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Maintaining Due Process By Extending Bristol-Myers Squibb Co. To Federal Class Actions

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Abstract

In 2017, the U.S. Supreme Court issued its seminal decision in Bristol Myers Squibb Co. v. Superior Court of California, subsequently altering the scope of personal jurisdiction and further narrowing its interpretation of specific jurisdiction. Bristol-Myers Squibb Co. held that a state court can only assert specific personal jurisdiction over a defendant when there is a meaningful nexus between the forum state and the claims at issue. The Court purposefully refrained from deciding whether its holding applies to federal courts adjudicating federal class actions. After denying a petition for writ of certiorari to resolve the issue in 2021, the question continues to plague the lower courts.

This Comment provides a comprehensive analysis of how the principles of fair play and substantial justice interpreted by the Court in Bristol-Myers Squibb Co. squarely complement extending its holding to federal class actions. The procedural safeguards outlined in Rule 23 do not adequately shield defendants from the constitutional constraints of personal jurisdiction, and Rule 23 inadvertently provides the strength from which classes derive their power. The heightened strength of the plaintiff class necessitates more than Rule 23's minimum protections, and Bristol-Myers Squibb Co.'s holding fills the resulting defendant due process gap. Bristol-Myers Squibb Co.'s holding assures defendants of due process, and courts should extend its claim-forum nexus. Accordingly, this Comment concludes that due process requires Bristol Myers Squibb Co. v. Superior Court of California to extend to federal class actions.

Keywords

SCOUTS, Supreme Court, courts, due process, jurisdiction, civil procedure

COMMENT

MAINTAINING DUE PROCESS BY EXTENDING *BRISTOL-MYERS SQUIBB CO.* TO FEDERAL CLASS ACTIONS

FELICIA D. SYCH*

In 2017, the U.S. Supreme Court issued its seminal decision in Bristol-Myers Squibb Co. v. Superior Court of California*, subsequently altering the scope of personal jurisdiction and further narrowing its interpretation of specific jurisdiction.* Bristol-Myers Squibb Co. *held that a state court can only assert specific personal jurisdiction over a defendant when there is a meaningful nexus between the forum state and the claims at issue. The Court purposefully refrained from deciding whether its holding applies to federal courts adjudicating federal class actions. After denying a petition for writ of certiorari to resolve the issue in 2021, the question continues to plague the lower courts.*

This Comment provides a comprehensive analysis of how the principles of fair play and substantial justice interpreted by the Court in Bristol-Myers Squibb Co. *squarely complement extending its holding to federal class actions. The procedural safeguards outlined in Rule 23 do not adequately shield defendants from the constitutional constraints of personal jurisdiction, and Rule 23 inadvertently provides the strength from which classes derive their power. The heightened strength of the plaintiff class necessitates more than Rule 23's minimum protections, and* Bristol-Myers Squibb Co.*'s holding fills the resulting defendant due process gap.* Bristol-Myers Squibb Co.*'s holding assures defendants of due process, and courts should extend its claim-forum*

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nexus. Accordingly, this Comment concludes that due process requires Bristol-Myers Squibb Co. v. Superior Court of California *to extend to federal class actions.*

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INTRODUCTION

"[T]he end of law is not to abolish or restrain, but to preserve and enlarge freedom . . . ."[1] Perhaps as quintessential to the United States as apple pie, lawsuits have long found their roots in the tradition of the United States.[2] Some scholars even propose that the Petition Clause of the U.S. Constitution protects the private right of action[3]: "Congress

1. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 123–24 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

2. *See* PETER CHARLES HOFFER, LITIGATION NATION: A CULTURAL HISTORY OF LAWSUITS IN AMERICA 2 (2019) ("Litigation is not just part of the American way of life. It is an emblem of the American way of life."); *see also* Paul H. Rubin, *More Money into Bad Suits*, N.Y. TIMES (Nov. 16, 2010, 4:44 PM), https://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/more-money-into-bad-suits [https://perma.cc/7B65-S55G] (noting that the United States is the most litigious country in the world); J. Mark Ramseyer & Eric B. Rasmusen, *Comparative Litigation Rates* 1 (Harvard L. Sch. John M. Olin Discussion Paper Series No. 681, Nov. 2010) ("We know the stereotype: People around the world see American citizens as eager to sue and American judges as powerful shapers of the social order.").

3. *See, e.g.*, Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 691 (1999) ("Though I contend that the right of court access under the Petition Clause is a narrow right, I believe that it is a meaningful right."); Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1744–45 (2017) ("[T]he most compelling basis for a federal remedial right—as a matter of history, text, and precedent—lies in the final clause of the First Amendment—the Petition Clause . . . .").

shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[4]

Lawsuits have evolved far beyond one plaintiff against one defendant disputes; today, multiple parties can join as plaintiffs or defendants as prescribed by the rules of civil procedure.[5] One especially powerful tool is the class action device, which aggregates multiple parties as plaintiffs—or defendants—into one lawsuit.[6] In 2022, the U.S. court system settled fifteen class actions for $1 billion or more, with the total value of class action settlements estimated to exceed $100 billion.[7]

Competing with plaintiffs' right to redress of their grievances is defendants' right to preserve their freedom from suit.[8] Defendants can turn to the Federal Rules of Civil Procedure (the FRCP) for protection in pursuit of such freedom against plaintiffs,[9] and the Constitution serves as a shield against the sword of the court tasked with addressing

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4. U.S. CONST. art. I.

5. PRAC. L. LITIG., JOINING MULTIPLE CLAIMS AND PARTIES UNDER THE FRCP CHART (Thomson Reuters 2023). Because this Comment focuses on federal issue cases in federal courts, the Federal Rules of Civil Procedure (the "FRCP") will be the primary source of procedural content. *See id.* (discussing procedural rules allowing for joinder of multiple parties in a federal case in federal court). For a summary of the procedural differences between federal and state courts, see *Comparing Federal & State Courts*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts [https://perma.cc/XV4L-K2UY].

6. *Class Action*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a class action as a lawsuit in which one person or a small group of people represent the interests of others); *see* Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979) ("[T]he . . . class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."); *see also* Arthur R. Miller, *Keynote Address: The American Class Action: from Birth to Maturity*, 19 THEORETICAL INQUIRIES L. 1 (2018) (tracing the origins and tradition of class actions).

7. GERALD L. MAATMAN, JR. & JENNIFER A. RILEY, DUANE MORRIS LLP, DUANE MORRIS CLASS ACTION REVIEW – 2023 13 (2023), http://blogs.duanemorris.com/classactiondefense/wp-content/uploads/sites/56/2023/01/DMCAR-Final-Overview.pdf [https://perma.cc/J8Z5-XWHX].

8. It is the role of the courts to balance rights. *See* FREDERICA GIOVANELLA, COPYRIGHT AND INFORMATION PRIVACY: CONFLICTING RIGHTS IN BALANCE 6 (2017) ("The role of the courts is generally considered to be the resolving of conflicts between rights, and this is indeed their predominant task: deciding which right—and which part—must prevail in each and any of the lawsuits they judge.").

9. *See* FED. R. CIV. P. 11(b)–(c) (allowing sanctions for parties who use the court system to harass, unnecessarily delay, or needlessly increase the cost of litigation).

the suit.[10] The Due Process Clauses of the Fifth and Fourteenth Amendments are this Comment's most relevant constitutional protections.[11] Particularly of interest to defendants in any lawsuit, these Amendments assure that through its judicial system, the government will not—and cannot—resolve a dispute without ensuring due process of law.[12] A court has authority to resolve a lawsuit only if it has jurisdiction over the subject matter of the dispute and jurisdiction over the defendant.[13] A court that enters a judgment against a defendant without the power to do so has violated the defendant's due process rights.[14] Jurisdiction over the defendant is the crux of the issue addressed in this Comment.[15]

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10. *See generally* JONATHAN GROSSMAN, CONSTITUTIONAL RIGHTS AVAILABLE IN PROCEEDINGS OTHER THAN CRIMINAL TRIALS 1, http://www.sdap.org/downloads/research/criminal/jg20.pdf [https://perma.cc/8X3X-2MLJ] (highlighting various constitutional protections for civil litigants).

11. *See* Christopher Chorba & Blaine H. Evanson, *Other Due Process Challenges to the Class Device*, *in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 737 (Marcy Hogan Greer ed., 1st ed. 2010) ("By their very nature, group litigation and the class action procedure implicate the protections afforded by the [D]ue [P]rocess [C]lauses of the [fif]th and [fourteen]th Amendments to the U.S. Constitution."); *infra* Section I.A (explaining due process in the Fifth and Fourteenth Amendments).

12. *See* Roger A. Fairfax & John C. Harrison, *The Fifth Amendment Due Process Clause: Common Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-v/clauses/633 [https://perma.cc/5N8Z-Z2J2] ("At the most general level, the [Due Process] [C]lause reiterates the principle of the rule of law: the government must act in accordance with legal rules and not contrary to them. . . . Government actors violate due process when they frustrate the fairness of proceedings . . . .").

13. *See* 11 FEDERAL PRACTICE AND PROCEDURE § 2862 (Wright & Miller, 3d ed. 2023) ("A judgment . . . is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." (footnotes omitted)); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (noting that judgments against defendants entered by a court without personal jurisdiction over them are void and not entitled to full faith and credit); Brumfield v. La. State Bd. of Educ., 806 F.3d 289, 298 (5th Cir. 2015) (invalidating the lower court's judgment because it acted beyond its subject matter jurisdiction).

14. Hanson v. Denckla, 357 U.S. 235, 250, 255 (1958) (noting that a state is forbidden from entering a judgment against a person over whom it has no jurisdiction); *see* Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 307 (D.C. Cir. 2020) (Silberman, J., dissenting) ("A court's assertion of jurisdiction over a defendant exposes it to that court's coercive power, so such an assertion must comport with due process of law.").

15. *See infra* Section I.B (providing an overview of personal jurisdiction).

This Comment will argue that due process requires the holding in *Bristol-Myers Squibb Co. v. Superior Court of California*[16] ("*BMS*") to extend to federal class actions addressing federal issues because the FRCP do not sufficiently protect defendants against due process violations. Because Rule 23 of the FRCP only provides the minimum requirements for class certification, case law must supplement Rule 23 to fill the due process gap; accordingly, federal courts lack personal jurisdiction over claims of out-of-state plaintiffs with out-of-state injuries in federal-issue class actions.

Section I.A will provide an overview of due process and a brief explanation of how it applies to litigants generally. Section I.B includes a deeper explanation of how personal jurisdiction functions in the judicial system to provide further context of how *BMS* fits into the discussion. Next, Section I.C will give a brief overview of the history of the FRCP, paying particular attention to the rule governing class actions, Rule 23. Then, Section I.D will discuss *BMS*, the U.S. Supreme Court case that held that each claim against a defendant in a mass tort action must satisfy a minimum contacts, nexus, and fair play and substantial justice analysis. Next, Section I.E will discuss the current state of the circuit and district courts in how they apply—or do not apply—*BMS* to class actions in federal courts addressing federal issues.

Section II.A will begin an analysis of due process as it relates to defendants in class actions, highlighting the substantial power of a class in its ability to coerce defendants into settlement of otherwise weak independent claims. This Section will explore how Rule 23 inadvertently provides the very strength from which the class derives its power. Section II.B will analogize permissible joinder with a class action, explaining that defendants of either type of lawsuit maintain the same protections and rights as they would if plaintiffs brought suit individually. Section II.C will highlight *BMS*'s requirement that plaintiffs' claims connect with the forum state, concluding that unnamed, out-of-state plaintiffs' claims lack such nexus. Section II.D will address the forum state's lack of interest in adjudicating a class action with unnamed, out-of-state plaintiffs. Accordingly, this Section will suggest that due process must serve as a shield for defendants facing class actions.

Part III will discuss the Rules Enabling Act and how its underlying goal of protecting litigants' substantive rights supports *BMS*'s extension to federal class actions. Part IV will note that extending *BMS* will

16. 582 U.S. 255 (2017).

reduce the risk of forum shopping, ultimately leading to fairer adjudications for all parties. Part V will briefly refute the proposition that determining whether a court has personal jurisdiction over unnamed, out-of-state plaintiffs before class certification is premature, arguing that ancillary issues, like personal jurisdiction, logically precede class certification. Finally, this Comment concludes with an assurance that while extending *BMS* will necessarily curtail the availability of forums for class actions, the guarantee of due process outweighs the reduction in forum options.

I. BACKGROUND

First, this Part will briefly outline how the U.S. Supreme Court has and continues to interpret due process as articulated in the Fifth and Fourteenth Amendments of the U.S. Constitution. Next, this Part will explain personal jurisdiction and how it intersects with the basic tenets of due process. Then, this Part will introduce the history and application of the FRCP, especially as they relate to class actions brought under Rule 23. Finally, this Part will explain the Court's reasoning in *BMS* and explore how lower courts differ in applying its holding to federal class actions.

A. An Overview of Due Process

The Fifth Amendment of the U.S. Constitution protects against the "depriv[ation] of life, liberty, or property, without due process of law" by the federal government,[17] and the Fourteenth Amendment offers the same protection against violation by the states.[18] The U.S. Supreme Court has never provided an unequivocal interpretation of due process,[19] appreciating that it "cannot be imprisoned within the treacherous limits of any formula."[20] Indeed, due process is an amorphous and ever-changing concept unencumbered by a clearly

17. U.S. CONST. art. V.

18. U.S. CONST. amend. XIV ("[N]or shall any [s]tate deprive any person of life, liberty, or property, without due process of law.").

19. Ballard v. Hunter, 204 U.S. 241, 255 (1907) (noting that the Court has never attempted to provide a precise definition of due process).

20. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring) (recognizing that courts must apply due process on a case-by-case basis).

delineated prescription.[21] Despite its ambiguous definition, due process is the foundation protecting citizens from government overreach and providing fair procedure when the government acts.[22] Courts often consider the prevention of government overreach as the "substantive" protection of due process[23] and the provision of fair procedure as the "procedural" function.[24] Although the Court has not identified whether personal jurisdiction's limitations implicate substantive or procedural due process, at least one scholar suggests personal jurisdiction has elements of both:

> [I]n determining what process is "due" in any procedural due process case, a court must balance the defendant's interest in receiving the benefit of a procedural protection, on the one hand, against the state's interest in not providing that protection, on the other. This analysis applies in the context of state court personal jurisdiction, except that the issue for determination is not the *amount* of process the forum must afford to the defendant before depriving her of a protected interest, but rather whether the state, through its courts, may deprive the defendant of a protected interest *at all*. Although the context is different, the relevant analysis is the same: a court must balance the interest of the defendant in not having to answer in the forum against the interest of the forum state in forcing the defendant to answer in its courts.[25]

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21. *Id.* at 163 ("It may fairly be said that, barring only occasional and temporary lapses, this Court has not sought unduly to confine those who have the responsibility of governing by giving the great concept of due process doctrinaire scope.").

22. *Due Process*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/due_process [https://perma.cc/S7VB-KZ2Q] (last modified Oct. 2022).

23. Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) (noting that substantive due process prevents the government from infringing on rights "implicit in the concept of ordered liberty"), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

24. United States v. Salerno, 481 U.S. 739, 746 (1987) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)) (explaining that when government action seeks to deprive an individual of life, liberty, or property, it must be done through fair procedure).

25. Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 STAN. J. COMPLEX LITIG. 1, 6 (2014) (footnotes omitted). *But see* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 573 (2007) (concluding that personal jurisdiction limits are a matter of substantive due process).

1. Substantive due process

In short, substantive due process considers which rights are generally outside the scope of government interest.[26] Courts turn to substantive due process to protect individual rights, both those explicitly mentioned[27] and those unenumerated in the Constitution.[28] In other words, due process forbids the government from infringing on certain liberties absent a narrowly tailored approach serving a compelling government interest.[29] The Supreme Court first applied substantive due process at the beginning of the twentieth century, generally striking down legislation that interfered with business or contradicted the principles of *laissez-faire* economics.[30] Although the Court later overruled its earlier decisions, recognizing that the legislature is uniquely empowered to use its police power to restrict

26. Rhodes, *supra* note 25, at 573 (noting that the government must act fairly and reasonably when intruding upon substantive rights).

27. Notably, only the provisions of the Bill of Rights essential to the concept of ordered liberty are incorporated in the Fourteenth Amendment's Due Process Clause. *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021) ("The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant."); Pearson v. City of Grand Blanc, 961 F.2d 1211, 1216 (6th Cir. 1992) (highlighting that First Amendment protections are incorporated in substantive due process); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (incorporating the Second Amendment in the Fourteenth Amendment); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (acknowledging that the right to trial by jury in criminal cases is "fundamental to the American scheme of justice"); *see also* Andrew Cohen & Suja Thomas, *Is There Any Way to Resuscitate the Seventh Amendment Right to Jury Trial?*, BRENNAN CTR. FOR JUST. (Nov. 28, 2022), https://www.brennancenter.org/our-work/analysis-opinion/there-any-way-resuscitate-seventh-amendment-right-jury-trial [https://perma.cc/QY7P-JCWP] (noting that the Seventh Amendment has not been incorporated).

28. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1509 (1999). *See generally* Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253 (2016) (recognizing the challenge of explaining substantive due process).

29. Reno v. Flores, 507 U.S. 292, 301–02 (1993); *id.* at 341 (Stevens, J., dissenting) (commenting that courts heavily scrutinize government interference with fundamental rights).

30. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 70 (2006); *see, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905), *superseded by statute*, Fair Labor Standards Act (FLSA), 29 U.S.C. § 203 (invalidating a statute limiting bakers' hours as an undue restriction on employer and employee's right to contract).

certain freedoms,[31] it was soon inundated with substantive due process challenges.[32] Today, there are several guiding sources to which the Court will look to determine which rights are protected under substantive due process; conservative justices often identify fundamental rights as those deeply rooted in the nation's history and tradition,[33] while liberal justices generally view fundamental rights as ever-evolving as social norms change.[34] Nevertheless, the Court has held several rights as so fundamental as to need substantive due process protection.[35]

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31. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 389, 391 (1937) (clarifying that while the Constitution does not guarantee freedom of contract, it does protect the principles of freedom and liberty).

32. *See* Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause: Common Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 [https://perma.cc/PV46-9NN7] (noting that although the Court suggested it would "tread carefully" when considering substantive due process after overruling *Lochner v. New York* in the mid-twentieth century, the Court was later reinvigorated and affirmed several claims for substantive due process).

33. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (mentioning that, according to conservative justices, the Constitution protects the sanctity of families because the institution of family is deeply rooted in American history and tradition).

34. *See* Nell Peyser, *Liberal and Conservative Jurisprudence on the Contemporary Supreme Court: An Analysis of Substantive Due Process Interpretation* 9–10 (Apr. 26, 2011) (B.A. Thesis, Oberlin College) (on file with the Digital Commons at Oberlin College), https://digitalcommons.oberlin.edu/cgi/viewcontent.cgi?article=1416&context=honors [https://perma.cc/CX7H-6GG3] (tracing the history of substantive due process in a political context); *see, e.g.*, Victoria F. Nourse, *A Tale of Two* Lochner*s: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 751–52 (2009) (explaining the political division in substantive due process). *See generally* Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEX. L. REV. 275 (2014) (describing the tradition of substantive due process).

35. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 672 (2015) (same-sex marriage); Cruzan v. Miss. Dep't of Health, 497 U.S. 261, 278 (1990) (refusing life-saving medical treatment); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (contraception for married couples); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (intimate relationships); Youngberg v. Romeo, 457 U.S. 307, 316 (1982) (freedom from unreasonable bodily restraint); *see also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (void for vagueness doctrine). *But see, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (no constitutional right to abortion); Washington v. Glucksberg, 521 U.S. 702, 705–06 (1997) (no constitutional right to physician-assisted suicide).

2. Procedural due process

While substantive due process considers the government's underlying decision to deprive someone of their life, liberty, or property, procedural due process requires fair and reasonable procedures when the government acts.[36] At a minimum, procedural due process requires notice, reasonably calculated to apprise interested parties of the pendency of the deprivation, and the opportunity to be heard.[37] However, the complete analysis for determining what procedure is due in any case[38] requires courts to weigh the private interest, the government's interest, and the risk of erroneous deprivation.[39]

This Comment agrees that personal jurisdiction implicates both substantive and procedural due process elements;[40] therefore, it does not limit its application to one category. Because the Court has not instructed which category is most appropriate for personal jurisdiction, references to due process are not specifically tailored to a substantive or procedural argument; instead, the underlying concepts of due

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36. *E.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 570 (1972) (stating that procedural due process weighs the adequacy of the form of hearing); Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (discussing procedural due process balancing test); *Obergefell*, 576 U.S. at 722 (Thomas, J., dissenting) (repudiating substantive due process); Hebert v. Louisiana, 272 U.S. 312, 316–17 (1926) (recognizing that due process requires state action to comply with "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"); Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (per curiam) (explaining procedural due process analysis).

37. *E.g.*, Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) (discussing minimum due process requirements); Bell v. Burson, 402 U.S. 535, 542 (1971) (holding that notice and the opportunity to be heard were required before suspending petitioner's driver's license and vehicle registration); Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970) (determining that the lack of opportunity to present evidence or confront adverse witnesses was fatal to the adequacy of the state's procedures); Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (explaining how the opportunity to be heard must be proportionate to the nature of the case); Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (discussing whether procedural due process requires an opportunity to be heard before state seizure of property).

38. *See Bell*, 402 U.S. at 540 (recognizing that procedural due process requires an individualized application).

39. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542–43 (1985).

40. *See* Miller, *supra* note 25, at 6 n.16 (finding that both substantive and procedural due process apply to the limitations of personal jurisdiction).

process, namely, fairness and reasonableness,[41] appropriately guide the analysis.

B. Brief Summary of Personal Jurisdiction

To enter a constitutionally valid and enforceable judgment, a court must, *inter alia*, have jurisdiction over the defendant.[42] Defendants challenging a forum state's personal jurisdiction over them "allege[] an infringement of a constitutionally protected interest: [their] freedom is impaired when the government requires [them] to appear and defend against accusations of wrongful conduct."[43]

Accordingly, when a court seeks to assert jurisdiction over an out-of-state defendant, it must first determine whether a state or federal rule provides such authority.[44] All fifty states have a "long-arm statute" governing their state courts,[45] and the FRCP provide federal courts with the same jurisdictional reach.[46] A court's jurisdictional power over a defendant can generally arise in several ways[47]: in personam

41. *See Bd. of Regents*, 408 U.S. at 589 (Marshall, J., dissenting) (explaining that procedural due process is a guarantee of fairness); *Goldberg*, 397 U.S. at 268 (discussing how constitutionally adequate notice depends on what fairness requires given the circumstances).

42. *Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining jurisdiction as "[a] court's power to decide a case or issue a decree"); STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN, THOMAS O. MAIN & ALEXANDRA D. LAHAV, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 667 (6th ed. 2020) (explaining that a court must have both subject matter jurisdiction and personal jurisdiction for a judgment to be valid and enforceable).

43. Miller, *supra* note 25, at 6; *see* BRANDON J. MURRILL, CONG. RSCH. SERV., R44957, DUE PROCESS LIMITS ON THE JURISDICTION OF COURTS: ISSUES FOR CONGRESS 3–4 (2017) (tracing the evolution of personal jurisdiction); Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (recognizing that due process limits the extent of personal jurisdiction), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).

44. SUBRIN ET AL., *supra* note 42, at 690–91.

45. *See* 1 JURISDICTION CIVIL ACTIONS § 4.02 (2022) (examining the long-arm statutes for all fifty states).

46. FED. R. CIV. P. 4(k)(1)(A) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.").

47. *See infra* notes 51–53 and accompanying text (defining in personam jurisdiction, some of its effects on defendants, and two of its sub-categories).

jurisdiction,[48] in rem jurisdiction,[49] or waiver.[50] This Comment only addresses in personam jurisdiction as it directly relates to the due process analysis of defendants in federal class actions.

In personam jurisdiction, or personal jurisdiction, refers to a court's power to act with regard to a defendant.[51] Judgments against defendants subject to in personam jurisdiction attach to them and are enforceable by any state to which they travel.[52] In personam jurisdiction can be further divided into a general and specific analysis.[53]

1. General jurisdiction

A court has general jurisdiction over individuals domiciled in the state concerning all claims against them.[54] A corporation is subject to general jurisdiction in any state where it is incorporated, headquartered, or where it engages in activities so continuous and systematic that it is essentially "at home."[55] Notably, a class action brought in a state where

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48. JOSEPH W. GLANNON, ANDREW M. PERLMAN & PETER RAVEN-HANSEN, CIVIL PROCEDURE: A COURSEBOOK 177–78 (4th ed. 2021).

49. *Id.* at 149; *see* Aequitas Enters., LLC v. Interstate Inv. Grp., LLC, 267 P.3d 923, 926 (Utah 2011) (noting that in rem jurisdiction refers to a court's power to act with regard to property within its borders in disputes related to that property); *see also* Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958) ("A judgment *quasi in rem* affects the interests of particular persons in designated property."); Shaffer v. Heitner, 433 U.S. 186, 213 (1977) (holding that a court must find sufficient contacts between the state and the defendant before exercising quasi in rem jurisdiction).

50. GLANNON ET AL., *supra* note 48, at 175 ("If a defendant wants to litigate in the state that the plaintiff has chosen, the defendant may waive the procedural safeguard of personal jurisdiction."); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (holding that defendants may waive personal jurisdiction challenges by litigating the case); FED. R. CIV. P. 12(h)(1) (indicating the ways in which a party can waive various defenses, including want of personal jurisdiction).

51. SUBRIN ET AL., *supra* note 42, at 669 (defining personal jurisdiction as "the power of a court to enter a money judgment against the defendant").

52. *Id.* (illustrating how in personam judgments follow a defendant); *see* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each [s]tate to the . . . judicial [p]roceedings of every other [s]tate.").

53. Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255, 262 (2017) ("Since our seminal decision in *International Shoe*, our decisions have recognized two types of personal jurisdiction: 'general' . . . jurisdiction and 'specific' . . . jurisdiction.").

54. Goodyear Dunlop Tires Operations v. Brown, 564 U.S. 915, 924 (2011).

55. *E.g.*, *id.* at 924, 929 (holding that the court lacked general jurisdiction over foreign corporation because it lacked *continuous* activities within the forum state); Daimler AG v. Bauman, 571 U.S. 117, 138–42 (2014) (same holding as *Goodyear*); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 448 (1952) (permitting personal

the defendant is subject to general jurisdiction satisfies due process, as the plaintiffs' claims, named or unnamed, need not meet the claim-forum nexus.[56] The main due process concern for defendants in class actions relates to lawsuits where the plaintiff alleges the forum state has specific jurisdiction.[57]

2. Specific jurisdiction

A court has specific jurisdiction when a defendant has "purposefully established minimum contacts within the forum [s]tate,"[58] the cause of action relates to the defendant's contacts,[59] and subjecting the defendant to personal jurisdiction would not "offend 'traditional notions of fair play and substantial justice.'"[60] In determining whether a defendant has established minimum contacts, the court will consider the defendant's purposeful availment to the laws and benefits of the forum state.[61]

a. Purposeful availment of the forum state

A defendant's contacts with the forum state must be deliberate, as compared to accidental or inadvertent.[62] For example, in *World-Wide*

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jurisdiction over foreign company when the company's president moved his office to that state).

56. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318–20 (1945) (finding it reasonable to subject defendants to suit in states where they are at home); *see infra* Section I.B.2.b (discussing claim-forum nexus requirement).

57. *See* A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction Over Absent Class Member Claims Explained*, 39 REV. LITIG. 31, 33–34 (2019) (emphasizing the importance of resolving whether federal courts may exercise specific personal jurisdiction over the claims of unnamed, absent class members when the defendant is not subject to the general jurisdiction of the court).

58. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (plurality opinion) ("[I]t is the defendant's purposeful availment that makes jurisdiction consistent with 'traditional notions of fair play and substantial justice.'" (quoting *Int'l Shoe Co.*, 326 U.S. at 316)).

59. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984).

60. *Int'l Shoe Co.*, 326 U.S. at 316; Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024–26 (2021).

61. *Burger King Corp.*, 471 U.S. at 475–76; *Int'l Shoe Co.*, 326 U.S. at 319.

62. *Compare* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (holding that when defendants purposefully avail themselves of the privilege of conducting activities in the forum state, they have clear notice that they may be subject to suit there), *with* Walden v. Fiore, 571 U.S. 277, 291 (2014) (holding that even though the conduct of a defendant in Georgia could foreseeably affect the plaintiffs

Volkswagen Corp. v. Woodson,[63] the Robinson family purchased a vehicle from World-Wide Volkswagen Corporation in New York.[64] A year later, the family left New York in the vehicle to move to Arizona.[65] While driving through Oklahoma, another car hit the Robinsons, sparking a fire that severely burned the mother and two children.[66] The Robinsons filed suit in the District Court of Oklahoma against, *inter alia*, World-Wide Volkswagen.[67] World-Wide Volkswagen, which did not conduct any business in Oklahoma, challenged the court's jurisdiction.[68] The Oklahoma Supreme Court held that Oklahoma's long-arm statute authorized personal jurisdiction over the corporation because the car's mobility made it likely to eventually enter Oklahoma.[69] The U.S. Supreme Court reversed the lower court's decision, holding that Oklahoma lacked specific jurisdiction over the corporation because the foreseeability of the vehicle entering the forum state was insufficient to satisfy the minimum contacts test.[70]

b. Claim-forum nexus requirement

Next, in determining whether a defendant may be subject to a court's jurisdiction, the court will consider the nexus between the plaintiff's cause of action and the defendant's contacts in the forum state.[71] In *Helicopteros Nacionales de Colombia v. Hall*,[72] the Supreme Court established a "related to or 'aris[ing] out of'" requirement,[73] holding that the essential foundation of personal jurisdiction is the "relationship among the defendant, the forum, and the litigation."[74] The Supreme Court has yet to specify the appropriate test to determine how a claim must relate to or arise out of the defendant's contacts,[75]

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in Nevada, this was not enough for Nevada to exercise personal jurisdiction over the Georgia defendant).

63. 444 U.S. 286 (1980).
64. *Id.* at 288.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 288–89.
69. *Id.* at 289–90.
70. *Id.* at 299 (noting that absent minimum contacts, foreseeability was insufficient to subject World-Wide Volkswagen to Oklahoma's jurisdiction).
71. Int'l Shoe Co. v. Washington, 326 U.S. 310, 321 (1945).
72. 466 U.S. 408 (1984).
73. *Id.* at 414 (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).
74. *Id.* (quoting *Shaffer*, 433 at 204).
75. SUBRIN ET AL., *supra* note 42, at 691.

although its decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*[76] suggests that the claim need not flow from a direct causal link.[77] Lower courts have since split in applying this requirement and have accordingly formulated their own nexus tests.[78]

c. Constitutional concerns: Fair play and substantial justice

Even if the defendant satisfies the minimum contacts test and the plaintiff's claim fulfills the nexus requirement, personal jurisdiction remains limited to circumstances where the court's exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice."[79] Although the Supreme Court has not provided explicit clarity on the breadth of fair play and substantial justice, it has consolidated the analysis to several factors[80]: the burden on the defendant,[81] the interest of the forum state,[82] the interest of the

76. 141 S. Ct. 1017 (2021).

77. *Id.* at 1022, 1026 (rejecting a strict causation-only approach).

78. *See* SUBRIN ET AL., *supra* note 42, at 692 (examining the First and Ninth Circuits' differing standards). For a deeper discussion of lower courts' interpretations of the nexus requirement, see Levi M. Klinger-Christiansen, Comment, *The Nexus Requirement After* Bristol-Myers*: Does "Arise Out of or Relate to" Require Causation?*, 50 SETON HALL L. REV. 1145, 1146 (2020).

79. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

80. For an overview of the application of the "fair play and substantial justice" factors, see generally Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441 (1991).

81. *E.g.*, Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 114 (1987) (finding "significant weight" in the burden of defending suit in a foreign legal system when considering the reasonableness of a long-arm statute); McGee v. Int'l Life Ins., 355 U.S. 220, 223 (1957) (noting that modern transportation and communication have reduced the burden on defendants sued out-of-state).

82. *E.g.*, Keeton v. Hustler Mag., Inc., 465 U.S. 770, 776 (1984) (recognizing that a forum state "has a significant interest in redressing injuries that actually occur within the [s]tate"); *McGee*, 355 U.S. at 223 (noting that a forum state has an interest in protecting its residents from fraud).

plaintiff,[83] interstate efficiency,[84] and interstate policy interests.[85] In short, fair play and substantial justice *is* due process.[86]

While courts offer some weight to each factor in determining the "reasonableness" of exercising personal jurisdiction over the defendant,[87] the burden on the defendant is always the court's primary concern.[88] Nevertheless, even in cases where defending in a forum state greatly inconveniences the defendant, courts have found the exercise of personal jurisdiction reasonable unless the burden implicates a significant constitutional concern.[89] Notably, the Supreme Court recognizes that an egregious due process violation can turn an inconvenient forum into an *unreasonably* inconvenient forum.[90]

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83. *E.g.*, Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (holding that plaintiffs are entitled to minimal due process protections); Devlin v. Scardelletti, 536 U.S. 1, 14 (2002) (holding that plaintiffs who have objected to class settlement have a right to appeal).

84. *E.g.*, Anderson Energy Grp., LLC v. Endeavor Ohio, LLC, No. 12-CV-430, 2013 WL 1910389, at *279 (N.D. Okla. May 8, 2013) (noting that interstate efficiency requires an analysis of the location of the witnesses, where the cause of action occurred, which state's substantive law governs the lawsuit, and which state will most reduce piecemeal litigation).

85. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) (recognizing state sovereignty as "a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment"); *e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (noting that when residents of State A create legal obligations with residents of State B, they can be held liable for the consequences of their actions in State B).

86. Robert E. Pfeffer, *A 21st Century Approach to Personal Jurisdiction*, 13 U.N.H. L. REV. 65, 70 (2015).

87. *See World-Wide Volkswagen Corp.*, 444 U.S. at 292 (highlighting that the protection of defendants against inconvenient litigation is often referred to as "reasonableness").

88. *Id.* at 292; Oral Argument at 6:44, Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255 (2017) (No. 16-466), https://www.oyez.org/cases/2016/16-466 [https://perma.cc/ZAJ2-3D2X].

89. *Burger King Corp.*, 471 U.S. at 484 (recognizing that at some point, inconvenience may become substantial enough to constitute a violation of the defendant's constitutional rights).

90. *See* McGee v. Int'l Life Ins., 355 U.S. 220, 224 (1957) (recognizing that although California was an inconvenient forum for the defendant, this choice of forum did not amount to a denial of due process).

C. The Federal Rules of Civil Procedure

In 1934, Congress passed the Rules Enabling Act[91] (the "Act") which provided the initial direction for the U.S. Supreme Court to establish rules related to civil procedure.[92] Accordingly, the Court delegated the task to an Advisory Committee, which fashioned the FRCP.[93] The drafters intended the FRCP to ease procedural administration instead of effectively changing any substantive right.[94] Indeed, Rule 1 of the FRCP outlines their scope and purpose: "to secure the just, speedy, and inexpensive determination of every action and proceeding."[95]

In creating the FRCP, drafters looked to existing state codes[96] and the Federal Rules of Equity for guidance,[97] particularly as they related to joinder[98] or aggregation of claims or parties.[99] Borrowing language from Federal Equity Rule 38, drafters of the FRCP created Rule 23 to allow similarly situated parties to aggregate their claims, and especially

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91. 28 U.S.C. § 2072(b).

92. JOANNA R. LAMPE, CONG. RSCH. SERV., IF11557, CONGRESS, THE JUDICIARY, AND CIVIL AND CRIMINAL PROCEDURE (2020).

93. *Federal Rules of Civil Procedure*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/federal_rules_of_civil_procedure [https://perma.cc/VGP6-V9AL] (last updated Apr. 2021).

94. John G. Harkins, Jr., *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705, 705 (1997) (noting that the drafters proposed Rule 23 as an attempt to codify, not reform, civil procedure); Willy v. Coastal Corp., 503 U.S. 131, 134 (1992) (accepting that the FRCP may not "abridge, enlarge or modify any substantive right" (quoting 28 U.S.C. § 2072(b))); 1 MOORE'S MANUAL–FEDERAL PRACTICE AND PROCEDURE § 1.20[2] (2023) (stating that the FRCP "expressly prohibit[] . . . abridging, enlarging, or modifying substantive rights" (citing 28 U.S.C. § 2072)).

95. FED. R. CIV. P. 1.

96. Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 767–68 (2012). *See generally* Charles E. Clark & Herbert Brownell, Jr., *Joinder of Parties*, 37 YALE L.J. 28 (1927) (tracing the history of joinder).

97. *See* Robert E. Bunker, *The New Federal Equity Rules*, 11 MICH. L. REV. 435, 435 (1913) (explaining that the predecessor to the FRCP, the Federal Rules of Equity, provided a code of rules for courts of equity in the United States). Notably, the FRCP merged courts of law and equity by providing federal courts with jurisdiction over matters of both law and equity. FED. R. CIV. P. 1.

98. The FRCP also establish rules for joining plaintiffs, claims, and defendants through required and permissible joinder. FED. R. CIV. P. 19, 20. Most relevant for purposes of this Comment, Rule 20 permits plaintiffs to join one action if "(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action." FED. R. CIV. P. 20(a)(1); *see infra* Section II.B (analogizing Rule 20 with Rule 23).

99. Effron, *supra* note 96, at 767–68.

as a tool to vindicate civil rights.[100] Practitioners struggled with the original language of Rule 23,[101] and in 1960, the Supreme Court appointed a new Advisory Committee on Civil Rules to address some of the concerns.[102] Several members of the Committee believed Rule 23 should adapt as "substantive law and society might warrant,"[103] while other members thought inappropriate any future broadening of Rule 23 to allow aggregation of people with no prior connection to file suit.[104] Ultimately, the Committee fashioned Rule 23 to ensure procedural regularity and consistency of outcome.[105] Rule 23 provides several criteria for class certification: the first section governs prerequisites for the class; the second section provides for three types of classes; and the third section outlines the judicial administration of the action.[106] In doing so, drafters envisioned Rule 23 as a codification

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100. *See* Harkins, Jr., *supra* note 94, at 705 (noting that much of the language from Federal Equity Rule 38 influenced the creation of Rule 23); S. REP. NO. 109-14, at 7 (2005) (mentioning that class actions were originally envisioned as a tool for civil rights litigants); Edward H. Hammond, *Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure*, 23 AM. BAR ASS'N J. 629, 631 (1937) (acknowledging the incorporation of Equity Rule 38 in Rule 23); Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 KAN. L. REV. 325, 328–29 (2017) (discussing how Rule 23 allowed those fighting racial oppression to act together).

101. *See* John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. COLL. L. REV. 323, 331–33 (2005) (discussing the problems with the original Rule 23); Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 6, 8–9 (1991) (stating that Advisory Committee members proposed several amendments to Rule 23 before its finalization); 39 F.R.D. 69, 98–100 (1966) (highlighting that Rule 23 frustrated practitioners before it was revised).

102. Miller, *supra* note 6, at 1, 4–6.

103. *Id.* at 5 (noting that proponents considered access to the courts as part of a changing commitment to promote social justice).

104. *Id.* at 15 (recognizing that opponents feared "the economic and philosophical threat" posed by class actions); Simona Grossi & Allan Ides, *The Modern Law of Class Actions and Due Process*, 98 OR. L. REV. 53, 62 (2020).

105. Grossi & Ides, *supra* note 104, at 62; *see* Malveaux, *supra* note 100, at 331–33, 340, 347 (identifying that the drafters wanted to support equity and fairness). *See generally The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PENN. L. REV. 1217, 1217–18 (1975) (discussing the procedural protections under the Rule).

106. FED. R. CIV. P. 23(a)-(c); Marjorie H. Mintzer & Yasmin Daley-Duncan, *Mass Tort Litigation: Why Class Action Suits Are Not the Answer*, 22 BRIEF 24, 25 (1992); *see* 28 U.S.C. § 1332(d)(1)(D) (defining "class members" as persons, named or unnamed, who satisfy the definition of a proposed or certified class); *see also* Jeffrey M. Wagner &

of the minimum requirements for class actions without explicitly considering the parties' constitutional or statutory rights.[107]

Professor John Frank, a member of the 1966 Advisory Committee, testified that the drafters intended a narrow application for Rule 23—certainly not anticipating its future use as a device for adjudicating product liability or mass injury cases.[108] As put simply by the nation's leading scholar in civil procedure, Arthur Miller,[109] "[not] even those extraordinarily gifted Advisory Committee members could have predicted the tremendous increase in class actions that followed the 1966 revision or the concomitant changes in their dimension or the ways in which they are processed."[110] Despite the drafters' limited intentions, in 2022, companies spent $23.7 billion on litigation-related legal services and $3.37 billion of which (14.2%) on class action litigation.[111] As plaintiffs continue to turn to Rule 23 for claims resolution,[112] a careful reflection of the limits of the Act and the original intent of the drafters of Rule 23 helps to explain *BMS*'s required role in safeguarding due process.[113]

Daniel Meyers, *Defending Class Actions: Using Absent Class Member Discovery*, LEXOLOGY (Feb. 11, 2014), https://www.lexology.com/library/detail.aspx?g=ce62c00c-2094-43a7-acc6-d953f20d76aa [https://perma.cc/DZ2D-T7NQ] (comparing the differences between named and unnamed class members).

107. Harkins, Jr., *supra* note 94, at 705–06 (noting the vision of the 1938 drafters); Grossi & Ides, *supra* note 104, at 62.

108. Rabiej, *supra* note 101, at 329, 341–42 (discussing Frank's desire for a narrow interpretation); *see* Brian T. Fitzpatrick, *The Ironic History of Rule 23* 2–3 (Vanderbilt Univ., Working Paper No. 17-41, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020306 [https://perma.cc/J4V6-VXCG] ("Today's class actions, where large numbers of consumers, employees, and shareholders who have never met one another before are combined into a class were largely foreign to [the drafters].").

