

# BEYOND *BRISTOL-MYERS*: PERSONAL JURISDICTION OVER CLASS ACTIONS

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*The Supreme Court's 2017 decision in Bristol-Myers Squibb Co. v. Superior Court threatens a sea change in the relationship between personal jurisdiction and aggregate litigation. The most crucial concern has been what the decision means for class actions. Must a court subject the claims of every unnamed class member to separate jurisdictional scrutiny? If so, it could be impossible for a plaintiff who sues in her home state to represent class members outside that state; instead, the Constitution would permit multistate or nationwide class actions only in states where the defendant is subject to general jurisdiction. For claims against a foreign defendant, no such state may exist.*

*This issue potentially implicates a range of difficult and unsettled doctrinal, practical, conceptual, and theoretical questions—about both personal jurisdiction and class actions. This Article, however, proposes a clean solution that coheres with existing case law while retaining the vitality of class actions to provide meaningful remedies in cases where systemic wrongs have nationwide consequences. On this approach, specific jurisdiction would be proper in any case where (a) there is specific jurisdiction over the named plaintiff's claim against the defendant; and (b) a class action led by that plaintiff would satisfy the certification requirements of Rule 23. This solution finds support not only in longstanding practice prior to Bristol-Myers, but in the more fundamental principles and policies underlying specific jurisdiction. The impact of these underlying values has been further bolstered by the Supreme Court's most recent decision on personal jurisdiction—Ford Motor Co. v. Montana Eighth Judicial District Court. The upshot is that personal jurisdiction can exist over a class action even if the forum state would not have personal jurisdiction over a hypothetical separate action by an out-of-state individual who is an unnamed member of the class.*

*Moreover, this Article's proposal makes it unnecessary for courts to confront thornier questions that would otherwise arise. Those questions include: the proper timing and procedural mechanism for objecting to personal jurisdiction with respect to the claims of unnamed class members; whether the jurisdictional constraints apply differently in federal courts and state courts; whether they apply differently to claims based on substantive federal law as opposed to state-law claims; the precise scope and justification for pendent personal jurisdiction; and the extent to which post-service events in federal court (such as class certification) are subject*

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to the more expansive Fifth Amendment test for federal court personal jurisdiction. Under this Article's solution, courts have a straightforward way to examine personal jurisdiction over class actions that does not hinge on or implicate these other issues.

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## INTRODUCTION

The relationship between the Constitution's limits on personal jurisdiction and the claims of unnamed class members has long presented a fascinating puzzle.<sup>1</sup> Four decades ago, the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts* resolved part of this problem: It made clear that the class members *themselves* do not need to have the sort of contacts with the forum state that would be required of a defendant.<sup>2</sup> As long as notice is provided and members have the opportunity to opt out, personal jurisdiction is no obstacle to a classwide judgment that will benefit those class members (if suc-

<sup>1</sup> For early treatments of these issues, see Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 16–38 (1986); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 607–23 (1987).

<sup>2</sup> 472 U.S. 797, 808–11 (1985).

cessful) and preclude subsequent individual litigation (whether successful or not).<sup>3</sup>

In recent years, however, the question has been posed from the defendant's perspective: May a class include individuals who would not be able to obtain personal jurisdiction over that defendant if they filed a hypothetical separate suit on their own behalf? A common scenario that raises this issue is a nationwide class action, brought by an in-state named plaintiff, against a defendant that is not headquartered or incorporated in the forum state but engages in nationwide (if not global) commercial activity. Imagine, by way of illustration, an Alabama individual who is injured by a product, service, or activity that is provided or conducted by a Delaware corporation headquartered in New York. The Alabamian then files suit against the defendant in an Alabama court on behalf of a nationwide class of similarly situated individuals. In this example, the defendant likely would *not* be subject to general jurisdiction in Alabama given the Supreme Court's recent constriction of general jurisdiction—even if it engages in significant activity in Alabama, purposefully cultivates a market in Alabama, and earns substantial profits as a result.<sup>4</sup> But there likely

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<sup>3</sup> *Id.* at 811–14. See also *infra* notes 45–57 and accompanying text (discussing *Shutts*).

<sup>4</sup> See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117, 137–39 & n.20 (2014) (noting that a corporation is not subject to general jurisdiction “in every State in which a corporation engages in a ‘substantial, continuous, and systematic course of business’” and that “[a] corporation that operates in many places can scarcely be deemed at home in all of them”); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558–59 (2017) (“[T]he business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana. But in-state business . . . does not suffice to permit the assertion of general jurisdiction . . .”). Although the Court took pains not to “foreclose the possibility that in an exceptional case, . . . a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State,” *Daimler*, 571 U.S. at 139 n.19, courts have been skeptical of arguments invoking this “exceptional” possibility, see, e.g., *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016) (“[W]hen a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how ‘systematic and continuous,’ are extraordinarily unlikely to add up to an ‘exceptional case.’”). That said, in the Court’s more recent decision in *Ford Motor Co. v. Montana Eighth Judicial District*, some Justices appeared ready to rethink this restrictive approach to general jurisdiction. 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring) (noting that “this Court usually considers corporations ‘at home’ and thus subject to general jurisdiction in only one or two States” even while “global conglomerates boast of their many ‘headquarters’” and that “[t]he Court has issued these restrictive rulings, too, even though individual defendants remain subject to the old ‘tag’ rule, allowing them to be sued on any claim anywhere they can be found”); *id.* (“Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why.”); see also *id.* at 1027 n.3 (majority opinion) (disagreeing with “Justice Gorsuch’s apparent (if oblique) view that a state court should have jurisdiction over a nationwide corporation like Ford on any claim, no matter how unrelated to the State or Ford’s activities there”). The Court is poised to address another facet of general

would be specific jurisdiction over the named plaintiff's claim—based on the defendant's activities directed toward Alabama and the “affiliation between the forum and the underlying controversy.”<sup>5</sup>

If a hypothetical Minnesota individual sued that same defendant in Alabama, there likely would not be specific jurisdiction. The defendant's contacts with Alabama are still substantial, but the Minnesotan's claims do not “arise out of or relate to” those contacts as specific jurisdiction requires.<sup>6</sup> The question is: Does it automatically follow that the Alabama plaintiff may not pursue a class action that includes Minnesotans and other out-of-state claimants?

This issue has received renewed attention since the Supreme Court decided *Bristol-Myers Squibb Co. v. Superior Court* in 2017.<sup>7</sup> In that case, a group of nearly seven hundred plaintiffs sued Bristol-Myers Squibb (BMS) in California state court for injuries relating to its blood-thinning drug Plavix.<sup>8</sup> Only eighty-six of the plaintiffs were

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jurisdiction over corporations in a case to be argued in Fall 2022. *Mallory v. Norfolk Southern Railway Co.*, 266 A.3d 542 (Pa. 2021), cert. granted, 142 S. Ct. 2646 (2022), presents the question whether a state can require a corporation to consent to general jurisdiction as a condition of registering to do business in the state, *id.* at 547. The Court's recent decisions on general jurisdiction, e.g., *Daimler*, 571 U.S. 117; *BNSF*, 137 S. Ct. 1549, do not address this particular issue.

<sup>5</sup> *Ford*, 141 S. Ct. at 1025; see also *id.* at 1028 (“[T]his Court has used this exact fact pattern (a resident-plaintiff sues a global car company, extensively serving the state market in a vehicle, for an in-state accident) as an illustration—even a paradigm example—of how specific jurisdiction works.”); Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1443–45 (2018) [hereinafter Steinman, *Access to Justice*] (arguing prior to the *Ford* decision that the Supreme Court's case law did not foreclose specific jurisdiction in cases where “out-of-state defendants benefit—at least indirectly—from markets for their products in the forum state, even when they access those markets through distribution mechanisms that put them further up the ‘stream of commerce’”).

<sup>6</sup> See, e.g., *Daimler*, 571 U.S. at 118 (noting that “specific jurisdiction . . . encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum” (brackets, citations, and internal quotation omitted)).

<sup>7</sup> 137 S. Ct. 1773 (2017). Works addressing the potential effect of *Bristol-Myers* on class actions include 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. 1251 (2018); Louis J. Capozzi III, *Relationship Problems: Pendent Personal Jurisdiction After Bristol-Myers Squibb*, 11 DREXEL L. REV. 215 (2018); Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1 (2018); David W. Ichel, *A New Guard at the Courthouse Door: Corporate Personal Jurisdiction in Complex Litigation After the Supreme Court's Decision Quartet*, 71 RUTGERS U. L. REV. 1 (2018); David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, 2019 BYU L. REV. 1511 (2019); A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction over Absent Class Member Claims Explained*, 39 REV. LITIG. 31 (2019); Daniel Wilf-Townsend, *Class Action Boundaries*, 90 FORDHAM L. REV. 1611 (2022) [hereinafter Wilf-Townsend, *Boundaries*]; Daniel Wilf-Townsend, *Did Bristol-Myers Squibb Kill the Nationwide Class Action?*, 129 YALE L.J. F. 205 (2019).

<sup>8</sup> *Bristol-Myers*, 137 S. Ct. at 1777–78.

from California; the remaining plaintiffs resided in thirty-three other states.<sup>9</sup> There was no doubt that specific jurisdiction over BMS was appropriate with respect to the claims by the California plaintiffs.<sup>10</sup> But the Court rejected personal jurisdiction over the claims by non-California plaintiffs. Justice Alito's majority opinion explained: "The 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."<sup>11</sup>

*Bristol-Myers* was not a class action; it was a mass action. In a mass action, individual plaintiffs voluntarily join together to pursue their individual claims in a single action. No single person purports to represent the group; each claimant appears before the court. Federal Rule of Civil Procedure 20—which governs such joinder in federal court—authorizes persons to "join in one action as plaintiffs."<sup>12</sup> A class action, by contrast, is a representative proceeding. In federal court, class actions rely on Rule 23, which authorizes "[o]ne or more members of a class" to sue "as representative parties on behalf of all members."<sup>13</sup> Justice Sotomayor—the lone dissenter in *Bristol-Myers*—was quick to flag the distinction. She wrote that "[t]he 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 State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there," observing that "[n]onnamed class members . . . may be parties for some purposes and not for others."<sup>14</sup> Courts have been wrestling with the relevance of *Bristol-Myers* to unnamed class members ever since.<sup>15</sup>

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<sup>9</sup> *Bristol-Myers Squibb Co. v. Superior Ct.*, 377 P.3d 874, 877–78 (Cal. 2016). There were, for example, ninety-two plaintiffs from Texas and seventy-one from Ohio. *Id.* at 878.

<sup>10</sup> See *Bristol-Myers*, 137 S. Ct. at 1778 (assessing whether specific jurisdiction could be asserted only with respect to the claims by the nonresident plaintiffs); see also *Bristol-Myers*, 377 P.3d at 888 ("The California plaintiffs' claims concerning the alleged misleading marketing and promotion of Plavix and injuries arising out of its distribution to and ingestion by California plaintiffs certainly arise from BMS's purposeful contacts with this state . . .").

<sup>11</sup> *Bristol-Myers*, 137 S. Ct. at 1781.

<sup>12</sup> FED. R. CIV. P. 20(a)(1).

<sup>13</sup> *Id.* 23(a). All references to "Rules" are to the Federal Rules of Civil Procedure, unless otherwise specified.

<sup>14</sup> *Bristol-Myers*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting) (ellipses in original) (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002) and citing *Wood*, *supra* note 1, at 616–17).

<sup>15</sup> See 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE & PROCEDURE § 1067.2, nn.23.80–23.90 (4th ed. 2022) (citing more than ninety decisions addressing this issue through 2020). For examples of courts that have rejected *Bristol-Myers*'s relevance to unnamed class members, see *Lyngaas v. Curaden*

This Article argues that the logic of *Bristol-Myers* does not, as some courts have suggested, restrict class actions that include out-of-state unnamed class members. Correctly understood, the Supreme Court's case law on personal jurisdiction supports the following principle: The Constitution permits specific jurisdiction in any case where (a) there is specific jurisdiction over the named plaintiff's claim against the defendant; and (b) a class action led by that plaintiff would satisfy the certification requirements of Rule 23.<sup>16</sup> A corollary to this principle is that any such class action satisfies the test for specific jurisdiction even if the forum state would not have personal jurisdiction over a hypothetical separate action by an out-of-state individual who is an unnamed member of the class. Accordingly, there is no need for any independent jurisdictional analysis of those hypothetical individual lawsuits. The "affiliation"<sup>17</sup> or "relat[ionship]"<sup>18</sup> or "connection"<sup>19</sup> that is required for specific jurisdiction is necessarily provided by the relationship Rule 23 requires for an in-state plaintiff to represent a class of that scope. And if Rule 23 would *not* allow that in-

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AG, 992 F.3d 412 (6th Cir. 2021); *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020). For examples of courts that have read *Bristol-Myers* to restrict class actions that include out-of-state unnamed class members, see *Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028 (S.D. Cal. 2020), and *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711 (E.D. Mo. 2019). To date, federal courts have dominated the debate over *Bristol-Myers*'s relevance to class actions. This is not because the question cannot arise in state courts. If, hypothetically, a California plaintiff filed a nationwide class action on behalf of Plavix users in California state court, the same question would arise. Most such class actions, however, are subject to federal jurisdiction under the Class Action Fairness Act. See 28 U.S.C. § 1332(d) (authorizing subject-matter jurisdiction over certain class actions where the aggregate amount in controversy exceeds \$5 million). Even if a plaintiff files such a class action in state court as an initial matter, the defendant can—and typically will—remove it to federal court. See *id.* § 1453(b). Potential differences between state court and federal court are discussed *infra* Section III.B. See also *infra* note 33.

<sup>16</sup> To be clear, whether personal jurisdiction is permitted as a matter of constitutional due process is not the end of the inquiry. In state court, for example, the relevant state law must also authorize personal jurisdiction. Although many state systems permit their courts to assert personal jurisdiction as far as the Fourteenth Amendment will allow, see 4 WRIGHT ET AL., *supra* note 15, § 1068, not all of them do. Such state laws may also be relevant in federal court. See *infra* notes 258–59 and accompanying text (discussing FED. R. CIV. P. 4(k)(1)(A)).

<sup>17</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist.*, 141 S. Ct. 1017, 1025 (2021) (stating that specific jurisdiction requires “an affiliation between the forum and the underlying controversy” (quoting *Bristol-Myers*, 137 S. Ct. at 1780)).

<sup>18</sup> *Id.* at 1031 (“The only issue is whether those contacts are *related* enough to the plaintiffs’ suits.” (emphasis added)).

<sup>19</sup> *Bristol-Myers*, 137 S. Ct. at 1781 (“When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State.”).

state plaintiff to represent a class of that scope, then the class action will not be certified—making this personal jurisdiction puzzle moot.<sup>20</sup>

This Article’s approach is confirmed by the Supreme Court’s most recent personal jurisdiction decision, *Ford Motor Co. v. Montana Eighth Judicial District Court*,<sup>21</sup> which provides a valuable account of the basic principles underlying specific jurisdiction. As Justice Kagan’s majority opinion explains, the “‘essential foundation’ of specific jurisdiction” is the “relationship among the defendant, the forum, and the litigation.”<sup>22</sup> A “strict causal relationship between the defendant’s in-state activity and the litigation” is not required.<sup>23</sup> *Ford* also recognized that personal jurisdiction is proper when a defendant conducts significant amounts of business in the forum state, thereby “enjoy[ing] the benefits and protection of [its] laws,” including the “formation of effective markets”;<sup>24</sup> jurisdiction is “reasonable” and “predictable” so long as a defendant has “structure[d] its primary conduct” to exploit those markets.<sup>25</sup> That kind of activity by a defendant supports jurisdiction in cases where an in-state plaintiff represents a nationwide class of similarly situated individuals.

