed by additional, out-of-state claims.³²⁵

Rule 23 requires, as a “prerequisite” for the certification of a class action, that “there are questions of law or fact common to the class”³²⁶ and “the claims or defenses of the representative parties are typical of the claims or defenses of the class.”³²⁷ Moreover, in seeking to certify a class action, the plaintiff must show the defendant “acted . . . on grounds that apply generally to the class, so that . . . relief . . . is appropriate respecting the class as a whole” under Rule 23(b)(2),³²⁸ or that “questions of law or fact common to class members predominate” under Rule 23(b)(3).³²⁹ Finally, the plaintiff must seek class certification from the court, and the court ultimately decides whether the case may proceed as a class action.³³⁰

These protective measures “adequately protect [class action defendants'] due process rights.”³³¹ Rule 23 ensures that a class action consists of a single, unitary claim litigated by the named representatives on behalf of the class members. This is quite different from mass actions, “which may—and likely would—present significant variations in the plaintiffs' claims.”³³² Furthermore, by requiring that a class action be certified by the court, Rule 23 serves a gatekeeping function that prevents the arbitrary, haphazard formulation of class actions.

While it is true that the Rule “primarily focuses on the relationship between the claims of the named representatives and the class members,”³³³ these

³²⁴ See *Sanchez*, 297 F. Supp. 3d at 1366 (“[I]n contrast to a mass action like *Bristol-Myers*, . . . the requirements of Rule 23 class certification ensure that the defendant is presented with a unitary, coherent claim . . .”).

³²⁵ See *Jones v. Depuy Synthes Prods., Inc.*, 330 F.R.D. 298, 312 (N.D. Ala. 2018) (“[T]he certification procedures set forth in Rule 23 not only protect absent class members' due process rights but also the rights of defendants.”); see also Mullenix, *supra* note 14, at 417–18 (describing due process protections provided by Rule 23 and noting other forms of aggregate litigation offer none of these protections).

³²⁶ FED. R. CIV. P. 23(a)(2).

³²⁷ *Id.* at (a)(3).

³²⁸ *Id.* at (b)(2).

³²⁹ *Id.* at (b)(3). While there are three types of class actions recognized by Rule 23(b), the 23(b)(1) class action is the least utilized. See 2 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 4:2 (5th ed. 2021 update) (discussing why 23(b)(1) class actions arise infrequently compared to 23(b)(2) and 23(b)(3) class actions).

³³⁰ *Id.* at (c).

³³¹ *Jones v. Depuy Synthes Prods., Inc.*, 330 F.R.D. 298, 312 (N.D. Ala. 2018).

³³² *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018).

³³³ *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 307 (D.C. Cir. 2020) (Silberman, J., dissenting).

principles nonetheless serve the purpose of protecting the defendants in a class action, as well as the class members themselves. The fact that Rule 23 may be intended to protect the class members should not abrogate the reality that it also protects defendants. For these reasons, Rule 23 ensures there is “no unfairness in haling [a class action defendant] into court to answer to [a class claim] in a forum that has specific jurisdiction over the defendant based on the representative’s claim.”³³⁴ Rule 23 ensures class action defendants are protected from unfair out-of-state class action claims, regardless of whether the class members are “parties” for personal jurisdiction purposes.

D. Applying Bristol-Myers to Class Actions Would Inhibit Both the Policy Goals of Class Actions and Impair the Overall Efficiency of the Judicial System

Neither *Bristol-Myers* itself, nor the demands of due process, require that personal jurisdiction over the defendant be shown with respect to class members in a class action. In addition, extending the holding of *Bristol-Myers* to the class action context would be an unwise choice, as it would contravene the policy goals of both the class action device and the court system as a whole. As a result, courts should decline to interpret *Bristol-Myers* to apply to class actions.³³⁵

The “principal function” of a class action suit is to prevent a “multiplicity” of various lawsuits, as well as “unnecessary filing of repetitious papers and motions” with a single, unitary action by which the claims of the class could be litigated.³³⁶ Class actions “save[] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.”³³⁷ Another purpose of the class action device is to prevent undesirable inconsistent judgments about similar issues of law and fact, which “would establish incompatible standards of conduct.”³³⁸ The availability of class actions ensures each injured party’s claims are resolved in the same way and in an efficient manner.³³⁹

³³⁴ *Sanchez*, 297 F. Supp. 3d at 1366.