109. *Arthur R. Miller*, N.Y.U. L., http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=20130 [https://perma.cc/CQ7Q-4YFU] (Arthur Miller's biography).

110. Miller, *supra* note 6, at 7; *see* Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977) ("Growing from apparently innocuous provisions of the Federal Rules of Civil Procedure, promulgated in 1938 and 1966, [class actions] [have] attained a notoriety rarely achieved by a procedural rule.").

111. CARLTON FIELDS, BTI CONSULTING GRP., 2022 CLASS ACTION SURVEY 6 (2022).

112. *See generally* MAATMAN, JR. & RILEY, *supra* note 7 (describing the future trajectory of class actions).

113. *See infra* Part III (arguing that the goals prescribed under the Act require the extension of *BMS* to class actions).

D. An Overview of Bristol-Myers Squibb Co. v. Superior Court of California

The 2017 U.S. Supreme Court case of *BMS* marked a critical shift in understanding the breadth of specific personal jurisdiction.[114] Bristol-Myers Squibb Co. (Bristol-Myers) is a pharmaceutical company incorporated in Delaware and headquartered in New York.[115] At the time of the lawsuit, Bristol-Myers engaged in substantial business in California with five research labs, 160 employees, 250 sales representatives, and a small government advocacy office in the state.[116]

In March 2012, plaintiffs filed a mass tort litigation in San Francisco Superior Court against Bristol-Myers, alleging injury caused by a blood thinner manufactured by the company.[117] Six hundred plaintiffs filed eight separate suits,[118] less than a quarter of whom lived and alleged injury from the blood thinner in California.[119] Although Bristol-Myers sold the blood thinner in California, it did not manufacture, label, or work on regulatory approval in the state.[120]

Bristol-Myers moved to quash the service of summons of the out-of-state residents, arguing that California lacked personal jurisdiction over their claims.[121] The Superior Court of California denied Bristol-Myers's motion, finding that California courts had general jurisdiction because Bristol-Myers engaged in substantial activities in the state.[122] Bristol-Myers then petitioned the California Court of Appeals for a writ of mandate.[123] Although the Court of Appeals denied the writ, the

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114. Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255 (2017); *see* Richard D. Freer, *Personal Jurisdiction: The Walls Blocking an Appeal to Rationality*, 72 VAND. L. REV. 99, 99 n.1 (2019) (considering *BMS* among several twenty-first century Supreme Court cases shaping the "new era" of personal jurisdiction).

115. *Bristol-Myers Squibb Co.*, 582 U.S. at 258.

116. *Id.* at 258–59.

117. *Id.*

118. *Id.*; *see* Recommendations Regarding Coordination and Stay Order, No. JCCP4748, 2013 WL 6780386, at *2 (Cal. Super. Ct. Mar. 27, 2013) (listing the eight cases).

119. *Bristol-Myers Squibb Co.*, 582 U.S. at 259.

120. *Id.*

121. *Id. See generally* Defendant Bristol-Myers Squibb Co.'s Memorandum of Points and Authorities in Support of Motion to Quash Service of Summons of Complaint for Lack of Personal Jurisdiction, *In re* Plavix Prod. & Mktg. Cases, No. 4748, 2013 WL 6474130 (Cal. Super. Ct. July 9, 2013) (arguing that most of the plaintiffs neither resided in California nor had any connections to the state otherwise).

122. *Bristol-Myers Squibb Co.*, 582 U.S. at 259.

123. *Id.* at 260.

Supreme Court of California instructed the Court of Appeals "to vacate its order denying mandate and to issue an order to show cause why relief sought . . . should not be granted."[124] After the U.S. Supreme Court's decision in *Daimler AG v. Bauman*,[125] which held that a state has general jurisdiction over out-of-state defendants only if they are at home in the forum state or if their contacts are *so* continuous and systematic as to render them essentially at home in the forum,[126] the Superior Court changed its analysis to find that California had specific jurisdiction[127] over the out-of-state plaintiffs' claims.[128]

The U.S. Supreme Court granted Bristol-Myers's petition for certiorari, ultimately reversing the lower court's decision and holding that California lacked personal jurisdiction over the out-of-state plaintiffs' claims because their injuries did not meaningfully connect to Bristol-Myers's connections within the state.[129] The Supreme Court's opinion left several questions unanswered, namely whether its holding applies to unnamed plaintiffs of class actions in federal courts addressing federal issues.[130]

1. Lower courts split on extending Bristol-Myers Squibb Co. v. Superior Court of California *to class actions*

Since the Supreme Court released its holding in *BMS*, lower courts have split on its application to federal class actions. In January 2021, the U.S. Supreme Court denied certiorari in *Iqvia Inc. v. Mussat*[131] to resolve the uncertainty.[132] Unfortunately, by declining Iqvia Inc.'s

124. *Id.*

125. 571 U.S. 117 (2014).

126. *Id.* at 128 (recognizing expansion of general jurisdiction would encroach on out-of-state defendants' ability to purposefully target specific forums).

127. *See supra* Section I.B.2 (explaining specific jurisdiction).

128. *Bristol-Myers Squibb Co.*, 582 U.S. at 260.

129. *Id.* (holding that specific jurisdiction requires an affiliation between the forum state and the underlying controversy, regardless of the defendant's unconnected activities in the forum).

130. *Id.* at 268–69 ("[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction by a [s]tate, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."); *id.* at 278 n.4 (Sotomayor, J., dissenting) ("The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum [s]tate seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.").

131. 953 F.3d 441 (7th Cir. 2020).

132. Iqvia Inc. v. Mussat, 141 S. Ct. 1126, 1126 (2021).

petition for review, the Court missed a critical opportunity to resolve an essential civil procedure question, leading to further confusion among the lower courts.[133] Without resolution, defendants of class actions face a serious affront to the fundamental principles of fairness and due process, which guide the basis for personal jurisdiction.[134] As put by the Voice of the Defense Bar in its brief of amicus curiae supporting Iqvia Inc., "forcing litigants to incur substantial costs attempting to litigate the question [of *BMS*'s application] through appeals from final judgments in class actions . . . will only unfairly delay the answer to a question that everyone acknowledges this Court will sooner or later have to resolve."[135]

a. Circuit courts declining to extend Bristol-Myers Squibb Co. v. Superior Court of California *to class actions*

In October 2020, Iqvia Inc. petitioned for review of the U.S. Court of Appeals for the Seventh Circuit's decision that *BMS* does not extend to class actions.[136] After receiving two unsolicited faxes from Iqvia Inc., Florence Mussat filed suit in the U.S. District Court for the Northern District of Illinois against Iqvia Inc. on behalf of a putative class, alleging violation of the Telephone Consumer Protection Act (TCPA), a federal statute.[137] Mussat, the named plaintiff, suffered injuries from or related to[138] Iqvia Inc.'s contacts with Illinois.[139] However, Mussat sought to represent unnamed out-of-state class members whose injuries did not occur in Illinois.[140] Accordingly, Iqvia Inc. moved to

133. Petition for a Writ of Certiorari at 24–25, *Iqvia Inc.*, 141 S. Ct. 1126 (No. 20-510) ("Whether [*BMS*] applies to absent class members' claims is an important issue that has divided federal and state courts alike. It is thus ripe for [] [the Supreme] Court's resolution . . . .").

134. *Id.* at 8; *see supra* Section I.B (discussing the connection between personal jurisdiction and fairness and due process).

135. Brief of Amicus Curiae DRI–The Voice of the Defense Bar in Support of Petitioner at 6, *Iqvia Inc.*, 141 S. Ct. 1126 (No. 20-510).

136. *See* Petition for a Writ of Certiorari, *supra* note 133.

137. Mussat v. Iqvia Inc., No. 17 C 8841, 2018 WL 5311903, at *1 (N.D. Ill. Oct. 26, 2018), *rev'd*, 953 F.3d 441 (7th Cir. 2020).

138. *See supra* Section I.B.2.b (explaining the "arising out of or related to" requirement).

139. *Mussat*, 2018 WL 5311903, at *5.

140. *Id.* at *1.

strike the class definition,[141] alleging that per *BMS*'s precedent, Illinois lacked personal jurisdiction over the claims of the out-of-state class members.[142] The district court agreed and granted Iqvia Inc.'s motion to strike class definition.[143] On appeal, Iqvia Inc. maintained its defense that Illinois lacked personal jurisdiction over the claims of the unnamed plaintiffs and added to its argument that FRCP 4(k)(1)(A)[144] sets an independent limitation on a federal court's ability to exercise personal jurisdiction.[145] The Seventh Circuit disagreed with both propositions, declining to extend *BMS* to federal class actions and refuting Iqvia Inc.'s claim that the FRCP suggest otherwise.[146]

In *Lyngaas v. Curaden AG*,[147] the U.S. Court of Appeals for the Sixth Circuit came to the same conclusion[148] as the Seventh Circuit.[149] Bryan Lyngaas received two unsolicited faxes from defendant Curaden and filed suit in 2017 on behalf of himself and others similarly situated in the U.S. District Court for the Southern District of Michigan, alleging violation of the TCPA.[150] Lyngaas, the named plaintiff, received the faxes at his dental practice in Michigan, but some unnamed class members received the faxes out of state.[151] Curaden moved to dismiss

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141. *See* FED. R. CIV. P. 23(d)(1) ("In conducting an action under this rule, the court may issue orders that . . . require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly . . . .").

142. *Mussat*, 2018 WL 5311903, at *2.

143. *Id.* at *4–5 ("[*BMS*] holds that due process requires the defendant to be subject to specific jurisdiction not only as to the named plaintiff's claims, but also as to the absent class members' claims.").

144. FED. R. CIV. P. 4(k)(1) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."). For clarity, the rule here refers to "general jurisdiction" as a court's authority to hear any case not vested in another court, compared to general jurisdiction in the personal jurisdiction context.

145. Iqvia Inc. v. Mussat, 953 F.3d 441, 447 (7th Cir. 2020); *see* FED. R. CIV. P. 4(k)(1)(A). For a complete explanation of Iqvia Inc.'s argument related to FRCP 4(k)(1)(A), see Petition for a Writ of Certiorari, *supra* note 133, at 14–15. The application of FRCP 4(k)(1)(A) to class actions is beyond the scope of this Comment.

146. *Iqvia Inc.*, 953 F.3d at 448.

147. 992 F.3d 412 (6th Cir. 2021).

148. *Id.* at 437 (explaining that a court must analyze the relationship between the defendant, the forum, and the litigation, and such relationship does not depend on the unnamed plaintiffs).

149. *Id.* at 434–35.

150. *Id.* at 417.

151. *Id.* at 417–18.

the case for want of personal jurisdiction, arguing that *BMS* prohibits Michigan's jurisdiction over the claims of the out-of-state class members.[152] The district court disagreed, holding that *BMS*'s application is limited to mass torts.[153] On appeal, the court of appeals affirmed, concluding that "[l]ong-standing precedent shows that courts have routinely exercised personal jurisdiction over out-of-state defendants in nationwide class actions, and the personal-jurisdiction analysis has been focused on the defendant, the forum, and the *named plaintiff*, who is the putative class representative."[154]

b. District courts extending Bristol-Myers Squibb Co. v. Superior Court of California *to class actions*

Although no circuit court has held that *BMS* extends to class actions, some district courts have done so.[155] The U.S. District Court for the

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152. Lyngaas v. Curaden AG, No. 17-cv-10910, 2019 WL 2231217, at *4 (E.D. Mich. May 23, 2019).

153. *Id.* at *18 (indicating that in *BMS*'s dissent, Justice Sotomayor explained the majority's holding did not necessarily apply to class actions); *see* Rosenberg v. LoanDepot.com LLC, 435 F. Supp. 3d 308, 326 (D. Mass. 2020) ("A mass tort action is fundamentally distinguishable from a class action. . . . [I]n a mass tort action each individual plaintiff is a real party in interest. In a putative class action, however, 'one or more plaintiffs seek to represent the rest of the similarly situated plaintiffs, and the named plaintiffs are the only plaintiffs actually named in the complaint.'" (quoting Molock v. Whole Foods Mkt. Grp., Inc., 297 F. Supp. 3d 114, 124–27 (D.D.C. 2018), *aff'd on other grounds*, 952 F.3d 293 (D.C. Cir. 2020))). *See generally* Christy Bieber, *What is a Mass Tort? Legal Definition & Examples*, FORBES, https://www.forbes.com/advisor/legal/personal-injury/mass-tort [https://perma.cc/D9BG-X9GU] (last updated May 19, 2023, 7:49 AM) (explaining the difference between mass torts and class actions).

154. *Lyngaas*, 992 F.3d at 433.

155. *E.g.*, *In re* Dental Supplies Antitrust Litig., No. 16 Civ. 696, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017) (noting that due process does not "wax and wane" when the lawsuit is brought by one plaintiff or on behalf of a class); Prac. Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840, 864 (N.D. Ill. 2018) (finding that because the out-of-state claims did not relate to the defendant's contacts in the forum state, the forum state could not exercise personal jurisdiction without violating due process); *In re* Dicamba Herbicides Litig., 359 F. Supp. 3d 711, 724 (E.D. Mo. 2019) (explaining that Missouri could not exercise specific jurisdiction over out-of-state claims because they did not connect to the defendant's contacts in the state). *But see, e.g.*, Carranza v. Terminix Int'l Co., 529 F. Supp. 3d 1139, 1145 (S.D. Cal. 2021) (distinguishing mass actions from class actions); Marquette v. HomeAdvisor Inc., No. 6:20-cv-1490-Orl-31EJK, 2021 WL 2942742, at *4 (M.D. Fla. Jan. 15, 2021) (differentiating the facts in *BMS* and class actions); Cedarview Mart, LLC v. State Auto Prop. & Cas. Co., No. 3:20-cv-107-NBB-RP, 2021 WL 1206597, at *2 (N.D. Miss. Mar.