Moreover, this approach allows class actions to continue to perform their crucial societal function of empowering meaningful private enforcement of substantive laws that could be toothless otherwise. Especially for systemic violations where individual recoveries are likely to be small, spreading the costs of litigation via a class action is essentially the only viable way to hold violators accountable.<sup>26</sup> Yet this concern does not by itself permit class certification—a plaintiff must satisfy a range of requirements designed to ensure that such aggregate proceedings are appropriate and desirable. A monetary damages class action can be certified only if it “is superior to other available

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<sup>20</sup> A rethinking of *general* jurisdiction along the lines that Justice Gorsuch suggested in *Ford*, see *supra* note 4, is another potential solution to this problem. That topic is beyond the scope of this Article. This Article’s proposal regarding personal jurisdiction over class actions is also distinct from my more general proposal on how to conceptualize specific jurisdiction. See Steinman, *Access to Justice*, *supra* note 5, at 1446–52 (arguing that “a case should be evaluated as a specific jurisdiction case when it would be rational for the forum state to adjudicate the availability of the requested judicial remedies”).

<sup>21</sup> 141 S. Ct. 1017 (2021).

<sup>22</sup> *Id.* at 1028 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

<sup>23</sup> *Id.* at 1026.

<sup>24</sup> *Id.* at 1029 (citation and quotation marks omitted).

<sup>25</sup> *Id.* at 1030.

<sup>26</sup> As Judge Posner famously remarked in affirming certification of a class of seventeen million consumers with low-value claims: “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.” *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis omitted); see also *infra* note 277 and accompanying text.

methods for fairly and efficiently adjudicating the controversy.”<sup>27</sup> And a class action for injunctive or declaratory relief can only be certified if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”<sup>28</sup> When a nationwide class action can satisfy the rigorous gauntlet required for certification, personal jurisdiction should not—and need not—impose an additional obstacle. That said, safety valves remain available if a nationwide class action brought in the named plaintiff’s home state would be especially burdensome, inconvenient, or otherwise inappropriate.<sup>29</sup>

The dangers of applying *Bristol-Myers* to class actions are not mere geographic technicalities. As a practical matter, the ability to hold a defendant fully accountable through a class action often hinges on individual plaintiffs reaching out to local attorneys who have the wisdom and wherewithal to appreciate and to act upon the broader societal ramifications of the defendant’s course of conduct. Even if there were some other state where the defendant is subject to general jurisdiction and where a nationwide class action might still move forward, to require the plaintiff and her attorney to sue outside their home state serves little purpose other than to compound the burdens and expense of litigation and to tilt the playing field more in the defendant’s favor. Nor is it always feasible—or efficient—to pursue aggregate justice at the state level by certifying different class actions for every different state.

Although the precedential and policy arguments in favor of this Article’s proposal stand on their own merits, its approach has another benefit. If courts were to reject this understanding, they necessarily would have to confront a range of unsettled, thorny questions that have thus far eluded coherent answers or gone unrecognized.<sup>30</sup> One important issue is whether *Bristol-Myers* has different consequences in state court than in federal court. Aspects of Justice Alito’s *Bristol-Myers* opinion suggest that its logic may not apply with equal force in federal court.<sup>31</sup> On the other hand, Federal Rule 4(k)(1)(A) typically restricts the jurisdictional reach of any federal district court to what would be allowed in the state court where it is located—effectively incorporating the same Fourteenth Amendment constraints that

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<sup>27</sup> FED. R. CIV. P. 23(b)(3).

<sup>28</sup> *Id.* 23(b)(2).

<sup>29</sup> See *infra* notes 294–96 and accompanying text.

<sup>30</sup> See *infra* Part III.

<sup>31</sup> See *infra* notes 251–52 and accompanying text.

would apply in state court.<sup>32</sup> This Article's approach, however, would govern regardless of whether the class action is filed in state court or in federal court.<sup>33</sup> Some courts have suggested that a further distinction should be drawn between class actions asserting federal-law claims (for which there would be personal jurisdiction with respect to out-of-state class members) and class actions asserting state-law claims (for which the reasoning of *Bristol-Myers* would foreclose personal jurisdiction with respect to out-of-state class members).<sup>34</sup> Here too, however, it is unclear how to reconcile such a distinction with Rule 4(k)(1)(A).<sup>35</sup>

There also would be difficult timing issues: whether a personal-jurisdiction challenge made prior to class certification is premature;<sup>36</sup>

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<sup>32</sup> FED. R. CIV. P. 4(k)(1)(A). *See, e.g.*, *Lyngaas v. Curaden AG*, 992 F.3d 412, 438–39 (6th Cir. 2021) (Thapar, J., concurring in part and dissenting in part) (stating that Rule 4(k)(1)(A) “incorporates the Fourteenth Amendment’s protections” (citing *Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014))). This assumes that there is no federal statute authorizing personal jurisdiction, *see* FED. R. CIV. P. 4(k)(1)(C), which would certainly unlock the Fifth Amendment test.

<sup>33</sup> This Article's analysis is specific to federal court in that it hinges on Federal Rule 23's requirements for class certification, which do not apply in state court. If a state were to adopt a radically more lenient attitude toward class certification, it is conceivable that a certified state-court class action would not entail the relationship between the class and the in-state plaintiff that is required in federal court; if so, class certification under that more lenient standard might not necessarily satisfy what is required for specific jurisdiction. This possibility is unlikely, however. First, as described *supra* note 15, most state-court class actions that trigger the issues discussed in this Article will be removed to federal court; if so, Rule 23 will apply. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 415–16 (2010) (holding that Federal Rule 23 governs whether a class action may be certified in federal court despite a state law forbidding class certification). *But cf.* Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act after Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1143–61 (2011) (describing how some state class action rules might be required even in federal court). Second, although there are some differences between how state and federal courts approach class certification, *see, e.g.*, *Smith v. Bayer Corp.*, 564 U.S. 299, 310–12 (2011) (describing the disparity between West Virginia's standard for class certification and the federal court's approach); Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 432–34 (2018) (describing deviations between state court class-action requirements and the Supreme Court's interpretation of Federal Rule 23 in *Wal-Mart v. Dukes*), their basic requirements overlap significantly. *See Wood, supra* note 1, at 600 n.6 (noting that “the state rules are generally patterned on the federal rules”). To the extent such class actions do proceed in state court, *see Linda S. Mullenix, The (Surprisingly) Prevalent Role of States in an Era of Federalized Class Actions*, 2019 B.Y.U. L. REV. 1551, 1555 (2020) (stating that “although Congress through CAFA attempted to *federalize* complex class litigation, state courts nonetheless have continued to perform a significant role in addressing complex cases”), this Article's theory would require a more particularized examination of state certification standards. Such state-by-state examinations may well lead to the same result, but they are beyond the scope of this Article.

<sup>34</sup> *See infra* note 259 and accompanying text.

<sup>35</sup> *See supra* note 32.

<sup>36</sup> *See infra* notes 219–25 and accompanying text.

whether a defendant waives such a personal-jurisdiction challenge by failing to include it in a pre-answer motion or omitting it from the initial answer;<sup>37</sup> and whether a district court's pre-certification ruling regarding personal jurisdiction and absent class members is subject to immediate appeal under Rule 23(f).<sup>38</sup> Related to these timing questions is the proper procedural vehicle for challenging the scope of a class action based on a lack of personal jurisdiction over the claims of absent class members.<sup>39</sup>

Finally, courts would have to come to terms with unsettled questions regarding the precise scope of pendent personal jurisdiction in federal court;<sup>40</sup> the interplay between Rule 4's initial service and jurisdictional provisions and subsequent steps in the litigation such as class certification;<sup>41</sup> and the federal common law authority of federal courts with respect to personal jurisdiction, whether grounded in Rule 83,<sup>42</sup> the need to preserve and promote class actions authorized by Rule 23,<sup>43</sup> or some other source.<sup>44</sup> These are intriguing questions to be sure—each one meriting its own full-length examination (and each one eluding meaningful guidance from federal courts to this point). One practical advantage of this Article's approach is that it will allow courts to assess personal jurisdiction over class actions coherently without having to resolve these myriad other questions.

This Article proceeds as follows: Part I summarizes the current case law on personal jurisdiction in the context of aggregate litigation. Part II develops this Article's theory about the proper approach to personal jurisdiction and class actions, supporting the view that specific jurisdiction will always be proper in a class action where there is specific jurisdiction over the named plaintiff's individual claim against the defendant and the class represented by that plaintiff would satisfy Rule 23's certification requirements. Part III discusses the many unresolved questions that courts would need to confront if this Article's proposal is rejected. And Part IV highlights the important values and practical considerations that are at stake in determining the extent of personal jurisdiction over class actions.

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<sup>37</sup> See *infra* notes 226–34 and accompanying text.

<sup>38</sup> See *infra* notes 237–43 and accompanying text.

<sup>39</sup> See *infra* notes 245–48 and accompanying text.

<sup>40</sup> See *infra* Section III.B.1.

<sup>41</sup> See *infra* Section III.B.2.

<sup>42</sup> See FED. R. CIV. P. 83(b) (“A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district’s local rules.”); see *infra* notes 268–71 and accompanying text.

<sup>43</sup> See *infra* note 272 and accompanying text.

<sup>44</sup> See *infra* notes 273–75 and accompanying text.

## I

WHERE THINGS STAND: PERSONAL JURISDICTION AND  
AGGREGATE LITIGATION

This Part summarizes the Supreme Court’s case law to date on the relationship between personal jurisdiction and aggregate litigation. It also describes the two key decisions from federal appellate courts—the Sixth Circuit and the Seventh Circuit—that explore the impact of *Bristol-Myers* on class actions.

A. *The Supreme Court*

The Supreme Court decision that deals most directly with personal jurisdiction over class actions is *Phillips Petroleum Co. v. Shutts*.<sup>45</sup> There, a class action was filed in Kansas state court against Phillips Petroleum, a Delaware corporation with its principal place of business in Oklahoma.<sup>46</sup> The class as initially certified included over thirty thousand royalty owners with rights to leases from which Phillips extracted natural gas.<sup>47</sup> The class members hailed from all fifty states (and beyond), and the land at issue was located in eleven different states (Kansas, Louisiana, Oklahoma, Texas, Wyoming, and others).<sup>48</sup>

Phillips argued that the Kansas state court could constitutionally assert jurisdiction over absent class members only if they “possess the sufficient ‘minimum contacts’ with Kansas as that term is used in cases involving personal jurisdiction over out-of-state defendants.”<sup>49</sup> To do otherwise—according to Phillips—would “violate[] the due process rights of the absent plaintiffs.”<sup>50</sup> The Supreme Court did not agree, however: “[A] forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.”<sup>51</sup> What due process does require—at least for any “claim for money damages or similar relief at law”—is “notice plus an opportunity to be heard and participate in the litigation,” as well as an opportunity for class members “to remove [themselves] from the class by executing and returning an ‘opt out’ or

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<sup>45</sup> 472 U.S. 797 (1985).

<sup>46</sup> *Id.* at 799.

<sup>47</sup> *Id.* at 801. The final certified class, after the notice and opt-out period, included approximately twenty-eight thousand members. *See id.*

<sup>48</sup> *Id.* at 815 n.6.

<sup>49</sup> *Id.* at 806.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 811.

'request for exclusion' form to the court."<sup>52</sup> The notice provided to class members "must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action.'"<sup>53</sup> An absent class member's failure to opt out after such notice constitutes consent to jurisdiction.<sup>54</sup>

Personal jurisdiction was not the only issue in *Shutts*. The Court also addressed the fact that the Kansas court applied Kansas substantive law to the claims of all the more than thirty thousand royalty owners, "notwithstanding that over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit."<sup>55</sup> The Supreme Court found that the Constitution did not permit Kansas courts to apply Kansas substantive law to all class members' claims. As to claims that were unrelated to Kansas—such as those based on "leases involving land and royalty owners outside of Kansas"<sup>56</sup>—applying Kansas law was "sufficiently arbitrary and unfair as to exceed constitutional limits."<sup>57</sup>

Widening the lens to aggregate litigation more generally, the Court issued another important decision the year before *Shutts*. In *Keeton v. Hustler Magazine, Inc.*, the Court unanimously approved jurisdiction in New Hampshire over a libel claim by a New York plaintiff against Ohio-based Hustler Magazine.<sup>58</sup> Hustler's monthly magazine sales in New Hampshire amounted to "some 10 to 15,000 copies," which was a "small portion" of its nationwide circulation.<sup>59</sup> Nonetheless, "[t]he general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state."<sup>60</sup>

What makes *Keeton* important from an aggregate-litigation standpoint is this: Even though just a "small portion" of the defendant's magazines were sold in New Hampshire,<sup>61</sup> the Court found that

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<sup>52</sup> *Id.* at 811–12. *Shutts* stated that its holding was "limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments" and "intimate[s] no view concerning other types of class actions, such as those seeking equitable relief." *Id.* at 811 n.3.

<sup>53</sup> *Id.* at 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950)).

<sup>54</sup> *See id.* ("Any plaintiff may consent to jurisdiction. The essential question, then, is how stringent the requirement for a showing of consent will be." (citation omitted)).

<sup>55</sup> *Id.* at 814–15.

<sup>56</sup> *Id.* at 822.

<sup>57</sup> *Id.*

<sup>58</sup> 465 U.S. 770, 774–75 (1984).

<sup>59</sup> *Id.* at 772, 775.

<sup>60</sup> *Id.* at 774 (alteration in original) (quoting Petition for Writ of Certiorari at 30, *Keeton*, 465 U.S. 770 (No. 82-485)).

<sup>61</sup> *Id.* at 775.

New Hampshire had jurisdiction to award damages arising from the distribution of those allegedly defamatory magazines throughout the United States. The defendant could be required “to answer to a *multi-state* libel action in New Hampshire,”<sup>62</sup> because New Hampshire had both (1) a legitimate interest in redressing injuries that occur within the state through “the deception of its citizens,”<sup>63</sup> and (2) “a substantial interest in cooperating with other States . . . to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding.”<sup>64</sup>

The Court’s most recent foray into personal jurisdiction and aggregate litigation was *Bristol-Myers*. As mentioned earlier,<sup>65</sup> the case involved nearly seven hundred plaintiffs—individually named and formal parties to the litigation—who sued BMS in California state court based on injuries they suffered from BMS’s blood-thinning drug Plavix. As to the eighty-six California plaintiffs, specific jurisdiction was certainly appropriate; BMS purposefully marketed Plavix in California, leading to the sale of almost 187 million Plavix pills there and more than \$900 million in California earnings.<sup>66</sup> Such activity in California, however, would not be sufficient to establish general jurisdiction in California over BMS, which was a Delaware corporation headquartered in New York.<sup>67</sup>

That left specific jurisdiction. And by an 8–1 vote, the Supreme Court found that specific jurisdiction could not reach the claims brought by non-California residents. According to Justice Alito, “[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.”<sup>68</sup> He explained that “‘a defendant’s relationship with a . . . third party, standing alone, is an

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<sup>62</sup> *Id.* at 777–78 (emphasis added).

<sup>63</sup> *Id.* at 776.

<sup>64</sup> *Id.* at 777. The Court did observe that substantive law could impact whether the plaintiff should be awarded multistate damages in the New Hampshire action “in the peculiar circumstances of this case,” but it made clear that personal jurisdiction posed no obstacle. *Id.* at 778 n.9 (calling it “a matter of substantive law, not personal jurisdiction”).

<sup>65</sup> See *supra* notes 7–11 and accompanying text.

<sup>66</sup> *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1778 (2017).