³³⁵ See *Devlin v. Scardelleti*, 536 U.S. 1, 10 (2002) (explaining that the decision of whether class members should be considered “parties” for various procedural purposes turns on whether “goals of class action litigation” would be furthered or inhibited by such a consideration).

³³⁶ *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550–51 (1974).

³³⁷ *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

³³⁸ FED. R. CIV. P. 23(b)(1)(A).

³³⁹ See *Sueoka v. United States*, 101 F. App’x 649, 654–55 (9th Cir. 2004) (“Addressing [a claim] in a single, rather than multiple, action, is the preferable approach . . .”).

If personal jurisdiction was required to be shown with respect to every class member's claim against the defendant, a likely consequence would be that smaller, duplicative lawsuits would be brought in multiple jurisdictions. *Bristol-Myers* contemplated this exact possibility, noting "plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States."³⁴⁰ Applying this principle to class actions would cause the very defects that the class action is designed to prevent. When general jurisdiction over the defendant is not possible,³⁴¹ the result, assuming the plaintiffs still bring their claims, would be redundant lawsuits in numerous states. This piecemeal litigation would lead to the "unnecessary filing of repetitious papers and motions," thus defeating the primary purpose of the class action device.³⁴² It would also be likely to lead to inconsistent judgments among the multiplicity of lawsuits, which would contravene another purpose of the class action device³⁴³ and may lead to potentially tricky issues of preclusion.³⁴⁴ As a result, plaintiffs whose claims would have been resolved the same way in a class action could instead see their claims resolved inconsistently.

It could be argued that a rise in statewide class actions may be consistent with the Court's tendency to discourage nationwide class actions. In *Wal-Mart Stores, Inc v. Dukes*, the Court rejected certification of a class action on grounds that the class members' claims were not sufficiently common under Rule 23(a)(2).³⁴⁵ As a result, class members filed smaller statewide class actions in an effort to satisfy the Rule 23(a)(2) commonality requirement.³⁴⁶ However, the critical difference between *Wal-Mart* and a hypothetical case applying *Bristol-Myers* to class actions is that *Wal-Mart* was based on commonality—a principal

³⁴⁰ *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct 1773, 1783 (2017). The Court cited this possibility of piecemeal litigation as a rebuttal of the idea that its decision would result in a "parade of horrors." *Id.*

³⁴¹ As Justice Sotomayor noted in her *Bristol-Myers* dissent, "it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. . . . What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States?" *Id.* at 1789 (Sotomayor, J., dissenting).

³⁴² *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974).

³⁴³ See FED. R. CIV. P. 23(b)(1)(A) (noting class actions may be certified when separate, individual actions would "create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct").

³⁴⁴ See *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979) (granting trial courts discretion to determine whether it would be fair for a nonparty plaintiff to assert issue preclusion over a defendant).

³⁴⁵ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359–60 (2011).

³⁴⁶ See *Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115, 1117 (N.D. Cal. 2013) ("Plaintiffs returned to the district court and sought to redefine a smaller class that would conform to the Supreme Court's holding.").

element of a class action.³⁴⁷ Robust enforcement of Rule 23(a)'s protections is necessary to ensure that defendants are not unjustly subjected to class liability through flimsy, arbitrary class actions. On the other hand, the personal jurisdiction issue does not relate to the merits of a class claim. Applying *Bristol-Myers* to class actions would impose a broad impediment to meritorious nationwide class actions such that the class action device itself would be rendered ineffective because some of the main purposes of class actions—preventing redundant litigation and inconsistent judgments—would be defeated.