Southern District of California granted a defendant's motion to strike allegations concerning a putative class action with out-of-state unnamed class members.[156] In *Carpenter v. PetSmart, Inc.*,[157] Todd Carpenter brought a product liability claim against PetSmart, Inc. on behalf of himself and all U.S. citizens who purchased the defective product.[158] PetSmart, Inc. moved to strike the allegations related to the class action, alleging, *inter alia*, the court lacked personal jurisdiction with respect to the claims by unnamed class members who purchased the product outside of California.[159] The district court granted the motion and found the procedural requirements of Rule 23 insufficient to safeguard PetSmart, Inc.'s right to be free from suit in a forum state lacking a legitimate interest in out-of-state claims.[160]

The U.S. District Court for the Northern District of New York found similarly in *Chizniak v. CertainTeed*.[161] Seven plaintiffs filed a class action against CertainTeed, a wholly-owned subsidiary of a Delaware corporation.[162] Only one plaintiff resided and alleged injury in New York.[163] CertainTeed moved to dismiss the complaint for lack of personal jurisdiction over the out-of-state plaintiffs' claims.[164] Recognizing that due process protects defendants from suit in inconvenient forums[165] and preserves state sovereignty,[166] the court granted CertainTeed's motion, failing to find any connection between

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30, 2021) (accepting Rule 23 as a sufficient due process protection); *Rosenberg*, 435 F. Supp. 3d at 326 (distinguishing the mass action in *BMS* from class actions and finding Rule 23 an additional safeguard).

156. Carpenter v. PetSmart, Inc., 441 F. Supp. 3d 1028, 1031 (S.D. Cal. 2020).

157. 441 F. Supp. 3d 1028 (S.D. Cal. 2020).

158. *Id.* at 1031.

159. *Id.* at 1032.

160. *Id.* at 1036; *see infra* Section II.D (discussing the relevance of a forum state's interest in the claims at issue); *see also infra* Part II (addressing the inadequacies of Rule 23 in protecting the due process rights of defendants).

161. No. 1:17-CV-1075, 2020 WL 495219, at *5 (N.D.N.Y. Jan. 30, 2020).

162. *Id.* at *1.

163. *Id.*

164. *Id.*

165. *See supra* notes 81, 87–90 and accompanying text (examining the burden on the defendant as a relevant factor in personal jurisdiction analysis).

166. *Chizniak*, 2020 WL 495219, at *4; *see supra* notes 82, 84–85 and accompanying text (discussing the implications of federalism in personal jurisdiction).

the out-of-state plaintiffs' claims and CertainTeed's contacts with New York.[167]

c. Court of Appeals for the District of Columbia holds personal jurisdiction issue premature prior to class certification

The U.S. Court of Appeals for the District Court of Columbia considered the issue of extending *BMS* to class actions in *Molock v. Whole Foods Market Group*.[168] Michael Molock, one of several named plaintiffs, filed suit in the U.S. District Court for the District of Columbia against Whole Foods, a Delaware corporation with its headquarters in Texas.[169] Molock, a District of Columbia resident and former District of Columbia Whole Foods employee, brought suit on behalf of himself and others similarly situated to recover wages and damages owed to them due to a mishandled employee incentivization program.[170] Whole Foods moved to dismiss the complaint for, *inter alia*, want of personal jurisdiction over the claims of the nonresident class members.[171] The district court denied the motion.[172] The Court of Appeals for the District of Columbia granted Whole Foods' interlocutory appeal on the issue and held that dismissal of putative out-of-state class members was premature before class certification.[173]

II. THE STRENGTH OF THE CLASS HEIGHTENS DEFENDANTS' DUE PROCESS CONCERNS

Opponents of *BMS*'s extension to class actions consider Rule 23 a sufficient safeguard in protecting the rights of class action defendants.[174] However, the supposed protections offered through

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167. *Chizniak*, 2020 WL 495219, at *5; *see infra* Section II.C (identifying the need for a claim-forum nexus to exercise personal jurisdiction).

168. 952 F.3d 293, 295–96 (D.C. Cir. 2020).

169. *Id.* at 295.

170. *Id.*

171. *Id.*

172. *Id.*; Molock v. Whole Foods Mkt. Grp., Inc., 297 F. Supp. 3d 114, 124–27 (D.D.C. 2018), *aff'd on other grounds*, 952 F.3d 293 (D.C. Cir. 2020).

173. *Molock*, 952 F.3d at 295–96 (holding that without class certification, putative class members are not yet parties to the suit); *see infra* Part V (refuting the court's suggestion that class certification predates a personal jurisdiction analysis).

174. *See, e.g.*, John Mikuta, *The Class Action Struggle: Should* Bristol-Myer's *Limit on Personal Jurisdiction Apply to Class Actions?*, 71 EMORY L.J. 325, 328 (2021) ("The class action is a unique form of litigation with built-in protections to ensure that the due

Rule 23 do not shield defendants from an unconstitutional infringement of personal jurisdiction.[175] In fact, by requiring a plaintiff class to satisfy different criteria than a typical plaintiff joinder and omitting the claim-forum nexus requirement, Rule 23 inadvertently creates the very strength from which the class derives.[176] Class certification "magnifies and strengthens the number of unmeritorious claims,"[177] ultimately coercing defendants to settle for higher damage awards than individual claims would merit.[178] The heightened strength of the plaintiffs in a class action requires more than the minimum protections of Rule 23, and *BMS*'s holding fills the resulting defendant due process gap.

A. The Plaintiff Class Receives Individualized and Group Protections Unafforded to the Defendant

Ordinarily, parties suffering $100 in damages would not sue the party who caused their injury because their legal fees and time spent

process rights of all parties are protected."); Jones v. Depuy Synthes Prods., Inc., 330 F.R.D. 298, 312 (N.D. Ala. 2018) ("Rule 23 contains procedural safeguards that adequately protect [d]efendants' due process rights."); Bryce Sanders, *23 and Me:* Bristol-Myers Squibb, *Federal Class Actions & the Non-Party Approach*, 71 CASE W. RSRV. L. REV. 1121, 1139 (2021) (suggesting that analyzing each unnamed plaintiffs' claim for personal jurisdiction is pointless because defendants' due process rights are adequately protected by Rule 23); Carpenter v. PetSmart, Inc., 441 F. Supp. 3d 1028, 1036 (S.D. Cal. 2020) (noting Rule 23 acts as an additional safeguard). *But see Molock*, 952 F.3d at 307 (Silberman, J., dissenting) ("I do not think, however, that Rule 23's standards are an adequate substitute for normal principles of personal jurisdiction.").

175. *See* GREENBERG TRAURIG, LLP, THE PERPETUATION OF CLASS-ACTION FORUM SHOPPING? FEDERAL CIRCUITS ADDRESS WHETHER COURTS NEED PERSONAL JURISDICTION TO HEAR NATIONWIDE CLASS ACTIONS 12 (2020), https://www.gtlaw.com/en/insights/2020/6/class-action-forum-shopping-federal-circuits-address-courts-personal-jurisdiction [https://perma.cc/EBW6-XNJ7] (acknowledging the lack of precedent to support setting aside personal jurisdiction in lieu of other procedural protections).

176. *But see* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 873 (2016) (arguing that the class action device benefits defendants and plaintiffs' counsel but hurts class members).

177. Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); ADVISORY COMM. MEETING ON THE RULES OF CIV. PRO., ADMIN. OFF. OF U.S. COURTS 77 (2017) (statement of Peter Martin) (recognizing that defendants of class actions face "insurmountable pressure" to settle); MICHAEL C. LYNCH & LYSTRA BATCHOO, KELLY, DRYE & WARREN LLP, HOW DEFENDANTS CAN USE CLASS CERTIFICATION TO THEIR ADVANTAGE 1 (Thomson Reuters 2013) (suggesting that plaintiffs' lawyers can abuse class action certification by pressuring defendants into settling otherwise meritless claims).

178. LYNCH & BATCHOO, *supra* note 177, at 1.

would make such litigation fruitless.[179] Importantly, regardless of whether the injured parties choose to file suit, they have acquired individual property interests in their claims,[180] which, absent forfeiture, are inextinguishable and protected by due process.[181] Nevertheless, if the injured parties decide to join a class action as unnamed plaintiffs, they commit responsibility of their claims to the class representative.[182] Through litigation of their own claims, the class representatives also serve as fiduciaries to the claims of the unnamed class members.[183] As thousands of other plaintiffs each suffering only $100 in damages join the class, each member's claim, while aggregated, remains an individual property right subject to due process consideration.[184] Therefore, not only does the class have the power to assert its cause of action as a collective entity, each plaintiff, named *or* unnamed, still

179. *See, e.g.*, Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 809 (1985) ("[T]his lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."); Ramseyer & Rasmusen, *supra* note 2, at 26 (describing the "disastrous" overuse use of the class action device).

180. *See Phillips Petrol. Co.*, 472 U.S at 807 (recognizing that even in a class action, each plaintiff individually possesses a constitutionally recognized property interest).

181. *See, e.g.*, Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 620 (2015) ("[G]overnment-created legal entitlements . . . typically cannot be extinguished except through an adjudicatory proceeding determining either an absence of legal right or some act of forfeiture on the part of the plaintiff."); Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (noting that due process restricts the government when it seeks to deprive individuals of property interests).

182. *See, e.g.*, Paper Sys. Inc v. Mitsubishi Corp., 193 F.R.D. 601, 610 (E.D. Wis. 2000) (mentioning that class representatives must advance and protect the interests of the class).

183. *See, e.g.*, Sherman v. Trinity Teen Sols., Inc., 339 F.R.D. 203, 206 (D. Wyo. 2021) (noting that the named plaintiff has "a fiduciary duty and obligation to vigorously prosecute the interests of the class"); Andrew S. Pollis, *Enforcing the Fiduciary Duties of Class Representatives: A Response to Professors Green and Kent*, 72 FL. L. REV. F. 153, 154 (2022) (discussing the ethical implications of class representatives).

184. *See* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 56 (2009) (illustrating how individual claims in class actions, although aggregated, are exercised as individual property rights subject to due process).

maintains rights related to their individual claim.[185] Further, class action plaintiffs' claims are afforded *individualized* protections under Rule 23, including the requirement of adequate notice[186] and representation.[187] The class's ability to bring suit against the defendant on behalf of the class is grounded in these individualized, substantive rights.[188] Therefore, the class action mechanism not only empowers the collective but also preserves plaintiffs' individual rights, maintaining a balance crucial for the fair and effective functioning of the legal system. However, this delicate balance can face challenges when the numerosity requirement of Rule 23 is met.

By way of example, many courts have held that so long as named plaintiffs can demonstrate a potential class exceeding forty members, they can satisfy Rule 23's "numerosity" requirement.[189] Excluding class

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185. Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1596–98 (2007); *see* Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 302 (D.C. Cir. 2020) (Silberman, J., dissenting) (noting that a "plaintiff attempting to bring a class action has two legally cognizable interests. The first is his underlying claim on the merits; the second is 'the claim that he is entitled to replace a class'" (quoting U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (1980))); *see also* Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1226 (11th Cir. 1998) ("Generally, principles of res judicata, or claim preclusion, apply to judgments in class actions as in other cases . . . . Yet class actions, as other cases, are subject to the requirements of due process . . . . Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process . . . ."); *cf. Phillips Petrol. Co.*, 472 U.S. at 810–12 (describing the "solicitude" of rights afforded to absent plaintiffs).

186. *See* FED. R. CIV. P. 23(c)(2)(B) (requiring that notice be made to all reasonably identifiable class members); *Twigg*, 153 F.3d at 1228–29 (holding that because the plaintiff did not receive adequate notice of the prior class action, his claims were not barred).

187. *See* Gonzales v. Cassidy, 474 F.2d 67, 74 (5th Cir. 1973) (emphasizing that a class's judgment can only be considered res judicata for absent class members if the court can confirm the class was adequately represented in the initial suit); *see also* Taylor v. Sturgell, 553 U.S. 880, 900–01 (2008) (highlighting that adequate representation might necessitate notifying the original suit's alleged representatives and that these restrictions are enforced by the procedural safeguards of Rule 23).

188. Redish & Larsen, *supra* note 185, at 1596 (noting that a cause of action "grows out of and enforces" an individual right vested in substantive law).

189. FED. R. CIV. P. 23(a); *e.g.*, Stewart v. Abraham, 275 F.3d 220, 226–27 (3d Cir. 2001) (stating that while there is no required number of members to meet the numerosity requirement, courts generally view forty members as sufficient); Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) (stating that numerosity is presumed met at forty members); Beneli v. BCA Fin. Servs., 324 F.R.D. 89, 96 (D.N.J. 2018) (commenting that courts generally view forty members as sufficient to meet the numerosity requirement as joinder would be impractical).

actions from *BMS*'s holding would allow a single named plaintiff to represent thirty-nine plaintiffs whose claims are entirely unrelated to the forum state, yet he would negotiate with the strength of all forty aggregated claims.[190] Martin H. Redish and Nathan D. Larsen illustrated this argument in their law review article, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*:

> Even though it is perhaps convenient to describe the [plaintiff's] rights as collective rather than individual when fifty or a hundred are involved, it is simply incorrect, as a conceptual matter, to define away the individually held chose. Certification under Rule 23 allows all one hundred [plaintiffs] to protect their individually held substantive rights in a unified fashion. However, that does not change the fact that the class action is still nothing more than an aggregation of what are unambiguously pre-existing individual held claims. These pristine underlying rights constitute individual causes of action invested in the individual by the substantive law. In its pristine form, the substantive right is individual and exists whether there is one [plaintiff] or many [plaintiffs].[191]

Importantly, the named plaintiff only has the power to represent the class *because* the class compiled their individual claims under Rule 23.[192] Without thirty-nine unnamed plaintiffs purposefully aggregating their claims against the defendant, the named plaintiff is left with his individual, negligible $100 claim.[193]

B. Class Actions Are a Sophisticated Species of Joinder

Through an erroneous distinction between Rule 23 and rules governing other joinders, opponents of *BMS*'s extension suggest the additional class certification requirements cure a defendant's potential

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190. *See* Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 435 (1960) (acknowledging an economic and psychological advantage "in coming before the court not alone, as the representative of one party, but on behalf of many").