<sup>67</sup> See, e.g., *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1554–59 (2017) (finding that Montana lacked general jurisdiction over a Delaware corporation with its principal place of business in Texas and noting that the defendant was not “so heavily engaged in activity in Montana ‘as to render [it] essentially at home’ in that State” (alteration in original) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014))). *But cf. supra* note 4 (describing Justice Gorsuch’s critiques of the Court’s recent approach to general jurisdiction).

<sup>68</sup> *Bristol-Myers*, 137 S. Ct. at 1781.

insufficient basis for jurisdiction[.]’ . . . even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents.”<sup>69</sup> Likewise, it did not matter “that BMS conducted research in California on matters unrelated to Plavix” because “[w]hat is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”<sup>70</sup> “The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State,” nor did any “conduct giving rise to the non-residents’ claims” occur in California.<sup>71</sup>

One way to frame the key issue regarding unnamed class members’ claims is this: Should they be treated like the out-of-state claims in *Keeton*? Or like the out-of-state claims in *Bristol-Myers*? One Supreme Court case that does not help answer this question—despite occasional attempts to invoke it—is *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*<sup>72</sup> In holding that the Rules Enabling Act did not forbid applying Federal Rule 23 despite a more restrictive state-law rule on class certification, the *Shady Grove* majority observed that a Rule 23 class action is simply “a species” of “traditional joinder.”<sup>73</sup> Defendants seeking to apply *Bristol-Myers* to the claims of unnamed class members have cited this language to suggest that a class action should be treated just like the mass action at issue in *Bristol-Myers* itself.<sup>74</sup> But this argument misreads that part of the *Shady Grove* opinion. The majority’s discussion of the relationship between class actions and joinder included not only Rule 20 joinder of parties (analogous to the joinder of multiple plaintiffs in a mass action in *Bristol-Myers*) but *also* Rule 18 joinder of claims (analogous to the joinder of multiple claims in *Keeton*).<sup>75</sup> To recognize that class actions act as a kind of joinder device, therefore, cannot by itself resolve whether courts must undertake an independent jurisdictional analysis of hypothetical separate actions by unnamed class members.

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<sup>69</sup> *Id.* (first alteration in original) (citation omitted) (quoting *Walden v. Fiore*, 571 U.S. 277, 286 (2014)).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1782.

<sup>72</sup> 559 U.S. 393 (2010).

<sup>73</sup> *Id.* at 408.

<sup>74</sup> One notable example is the unsuccessful petition for certiorari challenging the Seventh Circuit’s decision in *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020). See Petition for Writ of Certiorari at 14, *IQVIA Inc. v. Mussat*, No. 20-510, 2020 WL 6134181, *cert. denied*, 141 S. Ct. 1126 (2021).

<sup>75</sup> *Shady Grove*, 559 U.S. at 408 (“[W]e think it obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid. See, e.g., Fed. Rules Civ. Proc. 18 (joinder of claims), 20 (joinder of parties), 42(a) (consolidation of actions).”).

### B. *The Federal Courts of Appeals*

So far, two federal courts of appeals have directly confronted the key issue: In a class action, must a court subject the claims of every unnamed class member to separate jurisdictional scrutiny?<sup>76</sup> As described below, both the Sixth Circuit and the Seventh Circuit agreed that *Bristol-Myers* is not dispositive with respect to unnamed class members. A dissenting judge in the Sixth Circuit decision took the opposite view, however. And even the majority opinions leave open questions about their precise scope and rationale, making their impact in future cases unclear.

The first appellate court to weigh in on this issue was the Seventh Circuit. *Mussat v. IQVIA, Inc.* was a nationwide class action brought in Illinois federal court by an Illinois plaintiff against a Delaware corporation with its headquarters in Pennsylvania.<sup>77</sup> The plaintiff, who had received unsolicited faxes from the defendant that failed to include the information on how to stop receiving them, as required by federal law, brought claims under the federal Telephone Consumer Protection Act (TCPA).

The defendant argued that the district court did not have personal jurisdiction over the non-Illinois members of the proposed nationwide class. In a decision by Chief Judge Diane Wood, however, the Seventh Circuit rejected that argument. Judge Wood first recognized that “[b]efore the Supreme Court’s decision in *Bristol-Myers*, there was a general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court, even if the federal court did not have general jurisdiction over the defendant.”<sup>78</sup> As for specific jurisdiction, she explained that “minimum contacts, purposeful availment, and relation to the claim were assessed only with respect to the named plaintiffs.”<sup>79</sup> Accordingly, “[e]ven if the links between the defendant and an out-of-state unnamed class member were confined to that person’s home state, that did not destroy personal jurisdiction.”<sup>80</sup> Put another way: “Once certified, the class as a whole is the litigating entity, and its affiliation with a forum depends only on the named plaintiffs.”<sup>81</sup>

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<sup>76</sup> There may be gradations to this issue. As discussed below, some courts have indicated that the answer may differ depending on (a) whether the class action is in federal court rather than state court, or (b) whether the class action raises state-law claims or federal-law claims. *See infra* note 259.

<sup>77</sup> 953 F.3d 441, 443 (7th Cir. 2020).

<sup>78</sup> *Id.* at 445.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (emphasis added).

<sup>81</sup> *Id.* (citing *Payton v. County of Kane*, 308 F.3d 673, 680–81 (7th Cir. 2002)).

The Supreme Court's *Bristol-Myers* decision did not upset "[d]ecades of case law" supporting this approach, because *Bristol-Myers* "did not involve a certified class action, but instead was brought under a different aggregation device."<sup>82</sup> The plaintiffs in *Bristol-Myers* "brought their case as a coordinated mass action, which is a device authorized under section 404 of the California Civil Procedure Code, but which has no analogue in the Federal Rules of Civil Procedure."<sup>83</sup> That provision of California law "permits consolidation of individual cases, brought by individual plaintiffs,"<sup>84</sup> and it "does not involve any absentee litigants."<sup>85</sup> By contrast, the lead plaintiffs in a Rule 23 class action "earn the right to represent the interests of absent class members by satisfying all four criteria of Rule 23(a) and one branch of Rule 23(b)."<sup>86</sup> That right exists only because of "the careful procedural protections outlined in Rule 23," which are necessary to "bind[] a nonparty (including an unnamed class member) to the outcome of a suit."<sup>87</sup>

Class actions, therefore, "are different from many other types of aggregate litigation, and that difference matters in numerous ways for the unnamed members of the class."<sup>88</sup> Most pertinently, Judge Wood recognized longstanding Supreme Court authority regarding the treatment of absent class members for purposes of federal subject-matter jurisdiction. Not only are absent class members "not considered parties for assessing whether the requirement of diverse citizenship under 28 U.S.C. § 1332 has been met,"<sup>89</sup> they may piggyback on claims of the named plaintiff for purposes of § 1332's amount-in-controversy requirement.<sup>90</sup> Likewise, absent class members are not considered for venue purposes.<sup>91</sup> There was, therefore, "no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue: the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so."<sup>92</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 446.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 447.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 446 (citing *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008)).

<sup>88</sup> *Id.* at 446–47.

<sup>89</sup> *Id.* at 447 (citing *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002)).

<sup>90</sup> *See id.* (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566–67 (2005)).

<sup>91</sup> *Id.* (citing *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 140 (7th Cir. 1974)).

<sup>92</sup> *Id.*

Finally, Judge Wood emphasized that Rule 23 itself supported “a focus on the named representative for purposes of personal jurisdiction.”<sup>93</sup> Looking to Rule 23(b)(3), which typically governs damages class actions like the one in *Mussat*, she noted that one of Rule 23(b)(3)’s factors relevant to class certification is “the desirability or undesirability of concentrating the litigation of the claims in the particular forum.”<sup>94</sup> In explaining this factor, the Advisory Committee that promulgated this language noted that “a court should consider the desirability of the forum ‘in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought.’”<sup>95</sup> Thus, Rule 23 itself rests on the presumption “that a class action may extend beyond the boundaries of the state where the lead plaintiff brings the case.”<sup>96</sup> Moreover, “nothing in the Rules frowns on nationwide class actions, even in a forum where the defendant is not subject to general jurisdiction.”<sup>97</sup> For all these reasons, unnamed class members “are more like nonparties, and thus there is no need to locate each and every one of them and conduct a separate personal-jurisdiction analysis of their claims.”<sup>98</sup>

More recently, the Sixth Circuit followed the Seventh Circuit’s lead. In another TCPA case involving unsolicited faxes, *Lyngaas v. Curaden AG*,<sup>99</sup> a Michigan dentist filed an action in Michigan federal court on behalf of a nationwide class against a Swiss company and its U.S. subsidiary (an Ohio corporation headquartered in Arizona).<sup>100</sup> For the Swiss parent company, the court upheld personal jurisdiction under Rule 4(k)(2), which permits personal jurisdiction for federal-law claims against defendants who would not be subject to personal jurisdiction in any state.<sup>101</sup> Because Rule 4(k)(2) jurisdiction governs federal courts and does not derive from the constitutionality of a state court’s exercise of jurisdiction, its constitutionality hinges on the Fifth

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<sup>93</sup> *Id.* at 448.

<sup>94</sup> *Id.* (quoting FED. R. CIV. P. 23(b)(3)(C)).

<sup>95</sup> *Id.* (quoting FED. R. CIV. P. 23(b)(3) advisory committee’s note to 1966 amendment).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* Elsewhere in the opinion, Judge Wood seems to state the holding more narrowly: “[W]e hold that the principles announced in *Bristol-Myers* do not apply to the case of a nationwide class action filed in federal court under a federal statute.” *Id.* at 443. This reference to “federal court” and claims brought “under a federal statute” may implicate the federalism issues addressed below. See *infra* Section III.B. The logic of her reasoning in *Mussat*, however, supports more generally the proposition that the claims of unnamed class members need not independently satisfy the requirements of personal jurisdiction.

<sup>99</sup> 992 F.3d 412 (6th Cir. 2021).

<sup>100</sup> *Id.* at 417.

<sup>101</sup> *Id.* at 421–22 (citing FED. R. CIV. P. 4(k)(2)).

Amendment rather than the Fourteenth.<sup>102</sup> And the Fifth Amendment's due process test focuses on relevant contacts with the United States as a whole—rather than any particular state.<sup>103</sup> Accordingly, the Sixth Circuit's Rule 4(k)(2) reasoning did not require it to confront the state-focused issue prompted by *Bristol-Myers*.<sup>104</sup>

The domestic defendant in *Lyngaas*, however, invoked *Bristol-Myers* and argued that the Michigan federal court lacked personal jurisdiction over it as to all non-Michigan class members.<sup>105</sup> But the panel majority “decline[d] to extend *Bristol-Myers Squibb* in this manner.”<sup>106</sup> Judge Gilman's opinion reasoned that “courts have routinely exercised personal jurisdiction over out-of-state defendants in nationwide class actions” and that “the personal-jurisdiction analysis has focused on the defendant, the forum, and the *named plaintiff*, who is the putative class representative.”<sup>107</sup> This rule was “well established” and “has a well-reasoned basis for its existence.”<sup>108</sup> Following Judge Wood's reasoning in *Mussat*, the Sixth Circuit emphasized that weaponizing *Bristol-Myers* in the class action context would deviate from longstanding practice in both lower courts and the Supreme Court; Judge Gilman also highlighted the differences between class actions and mass actions like the one in *Bristol-Myers*.

In addition, the *Lyngaas* majority emphasized that any class action that satisfies Rule 23 will be an action where “[t]he defendant

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<sup>102</sup> *Id.* at 422. See generally 4 WRIGHT ET AL., *supra* note 15, § 1068.1 (describing Rule 4(k)(2)).

<sup>103</sup> *Lyngaas*, 992 F.3d at 422. See generally 4 WRIGHT ET AL., *supra* note 15, § 1068.1 (noting that the constitutionality of jurisdiction under Rule 4(k)(2) depends on whether “the defendant has sufficient contacts with the United States to satisfy the due process requirements of the Fifth Amendment”).

<sup>104</sup> *Lyngaas*, 992 F.3d at 423 (“[B]ecause the district court properly exercised personal jurisdiction over Curaden AG due to Curaden AG's contacts with the United States as a whole, we need not reach the question of whether the court has personal jurisdiction over Curaden AG due to the latter's contacts with Michigan alone.”). On the merits, however, the court found that the Swiss parent could not be liable under the TCPA because it was not the “sender” of the faxes at issue. See *id.* at 425.

<sup>105</sup> For the domestic subsidiary, Rule 4(k)(2) could not justify jurisdiction because it requires that “the defendant is not subject to jurisdiction in any state's courts of general jurisdiction.” FED. R. CIV. P. 4(k)(2)(A). An Ohio corporation headquartered in Arizona could be constitutionally subject to general jurisdiction in both Arizona and Ohio. See, e.g., *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (“The ‘paradigm’ forums in which a corporate defendant is ‘at home,’ we explained, are the corporation's place of incorporation and its principal place of business.” (first citing *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014); and then citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011))).

<sup>106</sup> *Lyngaas*, 992 F.3d at 433.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

‘is presented with a unitary, coherent claim to which it need respond only with a unitary, coherent defense.’”<sup>109</sup> Accordingly, “when the court considers whether the suit arises out of or relates to the defendant’s contacts with the forum, the court need analyze only the claims raised by the named plaintiff, who in turn represents the absent class members.”<sup>110</sup> Insofar as specific jurisdiction hinges on “the ‘relationship among the defendant, the forum, and the litigation,’”<sup>111</sup> that relationship “does not depend on the makeup of the unnamed class members.”<sup>112</sup> The class action device lets the court “treat the class as a single litigating entity represented by one Michigander.”<sup>113</sup> Judge Gilman found further support—like Judge Wood in *Mussat*<sup>114</sup>—in the principles governing subject-matter jurisdiction over class actions: “Regarding subject-matter jurisdictional inquires, the Supreme Court has held that absent class members are not considered parties at all . . . even though subject-matter jurisdiction is a constitutional and statutory requirement, and is perhaps more fundamental than personal jurisdiction because it cannot be waived or forfeited.”<sup>115</sup>

Unlike in the Seventh Circuit, the Sixth Circuit’s decision on this issue was not unanimous. Judge Thapar authored a dissenting opinion, which noted first that the Federal Rules of Civil Procedure incorporate “the due process principles that would apply in state court.”<sup>116</sup> And in his view, “[a] Michigan state court could not resolve the claims of out-of-state class members (without violating the defendant’s right to due process).”<sup>117</sup> This is the core of the argument against multistate class actions that the Supreme Court’s *Bristol-Myers* has unleashed. As Judge Thapar explained:

Brian Lyngaas, the class representative, . . . is a Michigan dentist who could have sued just for the faxes that Curaden sent to his Michigan office. And if he had, the Michigan state court would have jurisdiction over Curaden for this claim. But Lyngaas seeks redress for unlawful faxes sent to hundreds of dentists across the country. If dentists from other states joined Lyngaas’s suit, the Michigan court

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<sup>109</sup> *Id.* at 435 (quoting *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018)).

<sup>110</sup> *Id.* (brackets, citations, and internal quotation marks omitted).

<sup>111</sup> *Id.* at 437 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 132–33 (2014)).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* (“Indeed, only after Lyngaas’s claim was litigated and after judgment was rendered, were the absent class members brought into the picture to collect their due through an administrative process.”).

<sup>114</sup> See *supra* notes 89–92 and accompanying text.

<sup>115</sup> *Lyngaas*, 992 F.3d at 437 (citations omitted).

<sup>116</sup> *Id.* at 438 (Thapar, J., dissenting).