The class action device is not the only instrument the court system has to maximize judicial efficiency and economy. By virtue of the importance of these goals, the law recognizes multiple means by which the ordinary rules of personal and subject matter jurisdiction may be circumvented. Under the doctrine of pendent personal jurisdiction, for example, a court may exercise personal jurisdiction over a defendant “with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction.”³⁴⁸ As courts have concluded, “[w]hen a defendant must appear in a forum to defend against one claim, it is often reasonable to compel that defendant to answer other claims in the same suit.”³⁴⁹ The goals of “judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties” support the doctrine of pendent personal jurisdiction.³⁵⁰ Additionally, through the doctrine of supplemental jurisdiction, federal courts may exercise subject matter jurisdiction over state claims when the claim derives from the same “common nucleus of operative fact” as a valid federal claim.³⁵¹ The justification for this doctrine also “lies in considerations of judicial economy, convenience, and fairness to litigants.”³⁵²

Pendent personal jurisdiction and supplemental subject matter jurisdiction demonstrate the law's encouragement to resolve claims together when those claims can be resolved together. However, in *Sloan v. General Motors LLC*, despite recognizing that “it is by no means clear whether [the] pendent personal

³⁴⁷ See FED. R. CIV. P. 23(a)(2) (requiring “questions of law or fact common to the class”).

³⁴⁸ *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004).

³⁴⁹ *Id.* at 1181; see also *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (agreeing pendent personal jurisdiction is appropriate “where claims ‘arise from the same common nucleus of operative fact’” (citation omitted)); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993) (“Under the doctrine of pendent personal jurisdiction . . . the district court may assert personal jurisdiction over the parties to the related . . . claims even if personal jurisdiction is not otherwise available.”).

³⁵⁰ *Action Embroidery*, 368 F.3d at 1181.

³⁵¹ *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

³⁵² *Id.* at 726.

jurisdiction doctrine extends categorically to claims brought by different plaintiffs,” the district court nonetheless applied the doctrine in the class action context.³⁵³ The court declined to apply *Bristol-Myers* to class actions on grounds that the defendant “would face piecemeal litigation and would have to defend itself in several different courts on nearly identical issues.”³⁵⁴ In addition, because the various lawsuits would encompass claims that “[arose] out of the same nucleus of operative facts,” the resulting adjudications would overlap and possibly conflict with each other.³⁵⁵

The negative externalities that result from piecemeal litigation should be considered when considering whether *Bristol-Myers* should be extended to class actions. By definition, every named and nonnamed member of a class action must present a claim arising from the same nucleus of operative facts.³⁵⁶ Class actions are a valuable tool to permit these claims to be litigated together without requiring the plaintiffs and defendant(s) to travel to multiple fora, file repetitious motions, and undertake repetitive, tedious discovery. Given that the *Bristol-Myers* Court identified piecemeal litigation in the mass action context as a likely consequence of its holding,³⁵⁷ the same result would be expected to occur to class actions if *Bristol-Myers* were made applicable to them. Considering the likelihood that piecemeal litigation would arise if *Bristol-Myers* were extended to class actions, as well as the notable differences between mass actions and class actions and the presence of Rule 23’s protections, courts should adopt *Mussat*’s conclusion and decline to apply *Bristol-Myers* to class actions.

V. CONCERNS AND IMPLICATIONS

As courts continue to confront personal jurisdiction challenges to class members’ claims in class action suits, and as the possibility of eventual Supreme Court review grows, the potential consequences for aggregate litigation remain grave. Recent Court decisions have dramatically restricted the exercise of general jurisdiction over corporate defendants; the original “continuous and systematic” approach taken in *International Shoe* and expounded upon in *Helicopteros* has given way to the “essentially at home” standard adopted in *Goodyear* and *Daimler*.³⁵⁸ This new standard essentially limits the exercise of

³⁵³ 287 F. Supp. 3d 840, 861 (N.D. Cal. 2018).