191. Redish & Larsen, *supra* note 185, at 1593.

192. *See* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1149 n.57, 1160 (2009) (noting that aggregating claims increases the likelihood of recovery, and named plaintiffs can knowingly take advantage of the increased odds).

193. *See* THOMAS E. WILLGING, LAUREL L. HOOPER & ROBERT J. NIEMIC, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 7, 13–14 (Fed. Jud. Ctr. 1996) (observing that of the 407 class actions reviewed, no class member recovered an award sufficient to have induced a plaintiff's attorney to bring suit individually).

due process concerns.[194] Critics consider the unique prerequisites of a Rule 23 class sufficient substitutes for the claim-forum nexus requirement.[195] However, the unusual power imbalance between plaintiffs and defendants does not exist for defendants facing a permissive joinder[196] because any plaintiffs joining suit in a permissive joinder must have claims that satisfy the "nexus" requirement per the language of the FRCP.[197] To suggest Rule 23 is of any substantial benefit or protection to the defendant is flawed, especially considering the vast majority of defendants vigorously oppose class certification,[198] and the due process components of Rule 23 protect the class—not the defendant.[199]

The Supreme Court has provided explicit clarity on the distinction—or lack thereof—between a permissive joinder and a Rule 23 action:

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194. *See, e.g.*, Massaro v. Beyond Meat, Inc., No. 3:20-cv-00510-MSB, 2021 U.S. Dist. LEXIS 46980, at *37 (S.D. Cal. Mar. 12, 2021) ("Rule 23's requirements of numerosity, commonality, typicality, adequacy of representation, predominance, and superiority provide due process protections not available in the [*BMS*] mass tort context.").

195. *Id.*; Mikuta, *supra* note 174, at 328 ("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."); *see* Cedarview Mart, LLC v. State Auto Prop. & Cas. Co., No. 3:20-cv-10RP, 2021 WL 1206597, at *2–4 (N.D. Miss. Mar. 30, 2021) (noting that Rule 23 serves as a sufficient due process protection); Rosenberg v. LoanDepot.com LLC, 435 F. Supp. 3d 308, 326 (D. Mass. 2020) (considering Rule 23 an additional safeguard not applicable in *BMS* context); *supra* Section I.B.2.b (discussing the claim-forum nexus requirement).

196. *See supra* note 98 (explaining permissive joinder under Rule 20 of the FRCP).

197. *See* FED. R. CIV. P. 20(a)(1)(B) ("Persons may join in one action as plaintiffs if . . . any question of law or fact common to all plaintiffs will arise in the action.").

198. Carpenter v. PetSmart, Inc., 441 F. Supp. 3d 1028, 1037 (S.D. Cal. 2020); *see* Dawn Williams, *Lessons from Recent Life Insurance and Annuity Cases*, IN-HOUSE DEF. Q. 33 (2016), https://www.carltonfields.com/Libraries/CarltonFields/Documents/2018/defending-class-certification-idq-d-williams-02-2016.pdf [https://perma.cc/S7LR-MWCQ] (emphasizing that class certification can be "the death knell for litigation"); *see also* WILLGING ET AL., *supra* note 193, at 36 (finding that defendants opposed class certification in slightly over 50% of cases reviewed); *cf.* SYLVIA E. SIMSON & ELIZABETH J. SULLIVAN, GREENBERG TRAURIG, LLP, STRATEGIES FOR DEFENDING ISSUE CLASS ACTIONS 1, 2 (2020), https://www.gtlaw.com/en/insights/2020/6/published-articles/defending-issue-class-actions [https://perma.cc/C2KQ-34TP] (recognizing that once a class is certified, the defendant may have greater exposure to liability than if the claims were brought individually).

199. *Carpenter*, 441 F. Supp. 3d at 1037 (appreciating that the unnamed plaintiffs, not the defendants, are the prime concern of Rule 23); *see In re* Gen. Motors Corp., 55 F.3d 768, 796 (3d Cir. 1995) ("The Rule 23(a) class inquiries . . . constitute a multipart attempt to safeguard the due process rights of absentees. Thus, the ultimate focus falls on the appropriateness of the class device to assert and vindicate class interests.").

"[a] class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact. . . ."[200] Because of these direct procedural requirements, courts have found that *BMS* extends to traditional plaintiff joinders.[201]

In short, a class action is a permissive joinder with only one notable difference[202]: unnamed plaintiffs commit responsibility for their claims to named plaintiffs, who are then offered *further* procedural protections.[203] Despite this distinction, the Court has explained that the legal responsibilities of all parties remain the same whether plaintiffs bring suit through a permissive joinder or a class action.[204] Plaintiffs seeking to join their claims in a permissive joinder must satisfy certain procedural requirements—i.e., their claims must satisfy the claim-forum nexus requirement.[205] Given that class actions are only

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200. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins., 559 U.S. 395, 408 (2010) (plurality opinion) (explaining the similarities between permissive joinder and a Rule 23 class action); Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 306 (D.C. Cir. 2020) (Silberman, J., dissenting) ("Although the Supreme Court avoided opining on whether its reasoning in the mass action context would apply also to class actions, it seems to me that logic dictates that it does. After all, like the mass action in [*BMS*], a class action is just a species of joinder . . . ."); *see also* Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 483 (1983) ("The class action of Rule 23 differs from the simple joinder of Rule 20 only insofar as it offers added procedural protections for the litigants through increased judicial supervision and it does not require the unnamed members physically to come forward and conduct their own lawsuits."); David Marcus, *The History of Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 594 (2013) (articulating that like any other rule governing joinder, Rule 23 "serves classically procedural goals").

201. *See* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1252, 1282 (2018) (suggesting that *BMS* likely foreclosed mass joinders with plaintiffs from multiple states outside of the defendant's home state).

202. *See Molock*, 952 F.3d at 306 (Silberman, J., dissenting) (reiterating that class actions are a species of joinder); Hutchinson, *supra* note 200, at 459 (reminding that the joinder model treats class actions as nothing more than a device to bring together similarly situated individuals for adjudication of similar claims).

203. *See supra* Section II.A (discussing individual and group protections of plaintiffs in a class action).

204. *Shady Grove*, 559 U.S. at 408.

205. J. ALEXANDER TANFORD & LAYNE S. KEELE, THE PRETRIAL PROCESS § 3.05 (3d ed. 2022); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendant-Appellee at 16, Mussat v. Iqvia Inc., 953 F.3d 441 (7th

a species of joinder, there is no reason to assume the normal requirements of joinder, like those the Court held were required in *BMS*, disappear when considering a class action. Accordingly, the claims of unnamed plaintiffs in a class action too must meet the claim-nexus requirement.

C. Defendants Only Avail Themselves of Claims "Related to and Arising out of" the Forum

Courts seeking to exercise personal jurisdiction over out-of-state defendants must determine whether the defendants have purposefully availed themselves of the forum state.[206] This requirement "allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[207] In other words, by availing themselves of a forum state, defendants can reasonably expect that if they injure someone in the state, the injured party can hale them to court there.[208] The Supreme Court has confirmed that specific jurisdiction provides defendants a "fair warning" of potential litigation by injured plaintiffs if defendants direct their activities to a forum state:

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" those activities.[209]

Put simply, when defendants target a forum state, they are put on notice that anyone injured by their conduct within that state may sue them.[210] However, defendants of class actions cannot be "fair[ly]

Cir. 2020) (No. 19-1204), 2019 WL 1883614, at *16 [hereinafter Brief of the Chamber of Commerce of the United States of America].

206. *See supra* Section I.B.a (discussing the purposeful availment prong of personal jurisdiction).

207. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (discussing the Due Process Clause as the legal backdrop for the fairness principles balanced in the exercise of personal jurisdiction).

208. *Id.*; J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 882 (2011).

209. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (internal citations omitted).

210. *See* Keeton v. Hustler Mag., Inc., 465 U.S. 770, 781 (1984) (concluding that defendants who have continuously and deliberately exploited a forum state can reasonably expect to face legal proceedings in that state).

warned" that their activity in the forum state will bring about a class action suit involving claims of out-of-state residents.[211] In targeting a specific forum, they can anticipate that anyone injured within that forum can bring suit;[212] however, they cannot anticipate litigation resulting from injuries that *do not* "arise out of or relate to" those activities.

The corollary argument suggests that because the named plaintiff is the only "party" to the suit, the "fair warning" requirement only extends to his claim—not those of the class.[213] In *Devlin v. Scardelletti*,[214] the Supreme Court considered whether unnamed class members are parties to the suit for purposes of appealing the approval of a class settlement.[215] The Court held that "[t]he 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."[216] In other words, an unnamed class member may be considered a party for some purposes and not others.[217] By equating these purposes to those required in a personal jurisdiction analysis, opponents of *BMS*'s extension suggest that the unnamed plaintiffs are irrelevant in considering personal jurisdiction.[218]

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211. *See Burger King Corp.*, 471 U.S. at 471–72 ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945))); *cf.* Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255, 265 (2017) ("[T]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the [s]tate to assert specific jurisdiction over the nonresidents' claims.").

212. *Burger King Corp.*, 471 U.S. at 472 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)); Petition for a Writ of Certiorari, *supra* note 133, at 23.

213. *See, e.g.*, Mikuta, *supra* note 174, at 359–61 (arguing that class members are not "parties" for personal jurisdiction purposes); Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 295 (D.C. Cir. 2020) (holding that putative class members are not a party before the court).

214. 536 U.S. 1 (2002).

215. *Id.* at 7.

216. *Id.* at 10.

217. *Id.* (indicating that unnamed class members are not parties in considering whether there is complete diversity).

218. *See* Mikuta, *supra* note 174, at 361 ("In the personal jurisdiction context, classifying class members as parties such that [*BMS*] would require a court to have personal jurisdiction over each member's claim would not further the goals of the class

This approach fails to consider that *BMS* focused on the due process concerns related to the defendant and the *claims* brought against him, not the parties.[219] Specifically, in writing for the majority in *BMS*, Justice Alito said, "[t]he mere fact that 'other' plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the state to assert specific jurisdiction over the nonresidents' claims."[220] Had the Court held that absent in-state injuries, a forum state does not have jurisdiction over the nonresident plaintiffs, the Court would have shifted the due process inquiry to the plaintiff. However, while plaintiffs are entitled to some due process protections, the Court has distinguished between the burdens of unnamed plaintiffs and class action defendants,[221] who are faced with the full strength of the forum state to enter judgment against them.[222]

By purposefully requiring the due process inquiry to consider the plaintiffs' *claims*, the Court instructs that the due process analysis of personal jurisdiction concerns the underlying cause of action to which the defendant defends. Notably, the cause of action in a class action does not derive from Rule 23; rather, it is "vested by the substantive law

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action litigation—it would be more likely to impede them."); *see also* Saunders, *supra* note 174, at 1135–37 (explaining that unnamed plaintiffs are not parties with regard to personal jurisdiction); *Molock*, 952 F.3d at 306–07 (showing how scholars differ on whether an unnamed plaintiff is a party for the purposes of personal jurisdiction).

219. Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255, 265 (2017) (emphasis added) ("In today's case, the connection between the nonresidents' *claims* and the forum is even weaker. The relevant plaintiffs are not California residents and do not claim to have suffered harm in that [s]tate. In addition, . . . all the conduct giving rise to the nonresidents' *claims* occurred elsewhere."); *see* Greene v. Mizuho Bank, Ltd., 289 F. Supp. 3d 870, 874 (N.D. Ill. 2017) (insisting that the Court in *BMS* did not limit its holding to mass actions, but rather it announced the principle that due process requires a connection between the forum state and the claims at issue in all lawsuits); *Molock*, 952 F.3d at 306 (Silberman, J., dissenting) ("[S]ince the requirements of personal jurisdiction must be satisfied independently for the 'specific claims at issue,' . . . personal jurisdiction over claims asserted on behalf of absent class members must be analyzed on a claim-by-claim basis." (quoting *Bristol-Myers Squibb Co.*, 582 U.S. at 265)).

220. *Bristol-Myers Squibb Co.*, 582 U.S. at 256.

221. *See* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 808 (1985) (highlighting the differing burdens and protections for absent class action plaintiffs and defendants in state court jurisdiction).

222. *Id.*

in the individual" plaintiffs.[223] Courts excluding *BMS* from the class action context fail to appreciate that a class exists only because the class members have, albeit aggregated, individual causes of action against the defendant.[224] The class does not have a substantive right—or claim—as a whole; individual plaintiffs do.

The Court has continuously recognized that—absent meaningful contacts through purpose availment of the forum state—defendants have a substantive interest in being free from its jurisdiction.[225] Excluding *BMS* from the class action context would render the purposeful availment prong of specific personal jurisdiction obsolete for class action defendants.[226] Defendants with minimal contact with a forum state would expose themselves to class actions by residents of states to which they have not availed themselves.[227] Allowing an aggregation of claims that may or may not relate to or arise out of the forum state is unreasonable and contradicts the principles of fair play

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223. *See* Redish & Larsen, *supra* note 185, at 1596 (describing Rule 23 as a procedural tool to combine claims of individuals); *Phillips Petrol. Co.*, 472 U.S. at 809 (demonstrating that class actions rise from individual plaintiffs).

224. *See supra* Section II.A (noting that class members have individual, inextinguishable causes of action).

225. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (explaining why defendants with minimal contacts in the forum state should be free from its jurisdiction); Rhodes, *supra* note 25, at 571 (explaining that if a defendant has not purposefully availed himself to the forum state, the state cannot intrude on his liberty interest in being free from a binding judgment).

226. *See* Daimler AG v. Bauman, 571 U.S. 117, 138–39 (2014) (suggesting personal jurisdiction allows defendants to purposefully avail themselves only to specific forums); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 275 (1985) (allowing personal jurisdiction where a defendant's contacts "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum [s]tate" (quoting McGee v. Int'l Life Ins., 355 U.S. 220, 223 (1957))); Petition for a Writ of Certiorari, *supra* note 133, at 30–31 (explaining how *Daimler* curtailed plaintiffs' efforts to subject out-of-state defendants to general jurisdiction absent systematic and continuous business in the state).