<sup>117</sup> *Id.*

would dismiss their claims—Curaden would have rightly argued that the court lacked personal jurisdiction.<sup>118</sup>

Judge Thapar’s dissent rejected the view that class actions should be treated differently. Somewhat ironically, he cited *Shutts*—which was itself a class action that did include out-of-state class members.<sup>119</sup> For Judge Thapar, however, *Shutts* showed “that in a class action as in all actions, a court must have personal jurisdiction to bind the parties to its judgment.”<sup>120</sup> And he argued that “[t]o find out whether the court has personal jurisdiction, we need to examine these claims—we cannot just assume that jurisdiction over the class representative’s claims confers jurisdiction over the claims of the class.”<sup>121</sup> To hold otherwise—as the majority did—would “mean[] that a class action gives a court the power to exceed its ordinary jurisdictional reach.”<sup>122</sup>

The majority decisions in *Mussat* and *Lyngaas* are generally consistent with the argument developed in this Article. Both conclude that *Bristol-Myers* does not mandate independent jurisdictional scrutiny of the claims of unnamed class members as if they were pursuing those claims in stand-alone lawsuits. The precise scope of those decisions remains somewhat undefined, however. Both cases involved class actions asserting federal-law claims, so neither one directly addresses the proper analysis in federal class actions based on state substantive law.<sup>123</sup> Moreover, Judge Thapar’s *Lyngaas* dissent—among others<sup>124</sup>—shows that disagreement remains within the federal

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<sup>118</sup> *Id.* at 440.

<sup>119</sup> See *supra* notes 46–54 and accompanying text.

<sup>120</sup> *Lyngaas*, 992 F.3d at 440 (Thapar, J., dissenting).

<sup>121</sup> *Id.* at 441.

<sup>122</sup> *Id.*

<sup>123</sup> Parts of the *Mussat* opinion, for example, could be read as limited to claims arising under federal law. See *supra* note 98.

<sup>124</sup> In *Molock v. Whole Foods Market Group, Inc.*, 952 F.3d 293 (D.C. Cir. 2020), discussed *infra* notes 219–25 and accompanying text, the majority did not ultimately decide whether personal jurisdiction was proper over a nationwide class action. But the dissenting opinion by Judge Silberman would have concluded that *Bristol-Myers* applies with equal force to class actions that include out-of-state class members. See *id.* at 306 (Silberman, J., dissenting) (“Although the Supreme Court [in *Bristol-Myers*] 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.”).

appellate judiciary.<sup>125</sup> That dissonance is reflected in federal district court decisions as well.<sup>126</sup>

## II

### PERSONAL JURISDICTION AND UNNAMED CLASS MEMBERS

This Part develops and justifies this Article’s basic theory of how to assess personal jurisdiction over class actions in the wake of *Bristol-Myers*.<sup>127</sup> Constitutional due process allows personal jurisdiction in any case where (a) there is specific jurisdiction over the named plaintiff’s claim against the defendant; and (b) a class action led by that plaintiff would satisfy the certification requirements of Rule 23.<sup>128</sup>

#### A. Precedent and First Principles

The notion of precedent can have multiple meanings. One is strictly doctrinal: the obligation to follow particular tests or standards laid out by prior judicial decisions (specifically, decisions by courts that are equal or higher in the judicial hierarchy). Another is perhaps more amorphous: looking broadly at past practice and seeking consistency with the general way things are done.<sup>129</sup>

Many courts that have rejected efforts to limit class actions based on *Bristol-Myers* have emphasized this second kind of precedent. Seventh Circuit Judge Diane Wood—whose scholarship prior to

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<sup>125</sup> Judges have also disagreed regarding *Bristol-Myers*’s relevance to Fair Labor Standards Act (FLSA) collective actions—generating a circuit split. *Compare* *Canaday v. Anthem Cos., Inc.*, 9 F.4th 392, 397 (6th Cir. 2021) (“The principles animating *Bristol-Myers*’s application to mass actions under California law apply with equal force to FLSA collective actions under federal law.”), *and* *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861, 865–66 (8th Cir. 2021) (citing *Bristol-Myers*), *with* *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 91–99 (1st Cir. 2022) (rejecting the argument that *Bristol-Myers* “requires our dismissal of the nonresident opt-in claims because the Massachusetts district court lacked either general or specific personal jurisdiction as to those claims”). Issues relating to FLSA collective actions are discussed *infra* notes 214–17 and accompanying text.

<sup>126</sup> *See supra* note 15.

<sup>127</sup> For examples of the scholarly disagreement over this question, *compare* Capozzi, *supra* note 7, at 280 (arguing that “*Bristol-Myers* applies in federal court and to class actions”), *and* Spencer, *supra* note 7, at 48 (arguing that “the core holding of *Bristol-Myers*” applies with equal force to the claims of unnamed class members, whether the class action is in state or federal court), *with* Marcus & Ostrander, *supra* note 7, at 1515 (arguing in favor of a “class action exception to *BMS*”), *and* Wilf-Townsend, *Boundaries*, *supra* note 7, at 1664 (arguing that “*Bristol-Myers* . . . does not require lower courts to apply the minimum contacts test to the claims of absent class members”).

<sup>128</sup> This logic would apply with equal force in a state court whose class-certification requirements mirrored Rule 23—although defendants will likely remove such state-court class actions to federal court. *See supra* note 16 and accompanying text.

<sup>129</sup> *See, e.g.*, Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006); Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 1955–59 (2017).

joining the bench gave her unique perspective on this question<sup>130</sup>—noted: “The Supreme Court has regularly entertained cases involving nationwide classes where the plaintiff relied on specific, rather than general, personal jurisdiction in the trial court, without any comment about the supposed jurisdictional problem.”<sup>131</sup> Therefore, the argument that a class action may include only those class members who could obtain personal jurisdiction in a hypothetical separate action against the defendant was contrary to “[d]ecades of case law show[ing] that this has not been the practice of the federal courts.”<sup>132</sup> Admittedly, this kind of precedent may not explicitly answer the question at hand. As a formal matter, lack of personal jurisdiction is a waivable defense—so there would have been no cause for courts to consider the question if defendants in those earlier cases had failed to raise it. It is not surprising, however, that courts wrestling with this challenging doctrinal question would be swayed by the fact that, for decades, the personal-jurisdiction dogs did not bark.

This Article’s approach—and the long history of prior practice mentioned above—also finds support in the basic, precedential principles underlying specific jurisdiction. Justice Kagan’s majority opinion in the Supreme Court’s most recent personal jurisdiction decision—*Ford Motor Co. v. Montana Eighth Judicial District Court*<sup>133</sup>—provides a valuable account of these first principles. The “‘essential foundation’ of specific jurisdiction” is the “relationship among the defendant, the forum, and the litigation.”<sup>134</sup> *Ford* rejected the view that the required “affiliation between the forum and the underlying controversy”<sup>135</sup> demands “a strict causal relationship between the defendant’s in-state activity and the litigation”;<sup>136</sup> the lawsuit may “relate to the defendant’s contacts with the forum” even “without a causal showing.”<sup>137</sup> Accordingly, jurisdiction may be justified “because of another ‘activity [or] occurrence’ involving the defendant that takes place in the State.”<sup>138</sup>

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<sup>130</sup> See Wood, *supra* note 1.

<sup>131</sup> *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020) (first citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); then citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); and then citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

<sup>132</sup> *Id.*

<sup>133</sup> 141 S. Ct. 1017.

<sup>134</sup> *Id.* at 1028 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

<sup>135</sup> *Id.* at 1025 (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011))).

<sup>136</sup> *Id.* at 1026.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1026–27 (alteration in original) (quoting *Bristol-Myers*, 137 S. Ct. at 1780–81).

*Ford* also emphasized the *fairness* of jurisdiction in cases where the defendant conducts significant amounts of business in the forum state, thereby “enjoy[ing] the benefits and protection of [its] laws,” including the “formation of effective markets.”<sup>139</sup> When a defendant has “structure[d] its primary conduct” to exploit those markets, jurisdiction is “reasonable” and “predictable.”<sup>140</sup>

These principles support jurisdiction in cases where an in-state plaintiff represents a nationwide class of similarly situated individuals. Rule 23 itself ensures that there will be an “affiliation” between (a) the defendant’s conduct directed toward the forum state’s people and markets, as reflected by the in-state plaintiff’s individual claim, and (b) a class action on behalf of others based on that same conduct, product, or service. For the class to be certified under Rule 23, it must be shown that the in-state named plaintiff’s claims are *typical* of unnamed class members’ claims.<sup>141</sup> It also must be shown that the claims of the in-state plaintiff share common questions of law or fact with the claims of out-of-state class members.<sup>142</sup> And for most money-damages class actions, it must further be shown that those common questions *predominate* over individualized questions.<sup>143</sup> When injunctive or declaratory relief is at issue, it must be shown that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”<sup>144</sup>

Accordingly, a class action that meets Rule 23’s certification requirements necessarily entails the required “affiliation”<sup>145</sup> or “relationship”<sup>146</sup> or “connection”<sup>147</sup> between the activity the defendant directed toward the forum state and the claims being pursued on behalf of the class.<sup>148</sup> Although it may be true that the defendant’s conduct toward the named plaintiff and other in-state residents did not strictly cause injuries to out-of-state residents, *Ford* makes clear that such a causal relationship is not required.<sup>149</sup> As long as a defendant has directed activity purposefully toward the forum state’s

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<sup>139</sup> *Id.* at 1025, 1029.

<sup>140</sup> *Id.* at 1030.

<sup>141</sup> FED. R. CIV. P. 23(a)(3).

<sup>142</sup> *Id.* 23(a)(2).

<sup>143</sup> *Id.* 23(b)(3).

<sup>144</sup> *Id.* 23(b)(2).

<sup>145</sup> *Ford*, 141 S. Ct. at 1017, 1025, 1031.

<sup>146</sup> *Id.* at 1028.

<sup>147</sup> *Id.* at 1026.

<sup>148</sup> As discussed above, Rule 23 itself would not govern in state court, but most states impose similar certification requirements. *See supra* note 33.

<sup>149</sup> *See supra* notes 134–38 and accompanying text.

market, it is “fair[],”<sup>150</sup> “reasonable,”<sup>151</sup> and “predictable”<sup>152</sup> to be held accountable there for the kind of activity that would be the basis for a certifiable class under Rule 23.<sup>153</sup>

To this last point, a defendant might respond that it may have anticipated being sued in the forum state, but only with respect to the magnitude of that state’s market. That retort is a circular one, however; it presumes that the defendant is correct about the permissible scope of jurisdiction.<sup>154</sup> It is not any less predictable—or any less consistent with a defendant’s ability to “structure its primary conduct”—to permit a nationwide class action under these circumstances. In any event, this potential retort is squarely refuted by *Keeton*. Far from seeing something improper in allowing a New Hampshire court to adjudicate a defamation plaintiff’s claims for damages stemming from false stories distributed throughout the United States, *Keeton* found value in New Hampshire “cooperating with other States . . . to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding.”<sup>155</sup>

Perhaps the same line of argument should have led to a different result in *Bristol-Myers*.<sup>156</sup> At no point, however, did Justice Alito’s *Bristol-Myers* opinion “consider the practical value of aggregating related claims arising from the same underlying conduct,” including “the tangible benefit of (as the Court said in *Keeton*) ‘efficiently litigating’ the ‘issues and damage claims’ arising from a common course of conduct.”<sup>157</sup> This is especially so given that the *Bristol-Myers* deci-

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<sup>150</sup> *Ford*, 141 S. Ct. at 1029.

<sup>151</sup> *Id.* at 1030.

<sup>152</sup> *Id.*

<sup>153</sup> A defendant can still “structure its primary conduct” to avoid such a class action, *Ford*, 141 S. Ct. at 1030, because if a defendant makes no effort to serve the market in a particular state, specific jurisdiction would not be available for any individual in-state plaintiff who might initiate a class action in that state to begin with. Or, if specific jurisdiction nonetheless exists for an in-state plaintiff’s claim for an especially idiosyncratic reason, that idiosyncrasy would likely make it impossible to certify a nationwide class action under Rule 23’s requirements.

<sup>154</sup> See Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 499 (2012) (“[T]here is potentially a circular quality to the idea that jurisdiction must be foreseeable in the sense that defendants ‘should reasonably anticipate being haled into court’ in the forum state. It is, after all, the jurisdictional principles *themselves* that would make jurisdiction foreseeable.” (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980))).

<sup>155</sup> *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 777 (1984).

<sup>156</sup> See Steinman, *Access to Justice*, *supra* note 5, at 1457 (“Reconciling *Keeton* and *Bristol-Myers* is a bit of a challenge. As Justice Sotomayor pointed out in her *Bristol-Myers* dissent, the logic of *Keeton* would seem to support jurisdiction in a multistate proceeding like *Bristol-Myers*.”).

<sup>157</sup> *Id.* at 1459.

sion reaffirmed *Keeton*.<sup>158</sup> To the extent that the ultimate conclusion in *Bristol-Myers* is hard to reconcile with these broader principles, that is all the more reason to read *Bristol-Myers* narrowly rather than expansively.<sup>159</sup> At the very least, courts should not infer that *Bristol-Myers* has undermined these general principles.

One final related point deserves clarification. To find that a state can have personal jurisdiction regarding a class that includes out-of-state class members is not to say that differences in substantive law among states may be ignored. That is the clear upshot of the *Shutts* decision, as described above.<sup>160</sup> Accordingly, upholding personal jurisdiction will not upset any interest the defendant in such a class action has in a particular state's substantive law governing certain categories of class members. On this front as well, the prerequisites to class certification themselves provide a further check. In some situations, the differences in substantive law within a proposed nationwide class can be so significant that the class cannot be certified.<sup>161</sup> Those differences may render the out-of-state class members' claims atypical for purposes of Rule 23(a)(3); they may prevent common questions from predominating for purposes of Rule 23(b)(3); or they may mean that final injunctive relief is not "appropriate respecting the class as a whole" for purposes of Rule 23(b)(2). If so, the proposed class will not be certified and the personal jurisdiction question becomes a moot point.

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<sup>158</sup> *Bristol-Myers*, 137 S. Ct. at 1782 (acknowledging "our holding in *Keeton*"). There is nothing unique about the defamation claims at issue in *Keeton* that would suggest they warrant a more expansive approach to personal jurisdiction than the kind of class actions addressed in this Article. To the contrary, the concern when *Keeton* was litigated was whether the scope of personal jurisdiction should be *more constrained* in defamation cases, because of the First Amendment implications. The Supreme Court rejected that position, see *Calder v. Jones*, 465 U.S. 783, 790 (1984) (noting that the "infusion" of First Amendment considerations "into the jurisdictional analysis . . . would needlessly complicate an already imprecise inquiry"); *Keeton*, 465 U.S. at 780 n.12 ("As noted in *Calder* . . . , we reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause."), but it certainly did not suggest that defamation claims were deserving of especially broad jurisdictional reach.

<sup>159</sup> See Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1783–92 (2013).

<sup>160</sup> See *supra* notes 55–57 and accompanying text.

<sup>161</sup> See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 743 (5th Cir. 1996) (reversing class certification under Federal Rule of Civil Procedure 23 in part because the district court "failed to perform its duty to determine whether the class action would be manageable in light of state law variations").