³⁵⁴ *Id.* at 862.

³⁵⁵ *Id.*

³⁵⁶ FED. R. CIV. P. 23(a)(2)–(3).

³⁵⁷ See *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773, 1783 (2017) (noting “plaintiffs who are residents of a particular State . . . could probably sue together in their home States”).

³⁵⁸ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *Daimler AG v.*

general jurisdiction to a maximum of two fora: the defendant's place of incorporation and its principal place of business.³⁵⁹ Regardless of the merits of the Court's limitations on general jurisdiction, the simple reality is that it is now more difficult to bring lawsuits against corporate defendants who do business in many states.³⁶⁰ Consequently, there are now instances in which it is impossible to bring a general jurisdiction action against some corporate defendants in the United States. Lawsuits against two or more defendants that are neither incorporated nor maintain their principal place of business in the same state likely cannot be brought anywhere under general jurisdiction.³⁶¹ In addition, a defendant that is neither incorporated nor has its principal place of business anywhere in the United States cannot be subject to general jurisdiction in any state.³⁶²

The narrowing of general jurisdiction has required plaintiffs to classify cases that may have formerly been brought under general jurisdiction as specific jurisdiction cases. *Bristol-Myers* is an example of this. After the Court's decision in *Daimler*, the *Bristol-Myers* plaintiffs were forced to abandon their general jurisdiction theory and proceed on specific jurisdiction grounds.³⁶³ The eventual result, when the case reached the Supreme Court, was a narrowing of specific jurisdiction. Every plaintiff in a mass action must now satisfy personal jurisdiction over the defendant with respect to their claim.³⁶⁴ As a result, large, nationwide mass actions can effectively be brought only where the defendant is subject to general jurisdiction, or in the form of multiple smaller actions in multiple states.³⁶⁵

Bauman, 571 U.S. 117, 137 (2014).

³⁵⁹ *Daimler*, 571 U.S. at 137.

³⁶⁰ *Compare Goodyear*, 564 U.S. at 919 (holding that general jurisdiction may be asserted over corporate defendants when their contacts are "so 'continuous and systematic' as to render them essentially at home" in the forum state), and *Daimler*, 571 U.S. at 137 (noting a corporation's place of incorporation and principal place of business are the "paradigm bases" for when a corporation is "fairly regarded as at home"), *with* *Rush v. Savchuk*, 444 U.S. 320, 330 (1980) (stating defendants could be subject to general jurisdiction in all fifty states by virtue of "continuous and systematic" contacts with every state).

³⁶¹ *See Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting) ("[I]t is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States."). Although *Daimler* did not state, as a categorical matter, that a corporation could *only* be subject to general jurisdiction in its state of incorporation or its state of principal place of business, it did state that these are the "paradigm forums" for general jurisdiction, and no subsequent case has permitted general jurisdiction on other grounds. *Daimler*, 571 U.S. at 137.

³⁶² *See Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting) ("What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States?").

³⁶³ *See Bristol-Myers Squibb Co. v. Super. Ct.*, 175 Cal. Rptr. 3d. 412, 424 (Cal. Ct. App. 2014).

³⁶⁴ *Bristol-Myers*, 137 S. Ct. at 1783.

³⁶⁵ *See id.* (remarking plaintiffs in mass-action suits are free to file in the states in which the defendant is subject to general jurisdiction, or as an alternative, plaintiffs could sue jointly in their home state with the other