227. *See Daimler*, 571 U.S. at 138–39 (noting that an entity's affiliations with a state may be "so 'continuous and systematic' as to render [it] essentially at home in the forum [s]tate" (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011))); *Burger King Corp.*, 471 U.S. at 476 (noting that when defendants deliberately engage in significant activity in the state, they have created "continuing obligations" between themselves and the state's residents); Brief of the Chamber of Commerce of the United States of America, *supra* note 205, at 12–13 (explaining that there must be a connection between the defendant's conduct in the forum and the claim); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

and substantial justice.[228] During oral arguments for *BMS*, counsel for Bristol-Myers addressed the Court's concern that the claim-forum nexus requirement does not serve the due process "fairness" factor and would lead to inefficient piecemeal litigation.[229] Counsel identified both procedural and substantive disadvantages that a defendant faces for claims unrelated to the forum state:

> [P]rocedurally, you'll be playing by different rules than what the defendant has accepted, and this Court's always said, one of the goals in specific jurisdiction litigation is to make sure and tee up to businesses, particularly small businesses . . . look, if you enter a jurisdiction, here's what you're going to face. And Bristol-Myers doesn't disagree. When they sold 180 million pills in California, they opened themselves up to the jurisdiction for those pills. The question is, can the folks from the 33 other States sue on that?[230]

When defendants avail themselves of a forum state, they can expect to be haled to court only for claims relating to or arising out of that forum—regardless of whether plaintiffs join their claims through a mass or a class action.[231]

D. A Forum State Lacks a Legitimate Interest in Resolving Claims Without a Claim-Forum Nexus

Although the burden on the defendant is the primary consideration in determining whether it is reasonable to hale him to court in the forum state,[232] the court will also consider the forum state's interest in adjudicating the claims at issue.[233] Accordingly, even when defendants have purposefully availed themselves of a forum state, exercising

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228. *See supra* Section I.B.c (discussing the factors considered in a "fair play and substantial justice" analysis); Petition for a Writ of Certiorari, *supra* note 133, at 8–10.

229. Oral Argument at 4:11, 9:55, Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255 (2017) (No. 16-466), https://www.oyez.org/cases/2016/16-466 [https://perma.cc/KB7R-4DMS].

230. *Id.* at 10:12.

231. *See* Petition for a Writ of Certiorari, *supra* note 133, at 23 (contending that extending *BMS* to class actions allows the defendant "the ability to predict in advance where their conduct will potentially result in liability").

232. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

233. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); *see supra* note 37 and accompanying text (discussing the need to balance private and government interests when determining what is "due" under procedural due process); *see also* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 112–14 (1987) (qualifying the forum state's interests as a factor in determining the reasonableness of jurisdiction).

personal jurisdiction may not be reasonable when considering "fair play and substantial justice."[234]

In part of its analysis in *BMS*, the Court considered the "abstract matter" of when it is reasonable to submit a defendant to the coercive power of a state that lacks a legitimate interest in the claims at issue.[235] By limiting a state's ability to reach beyond its borders, personal jurisdiction restricts a forum state from imputing its judicial wisdom to lawsuits lacking a meaningful connection to its intrastate interests.[236] The purpose of such inquiry is not to compare the selected forum with other available options, but rather to determine the extent of the forum's interest.[237]

The court in *Carpenter v. PetSmart, Inc.* reiterated the importance of ensuring a forum state has a legitimate interest in the claims brought before it.[238] The court applied *BMS* to find that California lacked personal jurisdiction over out-of-state claims[239]: "restrictions on personal jurisdiction 'are more than a guarantee of immunity from

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234. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477–78 (1985) ("[M]inimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities."); *see Asahi*, 480 U.S. at 112–14 (determining the reasonableness of jurisdiction according to factors: burden on the defendant, interests of the forum state, plaintiff's interest in relief, interstate interest in efficient resolution of the controversy, and shared state interest in furthering social policy); Shaffer v. Heitner, 433 U.S. 186, 215 (1977) (reminding that just because a state law could be applied to the dispute, the state does not necessarily have jurisdiction over the parties).

235. *Bristol-Myers Squibb Co.*, 582 U.S. at 263; *see* Keeton v. Hustler Mag., Inc., 465 U.S. 770, 776 (1984) (emphasizing that the legitimacy of summoning a respondent to a New Hampshire court hinges on whether the respondent's activities connected enough to New Hampshire to provide the state with a valid interest in holding him accountable for a claim related to those activities).

236. *World-Wide Volkswagen Corp.*, 444 U.S. at 292 (reminding that the minimum contacts requirement "acts to ensure that the [s]tates through their courts, do no reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); Corrected Brief of Appellant Whole Foods Market Group at 17, 35–36, Whole Foods Mkt. Grp., Inc. v. Molock, 952 F.3d 293 (D.C. Cir. 2020) (No. 18-7162), 2019 WL 2717183, at *17, *35–36; *see Bristol-Myers Squibb Co.*, 582 U.S. at 263 (recognizing that personal jurisdiction purposefully imposes a territorial limitation on the states).

237. *Burger King Corp.*, 471 U.S. at 483 n.26 (noting that the purposeful availment analysis assumes that more than one state may be interested in the outcome of a dispute).

238. Carpenter v. PetSmart, Inc., 441 F. Supp. 3d 1028, 1036 (S.D. Cal. 2020).

239. *Id.* at 1033–37 (discussing how lower courts have interpreted and applied the holding in *BMS*).

inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective [s]tates.'"[240] Recognizing *BMS*'s direct instruction to tread cautiously and not to overstep interstate sovereignty,[241] the court in *Carpenter* found that California had little interest in out-of-state plaintiffs' claims, noting that they were better resolved in forums with a more sufficient claim-forum nexus.[242] The fact that PetSmart, Inc. sold *some* defective products in California "[did] not create a sufficient relationship" with the forum state to subject it to specific jurisdiction for the claims of a nationwide class.[243]

A dramatic yet plausible outcome of excluding *BMS* from the class action context is that taxpayers in State A could be required to fund their courts to resolve a forty-plaintiff class action when only one claim is actually connected to the state.[244] When exercising personal jurisdiction over a defendant, the forum state's interest is to resolve and protect its citizens from harm;[245] burdening its courts with out-of-state claims creates the very problem that the "fairness" consideration addresses.[246] Clogging a state's judicial system with out-of-state class action claims misdirects valuable resources better used to address in-state harms.[247]

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240. *Bristol-Myers Squibb Co.*, 582 U.S. at 263 (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

241. *Id.* at 263 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 294).

242. *Carpenter*, 441 F. Supp. 3d at 1036.

243. *Id.*

244. *See* Richard D. Freer, *From Contacts to Relatedness: Invigorating the Promise of "Fair Play and Substantial Justice" in Personal Jurisdiction Doctrine*, 73 ALA. L. REV. 583, 597 (2022) (outlining the concern that California taxpayers should not have to fund a court system that adjudicates claims for Ohio plaintiffs injured in Ohio).

245. Keeton v. Hustler Mag., Inc., 465 U.S. 770, 776 (1984); McGee v. Int'l Life Ins., 355 U.S. 220, 223 (1957); *cf. Carpenter*, 441 F. Supp. 3d at 1036 ("California has little interest in the claims of non-California plaintiffs arising out purchases made outside California from a Delaware company with a principal place of business in Arizona.").

246. Freer, *supra* note 244, at 597; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 cmt. b (AM. L. INST. 1971); Brief of the Chamber of Commerce of the United States, *supra* note 205, at 13–14 ("[A]llowing a [s]tate to assert jurisdiction over the claims of a putative nationwide class based on a single named plaintiff's connection to the forum would permit the forum [s]tate to decide claims as to which it has insufficient interest, infringing on the authority of the other [s]tates.").

247. Freer, *supra* note 244, at 597.

III. THE LIMITATIONS PRESCRIBED UNDER THE RULES ENABLING ACT REQUIRE THE EXTENSION OF *BRISTOL-MYERS SQUIBB CO. V. SUPERIOR COURT OF CALIFORNIA*

The legislature is acutely aware of the power and potential for injustice resulting from litigation without due process consideration.[248] The Rules Enabling Act (the "Act")[249] instructed the drafters of the FRCP to ensure their rules did not "abridge, enlarge, or modify any substantive right."[250] When the FRCP govern an action of the court, "the court has been instructed to apply the Federal Rule unless doing so would violate the Act or the Constitution."[251] The Supreme Court has reiterated this requirement,[252] as limiting a substantive right would violate the express constraints of the statute permitting class actions.[253] Although the Court did not explicitly consider the Act in *BMS*, its holding nonetheless maintained its essence—defendants have a substantive right under the Due Process Clauses to be free from suit by nonresident plaintiffs alleging injury outside the forum state.[254]

The purpose of the Act is evidenced when looking at how lower courts have interpreted and applied the holding in *BMS*.[255] A court violates the Act if it allows a plaintiff class to assert different rights than

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248. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins., 559 U.S. 393, 406–07 (2010) (plurality opinion) (acknowledging that Congress authorized the Supreme Court to establish procedural rules so long as they do not infringe on substantive rights); *id.* at 422 (Stevens, J., concurring) (recognizing the significance of Congress "delegat[ing] the creation of rules to this Court rather than to a political branch").

249. 28 U.S.C. § 2072(b); *see supra* notes 91–95 and accompanying text (providing a brief history of the Act); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 26 (2008) ("The Act's importance is difficult to overstate, for it plays a foundational, and often central, role in all federal court litigation.").

250. § 2072(b).

251. *Shady Grove*, 559 U.S. at 418 (Stevens, J., concurring) (quoting Hanna v. Plumer 380 U.S. 460, 471 (1965)).

252. *E.g.*, *id.* at 407 (plurality opinion); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997).

253. *See Shady Grove*, 559 U.S. at 407 (noting that when presented with challenges to the FRCP, the Court has rejected "every statutory challenge").

254. Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255, 264–65 (2017).

255. *See* Prac. Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840, 861 (N.D. Ill. 2018) (holding that the Act requires defendants' due process rights to remain the same regardless of the type of lawsuit); *see also Amchem Prods., Inc.*, 521 U.S. at 613 (confirming that Rule 23 must be interpreted in accordance with the Act).

would be available had they brought suit individually.[256] In an individual suit, a plaintiff's choice of forum is limited to where the defendant is subject to general jurisdiction or—if asserting specific jurisdiction—where the defendant has purposefully availed himself *and* the claim arises out of or relates to the forum.[257] A defendant of a class action is entitled to the same protections as a defendant facing an individual lawsuit; otherwise, his substantive right would violate the explicit instructions of the Act—that no rule abridge any substantive right.[258] Based on the Act's plain language, a court violates class action defendants' rights if it limits *BMS* to traditional joinders.

IV. EXTENDING *BRISTOL-MYERS SQUIBB CO. V. SUPERIOR COURT OF CALIFORNIA* TO CLASS ACTIONS REDUCES RISK OF FORUM SHOPPING

One of the key concerns addressed by the Court in *BMS* was the plaintiff's intentional decision to choose California as the forum state because of its plaintiff-friendly courts.[259] Forum shopping, or "litigation tourism,"[260] occurs when a litigant purposefully chooses a forum with only a slight connection to the factual circumstances of their action to gain an advantage over the defendant.[261] Until the Supreme Court addresses whether its holding in *BMS* extends to class actions, putative

256. *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 458 (2016) (explaining that the Act instructs that plaintiffs and defendants have the same rights in a class action as they would in an individual action); *cf. Shady Grove*, 559 U.S. at 456 (Ginsburg, J., dissenting) (finding issue with a plaintiff "seek[ing] class relief that is *ten thousand times* greater than the individual remedy available to it in state court").

257. *See supra* Section I.B (discussing the requirements for a forum state to exercise personal jurisdiction over a defendant).

258. *See* Petition for a Writ of Certiorari, *supra* note 133, at 21 ("After all, a defendant's rights should not shrink or expand based on whether it is sued individually or by a class . . . . And the Rules Enabling Act makes clear that a federal rule of procedure 'shall not abridge, enlarge, or modify any substantive right.'" (quoting 28 U.S.C. § 2072(b))); Brief of the Chamber of Commerce of the United States, *supra* note 205, at 16 (noting that the Act does not allow plaintiffs to use the "class-action device" to circumvent the due process constraints of specific personal jurisdiction).

259. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1031 (2021) (distinguishing the plaintiffs' choice of forum in *BMS* with *Ford Motor Co. v. Montana Eighth Judicial District Court*); *cf. Shady Grove*, 559 U.S. at 439 (Ginsburg, J., dissenting) (commenting that law should not be applied as to invite forum shopping).

260. Brief of Atlantic Legal Foundation as Amici Curiae Supporting Petitioners at 11, Iqvia Inc. v. Mussat, 141 S. Ct. 1126 (2021) (No. 20-510) [hereinafter Brief of Atlantic Legal Foundation].

261. *See* Capitol Recs., Inc. v. Optical Recording Corp., 810 F. Supp. 1350, 1353 (S.D.N.Y. 1992) (recognizing that courts generally disapprove of forum shopping).

plaintiffs will "pursue new tactics to avoid, or take advantage of, the Court's holding."[262]

Researchers Thomas E. Willging and Shannon R. Wheatman empirically analyzed plaintiffs' attorneys' choice of forum in class action litigations.[263] The researchers found that whether the attorney perceived the forum to be predisposed to favoring the class was among the top considerations for class action plaintiff attorneys in deciding where to file a class action.[264] Expanding personal jurisdiction—in the class action context or otherwise—heightens the risk of forum shopping by encouraging savvy plaintiffs' counsel to find the most pro-plaintiff forum for litigation.[265]

If *BMS* does not extend to the class action context, one plaintiff can bring suit in a desirable forum, and all unnamed plaintiffs can tack on their unrelated claims.[266] Recall the earlier example of forty plaintiffs in a class action with only one suffering in-state injuries.[267] The forty plaintiffs could decide who among them was injured in the most advantageous forum and choose to file suit there accordingly.[268] Excluding *BMS* from the class action context invites plaintiffs to

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262. Brief of Atlantic Legal Foundation, *supra* note 260, at 12; *cf.* 151 CONG. REC. 746, 748–49 (2005) (recognizing the issue of forum shopping in class actions).