*B. Analogies: Treatment of Unnamed Class Members in Other Contexts*

Some courts have sought to address the personal jurisdiction puzzle in terms of whether unnamed class members are “parties” to the lawsuit.<sup>162</sup> The problem, however, is that there is not a monolithic answer to this question. In the most formal sense, unnamed class members are not parties to the litigation—even when they qualify as members of a certified class action. Unnamed class members do not appear in the case’s caption;<sup>163</sup> they do not file any of the pleadings that are authorized in federal court;<sup>164</sup> and they need not “ratify, join, or be substituted into the action” under Rule 17.<sup>165</sup> That said, unnamed class members still have some participation rights. For example, they may object to a proposed class action settlement,<sup>166</sup> and they can appeal the district court’s handling of such an objection.<sup>167</sup>

In light of all this, the Supreme Court has explained that unnamed class members “may be parties for some purposes and not for others” and 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.”<sup>168</sup> If there is light to be shed from the relevance of unnamed class members to various procedural inquiries, it is worth exploring the treatment of unnamed class members with respect to issues that are potentially analogous to personal jurisdiction: subject-matter jurisdiction and venue.<sup>169</sup>

Federal subject-matter jurisdiction confirms that there is nothing at all radical about the notion that the claims of unnamed class members need not be subjected to independent jurisdictional scrutiny as if they had filed their own, separate, stand-alone actions. Under Article

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<sup>162</sup> See, e.g., *Fitzhenry-Russell v. Dr. Pepper Snapple Grp.*, No. 17-cv-00564, 2017 WL 4224723, at \*5 (N.D. Cal. Sept. 22, 2017) (inquiring whether personal jurisdiction is “one of those contexts in which an unnamed class member should be considered as parties”); *Sousa v. 7-Eleven, Inc.*, No. 19-CV-2142, 2020 WL 6399595, at \*4 (S.D. Cal. Nov. 2, 2020) (“[U]nnamed class members are not ‘parties’ for purposes of assessing personal jurisdiction over Defendant, and this Court declines to extend *Bristol-Myers* to unnamed class members in a putative class action.”).

<sup>163</sup> See FED. R. CIV. P. 10(a).

<sup>164</sup> See *id.* 7(a).

<sup>165</sup> *Id.* 17(a)(3).

<sup>166</sup> See *id.* 23(e)(5)(A).

<sup>167</sup> *Devlin v. Scardelletti*, 536 U.S. 1, 10–11 (2002) (holding that unnamed class members who objected to a settlement in the district court may appeal the approval of that settlement regardless of whether they formally intervened).

<sup>168</sup> *Id.* at 10.

<sup>169</sup> See *supra* notes 89–92 and accompanying text (describing Judge Wood’s discussion of these issues in *Mussat*).

III, which provides a constitutional outer boundary for the subject-matter jurisdiction of federal courts, jurisdiction can exist only with respect to the “case[s]” or “controversies” enumerated in Section 2 of that article.<sup>170</sup> But ever since the Supreme Court’s decision in *United Mine Workers v. Gibbs*, more than half a century ago, the following principle has been clear: The Constitution permits jurisdiction over claims that lack an independent basis for federal subject-matter jurisdiction as long as those claims arise from the same “common nucleus of operative fact” as the claims that do fall within one of the categories authorized by Article III.<sup>171</sup> This includes claims by additional plaintiffs, even when those plaintiffs have no claims that would independently satisfy Article III requirements.<sup>172</sup> That logic applies with equal—indeed greater—force to unnamed members of a plaintiff class, who are not formally parties to the case.<sup>173</sup>

Indeed, the Court’s interpretation of Article III is informed by the same practical considerations that support personal jurisdiction for claims of unnamed class members. As the Court explained in *Gibbs*, “[i]ts justification lies in considerations of judicial economy, convenience and fairness to litigants.”<sup>174</sup> So too would an approach to personal jurisdiction that permits jurisdiction where (a) personal jurisdiction is proper with respect to the named plaintiff’s claims against the defendant, and (b) unnamed class members’ claims concern “a common nucleus of operative fact.” Permitting a single class action to proceed in a forum that is clearly appropriate for the representative’s claim will likewise permit an efficient, consistent resolution of related claims.<sup>175</sup>

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<sup>170</sup> U.S. CONST. art. III, § 2.

<sup>171</sup> 383 U.S. 715, 725 (1966).

<sup>172</sup> 28 U.S.C. § 1367(a) (permitting federal courts to assert “supplemental jurisdiction” over “claims that involve the joinder or intervention of additional parties”); *see also* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005) (noting that “claims of other plaintiffs” can be included “in the same Article III case or controversy”); *id.* at 558 (“[T]he last sentence of § 1367(a) makes clear that the provision grants supplemental jurisdiction over claims involving joinder or intervention of additional parties.”).

<sup>173</sup> *See Devlin*, 536 U.S. at 9–10 (“Nonnamed class members . . . may be parties for some purposes and not for others.”).

<sup>174</sup> *Gibbs*, 383 U.S. at 726.

<sup>175</sup> *See, e.g.,* *Dennis v. IDT Corp.*, 343 F. Supp. 3d 1363, 1367 (N.D. Ga. 2018) (rejecting the argument that *Bristol-Myers* foreclosed a nationwide class action in the named plaintiff’s home state in part because “Congress enabled class actions to promote efficiency and economy in litigation”); *Jones v. Dupuy Synthes Prods., Inc.*, 330 F.R.D. 298, 312 (N.D. Ala. 2018) (“Given the requirement that class claims be coherent, it would be far less burdensome for Defendants to come to this forum to litigate the putative class members’ claims than it was for the defendants in *Bristol-Myers* who faced the possibility of each plaintiff bringing unique claims against them.”); *Marcus & Ostrander*, *supra* note 7, at 1549 (stating that “a single multistate class action surely compares favorably by an efficiency

The notion of a constitutional “case” or “controversy” is also instructive because it aligns with the inquiry required to establish specific jurisdiction. Specific jurisdiction requires an “affiliation between the forum and the underlying controversy” and applies to the “adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.”<sup>176</sup> As discussed above, the requirements of Rule 23 ensure that the adjudication of issues in connection with the claims of absent class members will bear a strong connection to the named plaintiff’s own claims, as to which personal jurisdiction is clearly proper.<sup>177</sup>

Non-constitutional aspects of federal subject-matter jurisdiction also support this approach—as Judge Wood emphasized in the Seventh Circuit’s *Mussat* decision.<sup>178</sup> Consider the complete diversity requirement of 28 U.S.C. § 1332(a).<sup>179</sup> For nearly a century, the Supreme Court has made clear that the presence of unnamed class members who are citizens of the same state as a defendant does not destroy complete diversity; only the citizenship of named class representatives affects the jurisdictional inquiry.<sup>180</sup> As the Court put it in *Snyder v. Harris*:

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metric to several single state ones”); Wilf-Townsend, *Boundaries*, *supra* note 7, at 1648 (“The marginal litigation burdens on the defendant from permitting jurisdiction in the model class will be low.”).

<sup>176</sup> *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780–81 (2017) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

<sup>177</sup> See *supra* notes 141–49 and accompanying text. To be clear, this argument would also support asserting jurisdiction over claims by additional named plaintiffs, at least in cases where—as under Federal Rule 20—such joinder requires a sufficient transactional relationship between those plaintiffs’ claims. That *Bristol-Myers* overlooked this consideration should not be grounds for expanding its logic to class actions, a situation that the Court consciously opted not to address. See *Bristol-Myers*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting) (“The Court today does not confront the question whether its opinion here would also apply to a class action . . . .”); cf. *supra* notes 156–59 and accompanying text (arguing that shortcomings in the *Bristol-Myers* majority opinion support reading the decision narrowly rather than broadly).

<sup>178</sup> See *supra* notes 93–98 and accompanying text.

<sup>179</sup> See, e.g., *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996) (“In *Strawbridge v. Curtiss*, 3 Cranch 267 (1806), this Court construed the original Judiciary Act’s diversity provision to require complete diversity of citizenship. We have adhered to that statutory interpretation ever since.”). The line of cases on § 1332(a) diversity jurisdiction does not apply to the Class Action Fairness Act’s special form of diversity jurisdiction, which has different rules for both diversity of citizenship and amount in controversy. See 28 U.S.C. § 1332(d).

<sup>180</sup> See, e.g., *Snyder v. Harris*, 394 U.S. 332, 340 (1969); *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 366–67 (1921). See generally 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE* § 1755 (4th ed. 2022) (noting that both before and after the 1966 amendment to Rule 23 “only the citizenship of the named representatives would be taken into account in determining if complete diversity existed”).

[I]f one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State.<sup>181</sup>

On this issue, the Supreme Court's case law treats unnamed members of a plaintiff class differently than plaintiffs who are joined as named parties in a mass action. The citizenship of named plaintiffs must be considered when applying § 1332(a); that is the upshot of the complete-diversity rule, which has governed the diversity-jurisdiction statute for more than two centuries.<sup>182</sup> It provides, therefore, a concrete example where the Supreme Court has drawn precisely the distinction that would render *Bristol-Myers* irrelevant to class actions. Even if *Bristol-Myers* requires independent jurisdictional scrutiny of each joined plaintiff's individual claims against the defendant (just as the complete-diversity rule requires independent consideration of each joined plaintiff's citizenship for purposes of diversity jurisdiction), courts need not determine whether there would be personal jurisdiction over each unnamed class member's hypothetical individual claims against the defendant (just as *Snyder* does not require courts to consider the citizenship of each potential member of the class for purposes of diversity jurisdiction).<sup>183</sup>

Federal venue requirements provide another valuable analogy. For venue over class actions, it has long been the rule that "only the residence of the named parties is relevant for determining whether venue is proper," and that "intervening and absent class members need not independently satisfy the applicable venue provision."<sup>184</sup> As one court put it, "[v]enue in a class action suit is proper for the entire class if it is proper for the named plaintiffs."<sup>185</sup> On this issue as well, federal courts contrast class members from individually named plaintiffs joined under Rule 20, for whom venue requirements must be met

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<sup>181</sup> *Snyder*, 394 U.S. at 340 (citing *Ben Hur*, 255 U.S. at 366–67).

<sup>182</sup> See *supra* note 179.

<sup>183</sup> See *supra* notes 180–81 and accompanying text.

<sup>184</sup> 7A WRIGHT ET AL., *supra* note 180, § 1757; see also *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020) ("Nor are absent class members considered when a court decides whether it is the proper venue."); 14D CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD D. FREER, *FEDERAL PRACTICE & PROCEDURE* § 3807 (4th ed. 2022) ("In class action litigation, the relevant residence is that of the named representative. The residences of other class members are irrelevant.")

<sup>185</sup> *Dunn v. Sullivan*, 758 F. Supp. 210, 216 (D. Del. 1991), *amended*, 776 F. Supp. 882 (D. Del. 1991); see also *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1129 (2d Cir. 1974) (noting that the venue statute "may be satisfied if only the named parties to a class action meet its requirements").

“as to each party”<sup>186</sup>— whether venue hinges on a party’s residence<sup>187</sup> or on where a party’s claim arose.<sup>188</sup> This distinction further supports the notion that *Bristol-Myers’s* reasoning for mass actions should not be transplanted to the claims of unnamed class members in the class-action context.

There are some jurisdictional issues, however, where federal courts have required independent scrutiny of unnamed class members’ individual claims. In interpreting § 1332(a)’s amount-in-controversy requirement, the Supreme Court previously held that federal jurisdiction did not exist over claims by absent class members whose claims failed to exceed that threshold.<sup>189</sup> But this line of cases was legislatively overturned by Congress’s enactment of the supplemental-jurisdiction statute in 1990.<sup>190</sup>

Another area that touches on subject-matter jurisdiction and class actions is Article III standing. In the Supreme Court’s recent decision in *TransUnion LLC v. Ramirez*, Justice Kavanaugh’s majority opinion observed that “[e]very class member must have Article III standing in order to recover individual damages” and that “Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.”<sup>191</sup> The *TransUnion* decision has already invited significant criticism,<sup>192</sup> and its observation regarding “uninjured” unnamed class members is in tension with prior case law.<sup>193</sup> But even if one accepts the premise that Article III

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<sup>186</sup> 14D WRIGHT ET AL., *supra* note 184, § 3807 (“Faced with multi-party cases, the Supreme Court long ago held that venue must be proper as to each party.”).

<sup>187</sup> *See id.* (“[A]s a statutory matter . . . venue is not proper merely because one plaintiff resided in the district if another plaintiff resided elsewhere and that suit cannot be brought based on residence against multiple defendants in a district in which some but not all of them resided.” (footnotes omitted)).

<sup>188</sup> *See id.* (“[T]ransactional venue must be proper for each party. The fact that a claim for some of the plaintiffs or against some of the defendants arose in a particular district does not make that district a proper venue for parties as to whom the claim arose somewhere else.”).

<sup>189</sup> *See Zahn v. Int’l Paper Co.*, 414 U.S. 291, 292–93 (1973).

<sup>190</sup> *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558–72 (2005) (concluding that the enactment of 28 U.S.C. § 1367 in 1990 overturned *Zahn* and permits supplemental jurisdiction over claims of unnamed class members that are individually below § 1332(a)’s amount-in-controversy threshold).

<sup>191</sup> 141 S. Ct. 2190, 2208 (2021).

<sup>192</sup> *See, e.g.*, Cass R. Sunstein, *Injury In Fact, Transformed* 12 (Mar. 12, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4055414> [<https://perma.cc/2HK2-QVAV>] (calling *TransUnion* a “far more radical ruling” than the Supreme Court’s earlier decisions on Article III standing).

<sup>193</sup> *See, e.g.*, *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) (“In a class action, standing is satisfied if at least one named plaintiff meets the requirements.”). Although the Supreme Court had long made clear that the named plaintiff must have suffered the “injury” required for Article III standing, *see, e.g.*, *Lewis v.*

standing entails an inquiry into the particular features of each unnamed class member's claims, the standing question bears a very attenuated connection to the personal jurisdiction issue that is this Article's focus. Standing doctrine purportedly derives from the federal courts' "proper function in a limited and separated government,"<sup>194</sup> and the premise that federal courts may "decide only matters 'of a Judiciary Nature.'"<sup>195</sup> Standing—at least when framed in this way<sup>196</sup>—involves whether a particular lawsuit or remedy even falls within the "judicial power."<sup>197</sup> Personal jurisdiction over multistate class actions does not implicate this question.

Moreover, a standing analogy ultimately proves too much. Not even a single claimant—whether a named plaintiff or an absent class member—can append a claim for which she lacks standing to a claim for which she has standing.<sup>198</sup> In the personal jurisdiction context, however, *Keeton* recognizes no such obstacle to personal jurisdiction over claims for damages that bear no direct connection to the forum state.<sup>199</sup> And the Supreme Court recognized this aspect of *Keeton* in the *Bristol-Myers* decision itself.<sup>200</sup>

One way to synthesize the analogies above is to distinguish between jurisdictional and venue issues that relate to the geographic characteristics of claimants or claims and issues that relate to other characteristics—such as the value of a claim or the qualitative or quantitative sufficiency of a claimant's injury. The issues for which independent assessment of unnamed class members is not necessary

Casey, 518 U.S. 343, 357 (1996), it had never indicated that an individual assessment of each unnamed class member's injury was required. Perhaps some money-damages class actions require a different approach to Article III standing than class actions seeking injunctive relief, as Justice Kavanaugh's language regarding "individual damages" suggests. *TransUnion*, 141 S. Ct. at 2208. But his more general assertion regarding "the power to order relief to any uninjured plaintiff, class action or not," *id.*, may be a troubling overstatement.

<sup>194</sup> *TransUnion*, 141 S. Ct. at 2203 (quoting John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1224 (1993)).

<sup>195</sup> *Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 430 (M. Farrand ed., 1911)).

<sup>196</sup> Many have criticized prevailing conceptions of Article III standing. See, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 465–500 (2008); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 290 (1988); James E. Pfander, *Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 175–82 (2018); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1451–61 (1988).

<sup>197</sup> U.S. CONST. art. III.

<sup>198</sup> See *TransUnion*, 141 S. Ct. at 2208 ("[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages).").

<sup>199</sup> See *supra* notes 58–64 and accompanying text.

<sup>200</sup> See *supra* note 158.

are those involving geographic characteristics: the complete diversity requirement and venue. Personal jurisdiction likewise concerns such geographic characteristics. Those are more suitable analogies, therefore, than either the interpretation of § 1332(a)'s amount-in-controversy requirement (prior to the 1990 enactment of the supplemental-jurisdiction statute) or the "injury" requirement of Article III standing. And those geographic analogies strongly support this Article's proposal.