The class action, however, remains unchanged—the *Bristol-Myers* opinion does not address the question of whether its holding would apply to a class action in which a court does not have personal jurisdiction over the claims of some of the class members, as Justice Sotomayor’s dissenting opinion notes.³⁶⁶ As with mass actions, applying *Bristol-Myers* in the class-action context would effectively require large, nationwide class-action suits to be filed only in states in which the defendant is subject to general jurisdiction.³⁶⁷ This application would at the very least affect where class actions are filed, and may affect whether some class-action suits ever get filed. It would “force[] injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.”³⁶⁸ It will “make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone,”³⁶⁹ and as a result, these claims may never be brought. Applying *Bristol-Myers* to class actions would “curtail—and in some cases eliminate—plaintiffs’ ability to hold corporations fully accountable for their nationwide conduct.”³⁷⁰

These consequences, if they came to fruition, would be detrimental to the legal system as a whole, given the important and valuable role that class actions play.³⁷¹ Class actions serve the essential purpose of affording injured parties an opportunity for recovery when an individual suit is impossible or impractical.³⁷² This ensures that defendants who cause small damages to a large amount of people are not free from liability for their wrongdoing.³⁷³ These critical functions would be threatened if the class action device becomes less available to potential class action plaintiffs.

CONCLUSION

Extending the holding of *Bristol-Myers* from mass actions to class actions would be anything but a “straightforward application . . . of settled principles of

plaintiffs from that state).

³⁶⁶ *Id.* at 1789 n.4 (Sotomayor, J., dissenting).

³⁶⁷ *Id.* at 1783 (majority opinion).

³⁶⁸ *Id.* at 1789 (Sotomayor, J., dissenting).

³⁶⁹ *Id.* at 1784.

³⁷⁰ *Id.* at 1789.

³⁷¹ *See* CAFA, 28 U.S.C. § 1711 (“Class action lawsuits are an important and valuable part of the legal system . . .”).

³⁷² *See* *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (“[S]mall recoveries do not provide the incentive for an individual to bring a solo action prosecuting his or her rights.”).

³⁷³ *See id.* (noting “the class action [was] more likely to proceed, thereby helping to deter future violations”).

personal jurisdiction.”³⁷⁴ Such an application would allow challenges to courts’ personal jurisdiction over class members’ claims to grind class action procedure to a halt. It would also threaten to deprive society of the benefits that Federal Rule of Civil Procedure 23 provides. Class actions promote the efficient resolution of cases, allow injured parties to pursue claims that may otherwise be impossible to pursue, and deter wrongful conduct that the ordinary litigation system is incapable of deterring. Requiring courts to have personal jurisdiction over the claims of every class member would undoubtedly lead to the dismissal of many class action lawsuits and would result in many more never being filed.

Moreover, this application is unnecessary and unjustified by a need to protect defendants’ due process. Rule 23 sufficiently protects defendants by setting forth the requirements of numerosity, commonality, typicality, and adequacy.³⁷⁵ Moreover, a putative class action must still meet the criteria of Rule 23(b),³⁷⁶ and even then, certification is subject to the court’s discretion.³⁷⁷ These procedures are designed to ensure that defendants are protected from unfair and arbitrary class action certification while preserving plaintiffs’ ability to make use of the class action device. Applying *Bristol-Myers*’s holding to class actions would over-protect defendants at the expense of legitimate, meritorious class action plaintiffs. For these reasons, courts faced with the question of whether to apply *Bristol-Myers* to class actions should adopt the conclusion reached in *Mussat* and preserve the class action as an effective tool for aggregate litigation.

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³⁷⁴ *Bristol-Myers*, 137 S. Ct. at 1783.

³⁷⁵ FED. R. CIV. P. 23(a).

³⁷⁶ *See id.* at (b).

³⁷⁷ *See id.* at (c).

* Managing Editor, *Emory Law Journal*, Volume 71; Emory University School of Law, J.D., 2022; Emory College of Arts and Sciences, B.A., 2019. Thank you to my faculty advisor, Professor Richard Freer, for your valuable insight and advice throughout the writing process. Thank you to the editorial staff of the *Emory Law Journal*, particularly Danielle Kerker Goldstein and Michael Kolvek, for your dedication to this piece and thoughtful edits. Finally, thank you to my friends and family for your continued support and encouragement.