263. *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 602 (2006) (showing regression analysis revealing three factors strongly relating to plaintiff attorneys' choice of forum).

264. *Id.*

265. Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. L. REV. 1301, 1307 (2014).

266. *See* Brief of Atlantic Legal Foundation, *supra* note 260, at 12 ("[*BMS*] has . . . clos[ed] state courthouse doors to nonresidents' aggregate claims where specific jurisdiction over their individual claims is lacking—presumably including the state-court claims of absent members of a putative class—instigat[ing] the filing of purported national class actions in federal, rather than state, court.").

267. *See* Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 296 (D.C. Cir. 2020) ("According to [the plaintiffs], [Rule 23] permits a federal court sitting in diversity to exercise personal jurisdiction over unnamed, nonresident class members' claims, even if a state court could not."); *supra* notes 190–94 and accompanying text (describing how Rule 23 permits thirty-nine plaintiffs to file a class action suit on the basis of one named plaintiff's relationship to the forum state).

268. *See* Brief of Washington Legal Foundation and the Chamber of Commerce of the United States as Amici Curiae Supporting Petitioners at 14–15, Iqvia Inc. v. Mussat, 141 S. Ct. 1126 (2021) (No. 20-510) (arguing that there is "no logical stopping point" and "[o]ut-of-state class members could outnumber the in-state named plaintiffs . . . by 500 , or even 5000:1, and still invoke specific jurisdiction").

manipulate the court system by bringing nationwide class actions in plaintiff-friendly states where just one, or few, plaintiffs suffered injury.[269]

V. REQUIRING CLASS CERTIFICATION PRIOR TO DETERMINING PERSONAL JURISDICTION IS COUNTERPRODUCTIVE AND CONTRARY TO THE INSTRUCTION OF *BRISTOL-MYERS SQUIBB CO. V. SUPERIOR COURT OF CALIFORNIA*

Some courts have held that before class certification, any personal jurisdiction issues related to unnamed plaintiffs' claims are not yet "ripe" for adjudication.[270] For example, the D.C. Circuit Court of Appeals held that prior to class certification, the "putative class members are not parties" to the lawsuit, rendering a motion to dismiss by the defendant for lack of personal jurisdiction premature.[271]

The court's logic, however, is erroneous for two reasons. First, if *BMS* extends to class actions, requiring class certification before the court addresses whether certain unnamed plaintiffs can join the class will be counterproductive.[272] Unless an issue bears on the existence of the class, adjudication of ancillary issues is logistically appropriate before class certification.[273] In fact, courts urge defendants to challenge personal jurisdiction at the earliest opportunity[274] to avoid an undue

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269. *Id.*

270. *See supra* Section I.D.1.c (U.S. Court of Appeals for the District Court of Columbia); GREENBERG TRAURIG, LLP, *supra* note 175, at 15 (explaining court precedent for waiting until class certification).

271. *Molock*, 952 F.3d at 295.

272. *See* Corrected Brief of Appellant Whole Foods Mkt. Grp., Inc., *supra* note 236, at 21 (asserting that the logical flow of the analysis requires the court to consider whether unnamed plaintiffs can join the class prior to requiring class certification).

273. *Cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997) (noting that because certification of the class is antecedent to addressing Article III standing, class certification should be resolved first and agreeing with the Third Circuit that decertification was appropriate because the issues only existed *because of* class certification).

274. *See* Mussat v. Enclarity, Inc., 362 F. Supp. 3d 468, 471–73 (N.D. Ill. 2019) (concluding that Enclarity, Inc. waived its ability to challenge personal jurisdiction after filing its motion to dismiss); Gerber v. Riordan, 649 F.3d 514, 518–19 (6th Cir. 2011) (holding that defendants waived personal jurisdiction when their attorney entered a general appearance); Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 59 (2d Cir. 1999) (finding that the defendant forfeited personal jurisdiction by participating in extensive pretrial litigation); s*ee, e.g.*, GREENBERG TRAURIG, LLP, *supra* note 175, at

waste of time and resources.[275] Indeed, researchers of a 1996 final report to the Advisory Committee on Civil Rules suggested that courts should first conduct a preliminary analysis of the case's merits to avoid committing resources to certify and manage a class that may ultimately be dismissed.[276] Conducting a preliminary analysis of the merits of the case and addressing ancillary issues, like personal jurisdiction, accomplishes the goal of protecting judicial time and resources.

Second, the court mistakenly focused on the status of the unnamed plaintiffs as parties to the lawsuit instead of considering their claims.[277] The court's mischaracterization of the issue contradicts the very principle set forth in *BMS*. Per *BMS*, personal jurisdiction relates to the relationship between the plaintiff's *claims* as they connect to the defendant and the forum state, not the relationship between the two parties.[278] Because class actions are a species of joinder,[279] defendants can challenge personal jurisdiction as plaintiffs bring *claims* into the action.[280]

The simpler approach is for the court first to determine who is in the putative class, then conduct an independent personal jurisdiction

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16 (noting that jurisdictional issues should be addressed as early as possible); Michael D. Sloan, *Pretrial Problems: Don't Forfeit Your Personal-Jurisdiction Defense*, CARLTON FIELDS, P.A. (Jan. 12, 2016), https://www.carltonfields.com/insights/appellate-issues-litigation/2016/pre-trial-problems-don-t-forfeit-your-personal-jur [https://perma.cc/YBU4-G3KP] ("To maximize the potential for proper preservation of a personal-jurisdiction defense, it should be presented as early as possible in the action . . . ."); *see also* FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").

275. Sloan, *supra* note 274; *see* ANTHONY PIERCE, CAROLINE WOLVERTON & JASON GANGWER, AKIN GUMP, WHAT 2 JURISDICTION RULINGS MEAN FOR CLASS DEFENDANTS 1 (2020), https://www.akingump.com/a/web/4jJ1go4yvGYTivTym6g35h/f2jgi/law360-what-2-jurisdiction-rulings-mean-for-class-action-defendants-002.pdf [https://perma.cc/9VBC-YDGS] (noting that claims arising out of multiple states increase the cost of discovery and defendants' overall exposure to liability).

276. WILLGING ET AL., *supra* note 193, at 29 (suggesting an amendment to Rule 23 that explicitly states judges can rule on motions prior to certification).

277. Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 300–02 (D.C. Cir. 2020) (Silberman, J., dissenting) ("[T]he majority's conclusion rests on [a] flawed premise.").

278. *See supra* Section II.D (explaining that personal jurisdiction focuses not on the parties of the lawsuit but rather on the claims).

279. *See supra* Section II.B (explaining that class actions are a type of joinder).

280. *See Molock*, 952 F.3d at 300–02 (Silberman, J., dissenting) (proposing that class claims can be disputed at the pleading stage).

analysis for each putative class member's claim, and finally, certify the class.[281] Once certified, the court order could easily put interested future class members on notice of the required nexus between their claims and the defendant's forum contacts.[282]

CONCLUSION

This Comment argued that due process requires the extension of *BMS* to federal class actions. Since emerging in the 1960s, the modern class action device has expanded far beyond its original limited purpose;[283] today, federal and state courts alike have become accustomed to adjudicating multi-million and billion-dollar class actions.[284] As putative plaintiffs—or more accurately, plaintiffs' attorneys[285]—continue to take advantage of the present-day ease with which they can solicit, create, and maintain a class,[286] courts cannot forget the precedent set by the courts before them. As both a concept

281. *Cf.* Shady Grove Orthopedic Assocs. v. Allstate Ins., 559 U.S. 393, 431 (2010) (Stevens, J., concurring) (recognizing that class certification requires courts to consider the instructions of the Act). Because a court must inquire whether certifying a class would "abridge, enlarge, or modify" a right or remedy, *id.*, the Act aligns with the proposed approach. *See supra* Part III (discussing the instruction of the Act).

282. BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 10 (3d ed. 2010) (instructing judges to include in the class certification order "those who are excluded from the class, such as residents of particular states").

283. *See supra* Section I.C (explaining the history of Rule 23).

284. *See* Andy Gillin, *The Largest Class Action Lawsuits & Settlements*, GJEL ACCIDENT ATT'YS (Aug. 1, 2022), https://www.gjel.com/blog/largest-class-action-settlements.html [https://perma.cc/6ZMX-WL32] (listing several of the largest class action settlements).

285. *See Greedy Class-Action Lawyers Take it on the Chin*, WASH. EXAM'R (Feb. 21, 2013, 12:00 AM), https://www.washingtonexaminer.com/examiner-editorial-greedy-class-action-lawyers-take-it-on-the-chin [https://perma.cc/49Q6-M2HX] (discussing plaintiffs' attorneys and ethical issues); 151 CONG. REC. 2637 (2005) (statement of Toni Boucher) ("The lawyer who filed the case gets rich. The plaintiff class members get virtually nothing.").

286. *See* Kathryn Honecker, Julia Campins & Laura Van Buren, *Class Actions 101: A Primer on Finding Plaintiffs for Your Class Action . . . Ethically*, 23 A.B.A. CLASS ACTIONS & DERIVATIVE SUITS LIT. COMM. 11, 11–14 (2013), https://www.americanbar.org/groups/litigation/committees/class-actions/articles/2013/summer2013-0913-primer-on-finding-plaintiffs-for-your-class-action-ethically (advising how to best solicit class members in the modern age).

continuously shaped by modernization and evolving social norms[287] and a tradition deeply rooted in fairness and critical to the administration of justice,[288] courts cannot ignore the due process considerations of personal jurisdiction in efforts to provide efficient claim resolution.

While *BMS*'s extension would necessarily curtail the available forums for class actions,[289] plaintiffs can rest assured that the class action device will remain a valuable tool in appropriate forums.[290] Moreover, this proposal will not prevent plaintiffs from aggregating their claims in forums where defendants are subject to general jurisdiction,[291] nor does it prevent plaintiffs from bringing class actions in the forums where they were injured.[292] Admittedly, reducing the number of forums available for nationwide class actions will lead to further piecemeal litigation, but the benefits of a "diversified litigation environment can promote fairness, and facilitate each claim being resolved on its own merits."[293]

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287. *See* Jenny Bagger, *Dropping the Other Shoe: Personal Jurisdiction and Remote Technology in the Post-Pandemic World*, 73 HASTINGS L.J. 861, 864 (2022) ("With roots in society's changing business and social practices and increased interactions across state lines, the 'fair play and substantial justice' standard can accommodate modern changes, such as the widespread use of remote technology following a norm-shifting pandemic."); McGee v. Int'l Life Ins., 355 U.S. 220, 223 (1957) (recognizing changes in personal jurisdiction because modern infrastructure has made defending out-of-state suits easier).

288. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 325–26 (1945) (highlighting how the traditional concepts of fair play and substantial justice apply to personal jurisdiction analysis).

289. *See* Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 310 (D.C. Cir. 2020) (Silberman, J., dissenting) ("[P]rocedural tools like class actions and mass actions are not an exception to ordinary principles of personal jurisdiction. The Court was apparently willing to live with the consequences of that fact in [*BMS*], and we should do likewise.").

290. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021) (stating that although the *BMS* rule "indeed serves to narrow the class of claims over which a state court may exercise specific jurisdiction . . . [n]one of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do").

291. *See supra* Section I.B and accompanying text (explaining general and specific jurisdiction).

292. *See supra* text accompanying note 56 (discussing general jurisdiction).

293. Philip S. Goldberg, Christopher E. Appel & Victor E. Schwartz, *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 DUKE J. CONST. L. & PUB. POL'Y 51, 81 (2019) (acknowledging that even though the resulting

To create a procedural device that efficiently resolves multiple claims,[294] Rule 23 inadvertently created a lawsuit where the plaintiff class holds more power than the defendant.[295] As the Court has confirmed that class actions are merely another species of joinder, Rule 23 cannot serve as an exhaustive list of requirements for a class to move forward.[296] Indeed, Rule 23 only outlines minimum prerequisites and does not provide adequate protection for challenges to personal jurisdiction. Further, defendants who purposefully avail themselves of forum states only expose themselves to liability from claims "arising out of or relating to" the forum state; defendants facing claims which fail to satisfy this test have not availed themselves of such suits.[297]

Similarly, a federal court adjudicating a class action with claims missing the claim-forum nexus cannot assert a legitimate interest in the suit's resolution.[298] Further, the constraints outlined in the Act require that any rules established under the FRCP cannot abridge the substantive rights of any parties, including those in a class action.[299] In addition, extending *BMS* to class actions mitigates the concern recognized by the Court in *BMS* that plaintiffs should not willfully take advantage of the ability to shop for plaintiff-friendly forums.[300] Finally, class certification should not be a prerequisite to determining whether the claims brought by unnamed plaintiffs satisfy personal jurisdiction because requiring class certification prior to a personal jurisdiction analysis is counterproductive.[301] This approach similarly fails to consider that personal jurisdiction relates only to the claims brought

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consequence is more piecemeal litigation, claims will be less concentrated in a few plaintiff-chosen jurisdictions).

294. *See supra* Section I.C (discussing the history of Rule 23).

295. *See supra* Section II.A (explaining how plaintiffs in class actions have individualized *and* group protections unafforded to defendants).

296. *See supra* Section II.B (describing how class actions are "a species of joinder").

297. *See supra* Section II.C (arguing that defendants only avail themselves of claims with forum connections).

298. *See supra* Section II.D (suggesting that states do not have a legitimate interest in claims unrelated to the state).

299. *See supra* Part III (explaining that the Act requires *BMS*'s extension to class actions).

300. *See supra* Part IV (discussing the increased risk of forum shopping if *BMS* does not extend to class actions).

301. *See supra* Part V (refuting the proposition that a court must certify the class before considering whether it has personal jurisdiction over the defendant).

against the defendants, not the individual parties to the class.[302] Because *BMS*'s holding uniquely supplies the missing ingredient to protect defendants against due process violations, and its extension serves the ultimate goal of law, the preservation of freedom,[303] *BMS* should extend to federal class actions.

302. *See supra* Section II.C (highlighting the specific language of *BMS* as it relates to the claims, not the parties, at issue).

303. LOCKE, *supra* note 1.