### C. Preclusion and Representation

Another procedural issue that can inform the approach to personal jurisdiction over class actions is preclusion. Consider Justice Alito's handling of *Keeton* in his *Bristol-Myers* opinion. He wrote that *Keeton* "concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State."<sup>201</sup> When an in-state plaintiff succeeds in certifying a class action, the scope of claim preclusion is the entire class. And sensibly so, given the prerequisites and procedures surrounding class certification and the litigation of class actions.<sup>202</sup>

Indeed, both claim preclusion and specific jurisdiction hinge on transactional relationships. Specific jurisdiction assesses the "relationship among the defendant, the forum, and the litigation."<sup>203</sup> And determining the preclusive scope of a particular judgment hinges on the relationship between the litigation leading to that judgment and the universe of future claims that would be precluded as a result.<sup>204</sup>

Consider a case like *Keeton*.<sup>205</sup> Preclusion would likely prevent a plaintiff like *Keeton* from filing separate lawsuits in each of the states where readers were deceived by the defendant's defamatory statements. This is because claim preclusion bars not only claims or theo-

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<sup>201</sup> *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1782 (2017).

<sup>202</sup> *See Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (noting that a "class action" where a non-party "was adequately represented by a party who actively participated in the litigation" is an "exception[]" that "temper[s] [the] basic rule" against non-party preclusion); *see also id.* at 894 ("Representative suits with preclusive effect on nonparties include properly conducted class actions."); *id.* at 896–98 (noting that nonparty preclusion is improper when, unlike a class action, "the original plaintiffs had not understood themselves to be acting in a representative capacity and . . . there had been no special procedures to safeguard the interests of absentees").

<sup>203</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1028 (2021) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

<sup>204</sup> *See infra* note 206.

<sup>205</sup> *See supra* notes 58–64 and accompanying text.

ries of relief that were actually pursued in the judgment-generating case; it can also bar claims that involve “a common nucleus of operative fact” or that “arise from the same transaction.”<sup>206</sup> Preclusion, it is often said, forbids “claim-splitting.”<sup>207</sup> It makes sense, therefore, to permit a plaintiff like Keeton to pursue in New Hampshire aspects of her claim that bear no direct connection to Hustler’s distribution of magazines in that state (say, claims based on injury to her reputation or financial prospects that occurred in California based on the distribution of the false stories in California) but that bear the sort of transactional relationship to her New Hampshire-based claims that would trigger claim preclusion. Insofar as claim preclusion principles would deem the New Hampshire judgment to include California-based injuries,<sup>208</sup> the lawsuit may include those California-based injuries without exceeding the jurisdictional reach of New Hampshire’s courts.

This same dynamic does not exist for a mass action like in *Bristol-Myers*. It is only the direct assertion of a claim by an out-of-state plaintiff that gives the judgment preclusive effect as to that individual. If none of the Texas or Ohio plaintiffs affirmatively made the decision to join the California lawsuit, the California judgment would not preclude them.<sup>209</sup> Preclusion occurs precisely because those out-of-state plaintiffs participate in their own capacity—not as passive parties represented by others.

Viewed through the preclusion lens, a class action is more like *Keeton* than *Bristol-Myers*. Like in *Keeton*, the judgment reached in a class action has preclusive effect vis-à-vis the entire class. That preclusive effect exists regardless of whether class members choose to initiate their own lawsuit or participate in the litigation. Indeed, one of the situations where class actions are most valuable is when individual litigation is not practically or economically feasible.<sup>210</sup> That condition

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<sup>206</sup> *Brownback v. King*, 141 S. Ct. 740, 747 n.3 (2021) (“Claim preclusion prevents parties from relitigating the same ‘claim’ or ‘cause of action,’ even if certain issues were not litigated in the prior action. . . . Suits involve the same ‘claim’ or ‘cause of action’ if the later suit ‘arise[s] from the same transaction’ or involves a ‘common nucleus of operative facts.’”) (quoting *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.*, 140 S. Ct. 1589, 1594–95 (2020)).

<sup>207</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 24 (AM. L. INST. 1982).

<sup>208</sup> This presumes, of course, that New Hampshire law would permit such a defamation plaintiff to recover out-of-state damages. *See supra* note 64. If not, then claim preclusion would not apply. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26 (AM. L. INST. 1982) (noting exceptions to the general rule against claim splitting).

<sup>209</sup> *See, e.g., Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (“It is a principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party . . . .” (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940))).

<sup>210</sup> *See infra* note 277.

alone does not automatically permit a class action—much less a class action of nationwide scope. As discussed above, the other prerequisites of Rule 23 would have to be met.<sup>211</sup> But when they are met, the preclusive effect of the class judgment will appropriately cover the entire class—just as the preclusive effect of the judgment in a case like *Keeton* will cover damages stemming from both in-state and out-of-state activity.

This understanding applies even though class members have the right to opt out, and thereby to avoid preclusion.<sup>212</sup> And it applies even when the case involves an opt-in collective action, such as exists under the Fair Labor Standards Act (FLSA).<sup>213</sup> These procedures can, to be sure, affect precisely whom a classwide judgment will ultimately bind. Opt-outs are freed from the preclusive effects of a class action.<sup>214</sup> And an opt-in collective action affects only those who provide affirmative consent.<sup>215</sup> But that does not change the basic structure of the class action in terms of its claim-preclusive effect on those who are part of that class (or the collective) as the case moves forward. In both situations, the named plaintiffs proceed as representatives of the broader group.<sup>216</sup> Although an FLSA collective action will bind only those who consent, those opt-ins need not affirmatively participate in the litigation of their claims—it remains a representative action brought “for and in [their] behalf.”<sup>217</sup>

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<sup>211</sup> See *supra* notes 141–44 and accompanying text.

<sup>212</sup> See FED. R. CIV. P. 23(c)(2)(B)(v) (noting, for Rule 23(b)(3) class actions, “that the court will exclude from the class any member who requests exclusion”); see also *supra* notes 52–54 and accompanying text (discussing *Shutts*).

<sup>213</sup> See *supra* note 125 (describing the circuit split regarding the relevance of *Bristol-Myers* to FLSA collective actions).

<sup>214</sup> Although Rule 23 guarantees the right to opt out only for Rule 23(b)(3) class actions, it does not categorically forbid courts from permitting opt-outs in other kinds of class actions, such as ones seeking certification for purposes of injunctive relief under Rule 23(b)(2). See, e.g., *Eubanks v. Billington*, 110 F.3d 87, 94–95 (D.C. Cir. 1997) (holding that Rule 23 affords district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions); *Lemon v. Int’l Union of Operating Eng’rs Loc. No. 139*, 216 F.3d 577, 582 (7th Cir. 2000) (similar); see also MANUAL FOR COMPLEX LITIGATION § 21.221 & n.821 (4th ed. 2004) (“A court is not precluded from defining a class under Rule 23(b)(1) or (b)(2) to include only those potential class members who do not opt out of the litigation.”).

<sup>215</sup> See 29 U.S.C. § 216(b) (authorizing an action “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated” but requiring that “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought”).

<sup>216</sup> See Wilf-Townsend, *Boundaries*, *supra* note 7, at 1631 (“A core distinction of class litigation is that it is representative litigation.”).

<sup>217</sup> 29 U.S.C. § 216(b) (providing that such actions are “for and in behalf of” employees who “give[] . . . consent in writing”); see also *Halle v. W. Pa. Allegheny Health Sys. Inc.*, 842 F.3d 215, 227 (3d Cir. 2016) (noting “the opt-in plaintiffs’ passive role in the suit”). Although courts often highlight the difference between Rule 23 class actions and FLSA

### III OF BULLETS DODGED AND ROADS NOT TRAVELED

The arguments in favor of this Article’s proposal stand on their own.<sup>218</sup> The proposal provides a straightforward, workable approach to personal jurisdiction over class actions that is consistent with long-standing practice and the broader principles that animate the Supreme Court’s case law. An additional practical benefit of this Article’s proposal is that courts would not have to resolve a host of other questions that have, so far, eluded coherent answers. One set of questions concerns the timing of—and the procedural mechanism for—mounting a *Bristol-Myers*-based challenge to a multistate class action. Another set of questions involves the extent to which federal courts might have broader jurisdictional reach than the state courts whose jurisdiction was at issue in *Bristol-Myers* itself.

#### A. *Timing and Procedural Mechanisms*

Consider first the issue of timing. If courts insist that a class action may include only class members who could independently establish personal jurisdiction over a defendant in a hypothetical separate lawsuit, when may—or when must—a defendant make that jurisdictional challenge?

Two appellate courts have addressed this question to date. In *Molock v. Whole Foods Market Group, Inc.*, the D.C. Circuit considered a nationwide class action to recover lost wages, which was filed in D.C. federal court against a Delaware corporation headquartered in Texas.<sup>219</sup> Prior to class certification, the defendant argued that the district court lacked personal jurisdiction with respect to the claims of putative class members who resided outside of D.C.<sup>220</sup> The district court denied the motion—siding with those federal courts that had

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collective actions, e.g., *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013) (“Rule 23 actions are fundamentally different from collective actions under the FLSA.”), such generalized statements typically focus on the FLSA’s opt-in requirement. *See id.* at 75 (emphasizing that employees “become parties to a collective action only by filing written consent with the court”). The two devices remain similar in their representative nature, in their shared quality that members of the class or collective may rely entirely on the named party’s litigation of claims on their behalf, and in the fact that the result of the litigation will have preclusive effect vis-à-vis the broader group (whether for good or for ill). Although a full analysis of FLSA collective actions is beyond the scope of this Article, their opt-in nature should be no obstacle to asserting personal jurisdiction over the claims of out-of-state employees.

<sup>218</sup> *See supra* Part II.

<sup>219</sup> 952 F.3d 293, 295 (D.C. Cir. 2020).

<sup>220</sup> *Id.* at 295.

rejected the application of *Bristol-Myers* to class actions<sup>221</sup>—but it certified the issue for immediate appeal.<sup>222</sup>

The D.C. Circuit affirmed, but on the alternative ground of timing: A defendant's motion to dismiss the claims of putative class members under *Bristol-Myers* is premature prior to class certification.<sup>223</sup> Unlike unnamed members of a certified class action—who may be treated as parties for some purposes but nonparties for others—putative class members of a class that has yet to be certified “are *always* treated as nonparties.”<sup>224</sup> As Judge Tatel explained: “It is class certification that brings unnamed class members into the action and triggers due process limitations on a court’s exercise of personal jurisdiction over their claims.”<sup>225</sup>

A recent Fifth Circuit decision addressed a different facet of the timing question. *Cruson v. Jackson National Life Insurance Co.* involved a nationwide class action brought in Texas federal court by Texas named plaintiffs against an insurance company incorporated in Michigan.<sup>226</sup> The defendant's initial Rule 12 motions—filed prior to class certification—had not argued a lack of personal jurisdiction.<sup>227</sup> So when it later tried to assert that the court lacked personal jurisdiction with respect to the claims of non-Texas class members,<sup>228</sup> the district court found that the personal jurisdiction issue had been waived.<sup>229</sup>

The Fifth Circuit found that the defendant had not waived its personal jurisdiction argument vis-à-vis the out-of-state putative class members.<sup>230</sup> Although Rule 12 provides that a defendant can waive its personal jurisdiction defense by omitting it from an earlier motion, such a waiver extends only to “a defense or objection that was available to the party” at the time.<sup>231</sup> Judge Duncan's opinion explained: “The issue, then, is whether the personal jurisdiction defense was

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<sup>221</sup> See *Molock v. Whole Foods Mkt. Grp., Inc.*, 297 F. Supp. 3d 114, 126–27 (D.D.C. 2018).

<sup>222</sup> See *Molock*, 952 F.3d at 295 (“The district court . . . certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Whole Foods then filed a petition for leave to appeal, which this court granted.”).

<sup>223</sup> *Id.* (“We affirm, but on alternative grounds. Absent class certification, putative class members are not parties before a court, rendering the defendant’s motion premature.”).

<sup>224</sup> *Id.* at 297.

<sup>225</sup> *Id.* at 298.

<sup>226</sup> 954 F.3d 240, 246 (5th Cir. 2020).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 247.

<sup>229</sup> *Id.* at 248 (“[T]he district court . . . held that Jackson had waived any personal jurisdiction defense by failing to raise it in its Rule 12 motions and, alternatively, by litigating on the merits of plaintiffs’ claims.”).

<sup>230</sup> *Id.* at 249.

<sup>231</sup> FED. R. CIV. P. 12(g)(2); see *Cruson*, 954 F.3d at 249–50.

‘available’ under Rule 12(g)(2) when Jackson filed its Rule 12 motions. We conclude it was not.”<sup>232</sup> His reasoning echoed that of the D.C. Circuit in *Molock*. The non-Texas class members “were not yet before the court when Jackson filed its Rule 12 motions” because “[w]hat brings putative class members before the court is certification.”<sup>233</sup> At the time the defendant filed its Rule 12 motions—pre-class-certification—“the only live claims belonged to the named plaintiffs, all Texas residents.”<sup>234</sup> A recent Ninth Circuit decision—*Moser v. Benefytt, Inc.*<sup>235</sup>—reached the same conclusion; it reasoned that a defendant “could not have moved to dismiss on personal jurisdiction grounds the claims of putative class members who were not then before the court” and was not required “to seek dismissal of hypothetical future plaintiffs.”<sup>236</sup>

Another timing question involves appellate review. If, contrary to the views in *Molock* and *Cruson*, a defendant either can or must raise its personal-jurisdiction challenge to unnamed class members prior to class certification, can interlocutory appellate review be sought under Federal Rule 23(f)? Rule 23(f) authorizes appeals—prior to final judgment—“from an order granting or denying class-action certification under this rule.”<sup>237</sup> Would a district court’s pre-certification ruling on a defendant’s *Bristol-Myers*-based motion qualify?

The Seventh Circuit has held that Rule 23(f) can allow immediate appellate review of such a ruling. In *Mussat*, the federal trial court had granted the defendant’s motion to strike the class definition—prior to any final decision on class certification—based on the defendant’s personal-jurisdiction argument.<sup>238</sup> The defendant, however, argued that Rule 23(f) did not permit appellate review of the district court’s decision, pursuant to Rule 12, granting the defendant’s motion to strike the plaintiff’s class definition “insofar as *Mussat* proposed to assert claims on behalf of people with no contacts to Illinois.”<sup>239</sup>

The Seventh Circuit rejected the defendant’s argument, noting the Supreme Court’s recognition in another context that “an order striking class allegations is functionally equivalent to an order denying class certification and therefore appealable under Rule 23(f).”<sup>240</sup> Judge Wood explained that “[t]he cases are clear: Rule 23(f) grants

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<sup>232</sup> *Cruson*, 954 F.3d at 250.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> 8 F.4th 872 (9th Cir. 2021).

<sup>236</sup> *Id.* at 877–78.

<sup>237</sup> FED. R. CIV. P. 23(f).

<sup>238</sup> See *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 443–44 (7th Cir. 2020).

<sup>239</sup> *Id.* at 444.

<sup>240</sup> *Id.* (quoting *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1711 n.7 (2017)).

the courts of appeals jurisdiction to hear interlocutory appeals of orders that expressly or as a functional matter resolve the question of class certification one way or the other.”<sup>241</sup> Furthermore, it was irrelevant that “Mussat still has an opportunity to seek certification of a much narrower class.”<sup>242</sup> As Judge Wood put it:

The district court’s order eliminates all possibility of certifying the nationwide class Mussat sought, and so to that extent it operates as a denial of certification for one proposed class. Rule 23(f) appeals are not limited to cases in which the district court has definitively rejected any and all possible hypothetical classes.<sup>243</sup>

The Fifth Circuit and the Ninth Circuit have also used Rule 23(f) to review a district court’s ruling regarding a class-action defendant’s personal-jurisdiction defense, albeit in slightly different procedural contexts.<sup>244</sup>

Related to these timing questions—at least regarding the timing of the initial motion in the district court—is the proper procedural vehicle for challenging the scope of a class action based on a lack of personal jurisdiction over the claims of absent class members. D.C. Circuit Judge Silberman, dissenting in the *Molock* case, laid out a number of possible options.<sup>245</sup> He took the position that a defendant may properly raise this argument as “a run-of-the-mill attack on class certification at the pleading stage.”<sup>246</sup> But he also noted that some courts had considered such a challenge via a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.<sup>247</sup> And still others had “considered the issue prior to certification on motions to strike allegations from the complaint.”<sup>248</sup> The Ninth Circuit majority in *Moser* also rec-

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> In *Cruson*, the Fifth Circuit relied on Rule 23(f) to review a district court’s finding that the defendant had waived its objection to personal jurisdiction—but without an explicit analysis regarding why that ruling fell within Rule 23(f)’s ambit. *See Cruson v. Jackson Nat’l Life Ins. Co.*, 954 F.3d 240, 248 (5th Cir. 2020). In that case, however, the appeal did not occur until the district court had issued an order certifying the class. *See id.* In *Moser*, the Rule 23(f) appeal also occurred after the district court had certified a class action, *see Moser v. Benefytt, Inc.*, 8 F.4th 872, 875 (9th Cir. 2021), and the Ninth Circuit concluded that it could review the district court’s finding that the defendant had waived its personal-jurisdiction objection in reviewing “the class certification decision itself.” *Id.* at 876–77.

<sup>245</sup> *See Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 300–10 (D.C. Cir. 2020) (Silberman, J., dissenting). Judge Silberman, at least, saw “no meaningful difference between the various plausible options in this context.” *Id.* at 304 n.7.

<sup>246</sup> *Id.* at 301.

<sup>247</sup> *Id.* at 304 & n.7 (collecting cases).

<sup>248</sup> *Id.* at 304 n.7 (citing *Jones v. Deput Synthes Prods., Inc.*, 330 F.R.D. 298 (N.D. Ala. 2018); *Al Haj v. Pfizer Inc.*, 338 F. Supp. 3d 815 (N.D. Ill. 2018)); *see also* FED. R. CIV. P. 12(f) (“The court may strike from a pleading . . . any redundant, immaterial, impertinent,

ognized that a defendant could move to strike class allegations as to which personal jurisdiction would not exist.<sup>249</sup>

Under this Article's approach, neither the timing nor the procedural mechanism issues must be resolved. There is no need for a distinct challenge to personal jurisdiction regarding unnamed class members' claims because everything ultimately hinges on whether Rule 23's class-certification requirements are satisfied. If they are, then specific jurisdiction is constitutional with respect to the class action as a whole.<sup>250</sup> If they are not, then the absent class members' claims are no longer at issue.

### B. Federalism (in Several Dimensions)

Courts contending with the effect of *Bristol-Myers* on class actions also have had to confront several hard questions relating to federalism. First is whether the impact of *Bristol-Myers* on class actions is different in state court than in federal court. Justice Alito's *Bristol-Myers* decision itself recognized how personal jurisdiction's conceptual drivers and underlying rationales support a more expansive approach to the federal judiciary's jurisdictional reach than that of state courts. He wrote: "[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."<sup>251</sup> His reasoning also highlighted "territorial limitations on the power of the respective States," observing that the "sovereignty of each State implies a limitation on the sovereignty of all its sister States."<sup>252</sup> That same concern does not apply when a court acts on behalf of the federal sovereign.

Accordingly, some federal courts have distinguished *Bristol-Myers* on the basis that it involved an assertion of personal jurisdiction by a California state court.<sup>253</sup> The Constitution does, of course,

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or scandalous matter."); Spencer, *supra* note 7, at 50 (arguing that a motion to strike under Rule 12(f) is the proper mechanism for challenging personal jurisdiction over the claims of unnamed class members based on *Bristol-Myers*).

<sup>249</sup> Moser, 8 F.4th at 878 n.2 (noting that the defendant "could have moved to strike Moser's class allegations under Rule 12(f) or Rule 23 based on Moser seeking to represent non-California residents" but that the defendant "did not have to do so").

<sup>250</sup> See *supra* Part II.

<sup>251</sup> *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1783–84 (2017).

<sup>252</sup> *Id.* at 1780.

<sup>253</sup> See, e.g., *Lyngaas v. Curaden AG*, 992 F.3d 412, 434–35 (6th Cir. 2021) ("We follow their lead in holding that *Bristol-Myers Squibb* does not extend to federal class actions."); *In re Takata Airbag Prods. Liab. Litig.*, 396 F. Supp. 3d 1101, 1134–35 (S.D. Fla. 2019) (finding that "*Bristol-Myers* is limited to state court litigation").

permit federal courts to assert a broader jurisdictional reach—when it comes to personal jurisdiction—than it allows state courts. State-court personal jurisdiction is governed by the Fourteenth Amendment’s Due Process Clause,<sup>254</sup> which assesses the defendant’s contacts with the state seeking to assert jurisdiction.<sup>255</sup> Federal-court personal jurisdiction is governed by the Fifth Amendment’s Due Process Clause,<sup>256</sup> which assesses the defendant’s contacts with the United States as a whole.<sup>257</sup>

In most federal-court cases, however, these potential differences between state-court and federal-court jurisdiction wash away. This is because of Federal Rule 4(k)(1)(A). Even though the Fifth Amendment might permit a federal court to assert jurisdiction based on a defendant’s contacts with the entire United States (regardless of where that particular federal court is located), Rule 4(k)(1)(A) generally subjects any particular federal district court to the same jurisdictional constraints that would apply to the state courts of the state where it is located—including the Fourteenth Amendment due process analysis that focuses on the defendant’s contacts with a particular state.<sup>258</sup>

Some courts have further suggested a distinction between cases that assert state-law claims in federal court based on diversity jurisdiction and cases raising federal-question claims.<sup>259</sup> On this theory, the presence of federal substantive law further weakens the interstate fed-

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<sup>254</sup> U.S. CONST. amend. XIV, § 2.

<sup>255</sup> See generally 4 WRIGHT ET AL., *supra* note 15, § 1067.2 (providing an overview of the current constitutional due process requirements for state-court personal jurisdiction).

<sup>256</sup> U.S. CONST. amend. V.

<sup>257</sup> See generally 4 WRIGHT ET AL., *supra* note 15, § 1068.1 (describing the development of Fifth Amendment restrictions on federal-court personal jurisdiction under a “national contacts” standard).

<sup>258</sup> FED. R. CIV. P. 4(k)(1)(A); see, e.g., *Lyngaas*, 992 F.3d at 438–39 (Thapar, J., concurring in part and dissenting in part); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 309 (D.C. Cir. 2020) (Silberman, J., dissenting). Not all assertions of personal jurisdiction in federal court rely on Rule 4(k)(1)(A). If a congressional statute authorizes personal jurisdiction for a particular action, see FED. R. CIV. P. 4(k)(1)(C), then a plaintiff need not rely on Rule 4(k)(1)(A), and the constitutional limits on personal jurisdiction will be set by the Fifth Amendment. See, e.g., *Laurel Gardens, LLC v. McKenna*, 948 F.3d 105, 113, 122–24 (3d Cir. 2020) (applying the Fifth Amendment to a case covered by Rule 4(k)(1)(C)). Likewise, the Fifth Amendment governs cases invoking Rule 4(k)(2), which authorizes personal jurisdiction in federal court for some claims arising under federal law. See FED. R. CIV. P. 4(k)(2); see also, e.g., *Douglass v. Nippon Yusen Kabushiki Kaisha*, 996 F.3d 289, 293, 298–300 (5th Cir. 2021) (applying the Fifth Amendment to Rule 4(k)(2)), *vacated and reh’g en banc granted on other grounds sub nom.* *Douglass v. Kaisha*, 2 F.4th 525, 526 (5th Cir. 2021) (per curiam).

<sup>259</sup> See, e.g., *Sloan v. Gen. Motors LLC*, No. 16-cv-07244, 2019 WL 6612221, at \*7–10 (N.D. Cal. Dec. 5, 2019) (pursuing separate inquiries as to how *Bristol-Myers* might apply in federal question and diversity jurisdiction cases).

eralism concerns Justice Alito invoked in *Bristol-Myers*. As with the previous issue, however, allowing federal-question claims to circumvent *Bristol-Myers*'s state-focused approach does not readily square with Rule 4(k)(1)(A), which seems to incorporate the jurisdictional limits that would apply in state court regardless of the precise basis for federal subject-matter jurisdiction.

Under this Article's proposal, courts need not rely on a distinction between federal-court and state-court class actions. As discussed above, this approach would support specific jurisdiction over class actions even in state court, provided that there is jurisdiction over an in-state plaintiff's claim and that class-certification requirements akin to Rule 23 could be met.<sup>260</sup> If courts did not adopt this approach, however, they would need to explore a number of potential grounds for allowing federal courts to reach class actions that could not proceed in state court, even in cases subject to Rule 4(k)(1)(A). Three of these are summarized briefly in the remainder of this Section.

### 1. *Pendent Personal Jurisdiction*

One uncertain question is the scope of pendent personal jurisdiction in federal court. Numerous federal courts have explicitly endorsed this doctrine—recognizing that the existence of personal jurisdiction over a defendant with respect to some claims can permit personal jurisdiction over that same defendant with respect to claims for which personal jurisdiction might not be proper standing alone.<sup>261</sup> But they have yet to delineate the reach of pendent personal jurisdiction as a distinct concept.<sup>262</sup>

This Article's proposal does not hinge on a specialized doctrine of pendent personal jurisdiction. Rather, it channels well-established Supreme Court principles to support the straightforward rule that for every class action that would satisfy Rule 23's certification requirements, specific jurisdiction applies so long as specific jurisdiction is proper with respect to the named plaintiff who would represent that class.

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<sup>260</sup> See *supra* Part II and note 33.

<sup>261</sup> See 4 WRIGHT ET AL., *supra* note 15, § 1069.7 (describing “common problems that arise when a defendant is subject to personal jurisdiction for one or more claims asserted against it, but not as to another claim or claims” and noting that “[m]any federal courts have attempted to resolve these problems by appealing to something called pendent personal jurisdiction”). For a critique of pendent personal jurisdiction, see Capozzi, *supra* note 7, at 222 (arguing that “both pendent party and pendent claim personal jurisdiction are unlawful”).

<sup>262</sup> See 4 WRIGHT ET AL., *supra* note 15, § 1069.7.

## 2. *Personal Jurisdiction, Initial Service of Process, and Subsequent Steps in the Litigation*

Another issue—and another potential basis for personal jurisdiction over class actions in federal court—involves the interplay between Rule 4’s initial service and jurisdictional provisions and subsequent steps in the litigation such as class certification. Consider the basic scenario that has been this Article’s focus: a nationwide class action, brought by an in-state named plaintiff, against an out-of-state defendant who is actively cultivating a market for its goods or services in all states. Service of process is the basic event that obtains personal jurisdiction over a defendant.<sup>263</sup> At the time process is served, however, the nationwide class has yet to be certified. The only operative claim is the named plaintiff’s individual claim, over which there is surely specific jurisdiction—even in the Rule 4(k)(1)(A) situation where personal jurisdiction in a federal district is subject to the same constitutional constraints that would apply to the state courts where the federal district is located.<sup>264</sup>

Rule 23 explicitly authorizes the certification of a class action *after* service of process occurs, provided the case satisfies the requirements of Rule 23. Rule 23, then, constitutes direct federal authorization for a case to expand to a particular scope. Arguably, the constitutionality of that expansion should be governed by the more expansive Fifth Amendment test that applies when jurisdiction is federally authorized—rather than relying on Rule 4(k)(1)(A)’s default rule that incorporates state-based limits.<sup>265</sup> Under a Fifth Amendment test, personal jurisdiction surely is appropriate over a defendant who is actively seeking to serve and profit from the U.S. market as a whole.<sup>266</sup>

This understanding would offer another potential way to justify personal jurisdiction over the kind of nationwide class actions that are this Article’s focus. Although it is a justifiable theory, it does hinge on a view of the relationship between Rule 4 and other Federal Rules that courts have only just begun to consider.<sup>267</sup> This Article’s pro-

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<sup>263</sup> See FED. R. CIV. P. 4(k) (describing the situations when “[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant”).

<sup>264</sup> See *supra* note 258 and accompanying text (discussing Rule 4(k)(1)(A)).

<sup>265</sup> See *supra* notes 256–57 and accompanying text (describing the test for personal jurisdiction under the Fifth Amendment).

<sup>266</sup> See, e.g., *Lyngaas v. Curaden AG*, 992 F.3d 412, 422–23 (6th Cir. 2021) (discussing the Fifth Amendment test as applied to a defendant subject to personal jurisdiction under Rule 4(k)(2)).

<sup>267</sup> In *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022), the panel majority became the first appellate court to embrace this approach, rejecting the argument that Rule 4(k)(1) “limits a federal court’s jurisdiction after the summons is properly

positional, however, does not require courts to take a position on this intriguing but unresolved issue.

### 3. *Federal Common Law and Personal Jurisdiction*

Federal common law might also provide a basis for personal jurisdiction over class actions in federal court. There are several potential sources of authority for such federal common law. One is Federal Rule 83(b), which states that “[a] judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district’s local rules.”<sup>268</sup> Delineating the circumstances under which service of process on a defendant is sufficient to give a federal court personal jurisdiction is the kind of “practice” that is a suitable subject for federal rulemaking under the Rules Enabling Act.<sup>269</sup> Rule 83(b) gives federal judges the ability to regulate

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served.” *Id.* at 93–97. It reasoned that Rule 4(k)(1)(A) did not require every member of an FLSA collective action to have sufficient contacts with the state where the district court was located, because Rule 4(k)(1) governed solely what was “necessary to establish jurisdiction over a defendant in the first instance.” *See id.* at 96. Accordingly, “after service has been effectuated at least in federal-law actions,” only “the Fifth Amendment’s constitutional limitations limit the authority of the court.” *Id.* Writing in dissent, Judge Barron noted several reasons supporting the majority’s approach, but he called it “controversial” and inconsistent with “the common (if, perhaps unreflective) practice of federal courts.” *Id.* at 102–03 (Barron, J., dissenting). In the *Waters* case specifically, Judge Barron argued in favor of a “more restrained course”—dismissing the grant of permission for an interlocutory appeal to allow the case to “proceed apace in the District Court rather than attempt to resolve on interlocutory review this substantial question of first impression in our Circuit about the best way to read Rule 4(k)(1)(A).” *Id.* at 103–04.

<sup>268</sup> FED. R. CIV. P. 83(b).

<sup>269</sup> Although Federal Rule 82 provides that the Federal Rules of Civil Procedure “do not extend or limit the jurisdiction of the district courts,” *id.* 82, it has long been understood that Rule 82’s “reference . . . to ‘jurisdiction’ refers only to jurisdiction of the subject matter,” 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *FEDERAL PRACTICE & PROCEDURE* § 3141 (3d ed. 2022); *see also id.* (noting that the Federal Rules of Civil Procedure “can and did extend jurisdiction over the person” (citing *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445 (1946))). Although some recent scholarship has questioned this prevailing view, *see* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 711–16 (2019) (calling Rule 4(k) “improperly jurisdictional” in violation of the Rules Enabling Act); Patrick Woolley, *Rediscovering the Limited Role of the Federal Rules in Regulating Personal Jurisdiction*, 56 HOUS. L. REV. 565 (2019), it retains support in the Supreme Court’s decisional precedent, *see Miss. Publ’g Corp.*, 326 U.S. at 445–46 (noting that former Rule 4(f) was a “rule of procedure” that was valid under the Rules Enabling Act even though it operated “to subject petitioner’s rights to adjudication by the district court for northern Mississippi”), and the Court’s rulemaking activity, *see* FED. R. CIV. P. 4 advisory committee’s notes to 1963 amendment (citing *Miss. Publ’g Corp.* as confirming the power to amend the Federal Rules to extend the extraterritorial effectiveness of service); *see also id.* 4 advisory committee’s notes to 1993 amendment (noting that “the revised rule extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States”).

that practice within the outer boundaries set by existing federal law.<sup>270</sup>

Because the Fifth rather than the Fourteenth Amendment would govern such federally authorized sources of personal jurisdiction, Rule 83(b) gap filling would not run afoul of the Constitution.<sup>271</sup> Although courts might resist such use of Rule 83(b) on the grounds that reaching the claims of unnamed out-of-state class members would not be “consistent with” Rule 4(k), that argument presumes that Rule 4(k) sets a ceiling rather than a floor. That is far from self-evident, however. It would be incoherent to assume that a court’s “regulat[ion]” of “practice” under Rule 83 is inconsistent with the Federal Rules whenever they are not explicitly authorized by the Federal Rules. There would be no need for common-law regulation of practice under Rule 83(b) if that regulation is already explicitly authorized by other rules.

Another possible justification for federal common-law-based personal jurisdiction in this context is the need to preserve and promote class actions authorized by Rule 23. In one recent article, Steve Burbank and Tobias Wolff convincingly identified a category of federal common-law doctrines “that aim[] to preserve and promote the provisions of and policies underlying a procedural rule.”<sup>272</sup> When the rules already authorize personal jurisdiction over a named plaintiff’s individual claim against a defendant, and personal jurisdiction would be necessary to permit a class action authorized by Rule 23 to proceed, federal common law properly could be invoked to preserve and promote the Federal Rules and the policies underlying them.

Finally, it is notable that the Supreme Court’s only direct discussion of federal common law authority for personal jurisdiction did not categorically reject the notion that courts had “authority for common-law rulemaking” that would trigger a Fifth Amendment inquiry permitting personal jurisdiction based on the defendant’s contacts with the United States as a whole.<sup>273</sup> The Court’s decision in *Omni Capital International, Ltd. v. Rudolf Wolff & Co.* rejected the argument that it

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<sup>270</sup> See, e.g., *STMicroelectronics, Inc. v. Motorola, Inc.*, 307 F. Supp. 2d 845, 848 (E.D. Tex. 2004) (“Federal Rule of Civil Procedure 83(b) gives district courts the authority to regulate practice in any manner not inconsistent with federal law, the Federal Rules of Civil Procedure, or local rules of the district.”).

<sup>271</sup> See *supra* notes 256–57 and accompanying text (detailing the broader jurisdictional reach of federal courts under Fifth Amendment standards).

<sup>272</sup> See Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. 1, 32 (2018).

<sup>273</sup> See *Omni Cap. Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 108–09 (1987).

should assert such common-law authority in that particular case.<sup>274</sup> But it left open the possibility in other cases.<sup>275</sup>

All of these issues present fascinating questions that have so far eluded clear guidance from federal courts. Each one merits a full article in its own right, and it is beyond the scope of this piece to explore them in detail. One benefit of this Article's particular proposal, however, is that it provides a way for courts to coherently assess personal jurisdiction over class actions without having to resolve these uncertain questions.<sup>276</sup>

#### IV

#### THE BIG PICTURE: WHY IT MATTERS AND HOW TO BALANCE OTHER CONCERNS

Sometimes, class actions are the only way to meaningfully and efficiently enforce the substantive laws that regulate our society.<sup>277</sup> Their ability to spread the costs of litigation across a large group enables valid claims that otherwise would not be economically feasible to pursue. Accordingly, class actions are vital to the core goals of our

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<sup>274</sup> *Id.* at 109.

<sup>275</sup> *See id.* at 108–09; Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509, 559 (2019) (noting this aspect of the *Omni* decision); Steinman, *Access to Justice*, *supra* note 5, at 1416 n.80 (same).

<sup>276</sup> Insofar as these unsettled questions would introduce additional complications into the jurisdictional inquiry, this proposal's ability to side-step those questions promotes the kind of clarity, predictability, and simplicity that is especially desirable for resolving jurisdictional issues. *See Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010) (“[W]e place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible.”); *id.* at 94 (criticizing “[c]omplex jurisdictional tests” because they “complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims,” and “diminish the likelihood that results and settlements will reflect a claim’s legal and factual merits”); *id.* (“Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions.”).

<sup>277</sup> *See In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013) (noting that class actions “may have an important deterrent value” with respect to “so-called negative value claims, that is, claims that could not be brought on an individual basis because the transaction costs of bringing an individual action exceed the potential relief”); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 73 (1975) (“Where the individual claims are too small to make actual compensation of the class members financially feasible, then the importance of the class action for deterrence, and hence for overall efficiency, must be assessed.”); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 108 (2006) (noting that the “deterrence of future wrongdoing” is “the strongest justification for small-claims class action litigation”); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941) (“[T]he suit which might not be brought at all because the demands on legal skill and time would be disproportionate to the original client’s stake can, when turned into a class suit, be brought and handled in a manner commensurate with its magnitude.”).

civil justice system: deterring wrongdoing, providing legally authorized remedies to those who deserve them, and allowing courts to clarify the law through their decisions.

Assessing the value of any particular class action in serving that goal is baked into Rule 23's requirements for class certification. A monetary-damages class action can be certified only if it "is superior to other available methods for fairly and efficiently adjudicating the controversy."<sup>278</sup> And a class action for injunctive or declaratory relief can be certified only if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."<sup>279</sup>

Using *Bristol-Myers* to require independent jurisdictional inquiries for every unnamed member of the class—even where the class otherwise satisfies Rule 23's certification requirements—could undermine this key function of class litigation. Justice Sotomayor's *Bristol-Myers* dissent canvassed many of these concerns. It is true that *Bristol-Myers* is not necessarily fatal to nationwide aggregation; in both the mass-action and class-action contexts, a nationwide suit might be brought in a state where the defendant is subject to general jurisdiction—say, its principal place of business or state of incorporation. But as Justice Sotomayor aptly put it: "[W]hat is the purpose of such limitations? What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated?"<sup>280</sup> Allowing a defendant to insist that a suit be brought in its home state "hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions."<sup>281</sup>

Justice Sotomayor also recognized that, in some situations, the universe of cases where a nationwide suit can be brought is indeed an empty set. If a case involves "two or more defendants headquartered and incorporated in different States," then "[t]here will be no State where both defendants are 'at home,' and so no State in which the suit can proceed."<sup>282</sup> Or if the case involves a foreign defendant, no U.S.

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<sup>278</sup> FED. R. CIV. P. 23(b)(3).

<sup>279</sup> *Id.* 23(b)(2).

<sup>280</sup> *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1789 (2017) (Sotomayor, J., dissenting).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

state will have general jurisdiction.<sup>283</sup> She concluded: “Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, the effect of today’s opinion will be to curtail—and in some cases eliminate—plaintiffs’ ability to hold corporations fully accountable for their nationwide conduct.”<sup>284</sup> To transplant *Bristol-Myers* to class actions would create even more significant obstacles.

One might argue that these practical concerns can be addressed by certifying class actions on a state-by-state basis. And there may be, as discussed above, some cases where differences in state law present an insurmountable obstacle to certification of a nationwide class.<sup>285</sup> But where they do not, insisting on state-by-state class actions rather than a nationwide class action can be just as detrimental to meaningful enforcement.<sup>286</sup> Initiating fifty state-by-state class actions is not easy. There is no phalanx of potential lead plaintiffs from all fifty states that can be deployed every time a defendant’s activities warrant civil redress. The ability to hold defendants fully accountable in that situation often hinges on individual plaintiffs’ reaching out to local attorneys who are experienced and sophisticated enough to appreciate and to act on the broader societal ramifications of the defendant’s course of conduct. Even if there is some other state where the defendant is subject to general jurisdiction and where a nationwide class action might still move forward, to require the plaintiff and her attorney to sue outside their home state tends to make litigation more burdensome and expensive, thereby tilting the playing field more in the defendant’s favor.

These concerns can also arise in cases involving injunctive relief. There has been robust debate in recent years regarding federal courts’ power to issue so-called “nationwide injunctions”<sup>287</sup> in cases where a particular plaintiff argues that a government policy violates federal

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<sup>283</sup> *Id.* For such a foreign defendant, there may be some state that bears a connection to every class member’s individual claims—say, if the defendant engages in or manages its efforts to cultivate the U.S. market through a facility in a particular state, or through a relationship with a distributor or subsidiary based in a particular state. See Steinman, *Access to Justice*, *supra* note 5, at 1432 n.179 (noting that *Bristol-Myers* “does not foreclose the possibility that some state would have enough of a connection to all plaintiffs’ or class members’ claims to support specific jurisdiction”).

<sup>284</sup> *Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

<sup>285</sup> See *supra* notes 160–61 and accompanying text.

<sup>286</sup> See Steinman, *Access to Justice*, *supra* note 5, at 1432 (observing that blocking the ability “to aggregate related claims on a nationwide basis . . . may make meaningful access to justice impossible”).

<sup>287</sup> Cf. *Summers v. Earth Island Inst.*, 555 U.S. 488, 500–01 (2009) (recognizing but not deciding “the question whether, if respondents prevailed, a nationwide injunction would be appropriate”).

law.<sup>288</sup> The debate on this issue has presumed, however, that if a nationwide class action were certified, a single court could indeed issue a nationwide injunction.<sup>289</sup> Yet if *Bristol-Myers* prevents class actions involving out-of-state class members, this could be impossible. No single state—and no single federal district whose jurisdiction is aligned with the state where it is located under Rule 4(k)(1)(A)—might have jurisdiction to entertain such a suit unless the named plaintiffs choose a state or district that has general jurisdiction over all relevant defendants.

As mentioned earlier, defendants may object that this approach may disrupt what one might call the “individual-litigation baseline,” insofar as it can subject them to suit on a nationwide basis in a forum where hypothetical individual suits by members of that nationwide collective could not be filed.<sup>290</sup> For all the reasons discussed in this Article, that concern should not be dispositive. Such an objection rings especially hollow, moreover, because our system regularly permits such disruption in ways that disadvantage plaintiffs. Under the federal multidistrict litigation (MDL) statute, an individual suit brought by an in-state plaintiff—in a federal district where specific jurisdiction unquestionably exists—may be involuntarily transferred to the other side of the country for “coordinated or consolidated pre-trial proceedings.”<sup>291</sup> This process can provide significant advantages to defendants, who can use MDL consolidation to postpone individual trials indefinitely with an eye toward obtaining a global settlement on favorable terms.<sup>292</sup> Insofar as this Article’s approach allows aggrega-

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<sup>288</sup> For recent articles examining the use, desirability, and legitimacy of such nationwide injunctions, see, for example, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Portia Pedro, *Toward Establishing a Pre-Extinction Definition of “Nationwide Injunctions,”* 91 U. COLO. L. REV. 847 (2020); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020).

<sup>289</sup> See, e.g., Bray, *supra* note 288, at 419 (describing the perceived problem that “in non-class actions, federal courts are issuing injunctions that are universal in scope—injunctions that prohibit the enforcement of a federal statute, regulation, or order *not only against the plaintiff, but also against anyone*”).

<sup>290</sup> See *supra* notes 154–55 and accompanying text.

<sup>291</sup> 28 U.S.C. § 1407(a).

<sup>292</sup> See, e.g., Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 16 (2021) (“More than ninety-seven percent of cases centralized through MDLs are resolved there, either via settlement or dispositive action. . . . [M]ost MDL judges do not manage cases with an eye toward trial or the possibility of trial—they are intensely focused on settlement.”); *id.* at 55 (noting “the inability to credibly threaten trial, given the naivety of the notion of remand”); *id.* at 57 (quoting a federal district judge’s observation that “something is lost when Mrs. Smith, who is injured by ingesting a drug in Columbus, Georgia, does not have the opportunity to tell her story here at home but must be relegated to ‘Plaintiff number X’ in some settlement grid in a faraway courthouse by a faceless judge”). For better or worse, the MDL statute might still play a role under this

tion in ways that do not disrupt a plaintiff's selection of a convenient forum, it is a refreshing exception to the host of procedural rules that can make it harder to enforce substantive law and to hold violators accountable.<sup>293</sup>

Finally, safety valves will continue to exist if a case arises in which a nationwide class action brought in the named plaintiff's home state would be especially burdensome, inconvenient, or otherwise inappropriate. For a case filed in (or removed to) federal court, the court may transfer it to another federal district using § 1404(a), which permits such a transfer “[f]or the convenience of parties and witnesses” and “in the interest of justice.”<sup>294</sup> For class actions filed in state court (which are not then removed to federal court<sup>295</sup>), forum non conveniens can perform a similar function.<sup>296</sup> These mechanisms mean that courts have discretion to address case-specific concerns when they arise. If, for example, a state where general jurisdiction existed was clearly the most suitable forum for such a class action—and proceeding there would not impose unwarranted burdens on the plaintiff—the case could be moved there.

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Article's approach. If, for example, multiple overlapping class actions are brought by in-state named plaintiffs in different federal districts, the MDL process may transfer those class actions to a single district for pretrial proceedings. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION § 21.15 (4th ed. 2004).

<sup>293</sup> *See, e.g.*, Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1536 (2016) (noting how “procedural and substantive constraints on legal access now litter the doctrinal landscape”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 309 (2013) (explaining that “federal courts have erected a sequence of procedural stop signs . . . that has transformed the relatively uncluttered pretrial process envisioned by the original drafters of the Federal Rules into a morass of litigation friction points”).

<sup>294</sup> 28 U.S.C. § 1404(a).

<sup>295</sup> *See supra* note 15 (describing defendants' ability to remove state-court class actions to federal court under the Class Action Fairness Act).

<sup>296</sup> *See, e.g.*, *Burnham v. Superior Ct.*, 495 U.S. 604, 639 & n.13 (1990) (Brennan, J., concurring) (noting that state-law forum non conveniens is a “procedural device[]” that can “ameliorate[]” “burdens” that arise when personal jurisdiction is obtained over a transient defendant by in-forum service of process); *see also* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1108 (2015) (“Forum non conveniens often exists in state law substantially in parallel to the federal doctrine.”); Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 400 (2017) (noting that “state courts often use forum non conveniens to dismiss cases in favor of courts in sister states”). For a summary of state forum non conveniens doctrine, *see* William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. (forthcoming Mar. 2023).

## CONCLUSION

Personal jurisdiction matters. Aggregation matters. And when personal jurisdiction doctrine thwarts aggregation, the result can be to undermine the effective enforcement of substantive laws governing a range of activities in our society. The Supreme Court's decision in *Bristol-Myers* has raised the disturbing possibility that personal jurisdiction will restrict nationwide class actions, which are often necessary means of access and enforcement.

Fortunately, a correct understanding of *Bristol-Myers* and the broader principles that the Supreme Court has developed do not compel this result. The Constitution permits specific jurisdiction in any case in which (a) there is specific jurisdiction over the named plaintiff's claim against the defendant, and (b) the class action led by that plaintiff would satisfy the certification requirements of Rule 23. Put simply, the "affiliation" or "relationship" or "connection" needed for specific jurisdiction is necessarily satisfied by the requirements Rule 23 imposes for an in-state plaintiff to represent such a class in the first place. This clean, straightforward approach has the further practical benefit of making it unnecessary for courts to resolve a range of other questions that have, thus far, eluded clear answers.