No. 19-1204

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FLORENCE MUSSAT, M.D., S.C.,

Plaintiff-Appellant,

v.

IQVIA INC.,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Case No. 17-C-8841, Hon. Virginia M. Kendall

DEFENDANT-APPELLEE IQVIA INC.'S PETITION FOR REHEARING AND REHEARING EN BANC

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APRIL 8, 2020

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1204

Short Caption: Florence Mussat v. IQVIA Inc., et al.

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Joseph R. Palmore Date: 4/8/2020

Attorney's Printed Name: Joseph R. Palmore

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Attorney's Signature: /s/ Samuel B. Goldstein Date: 4/8/2020

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Attorney's Printed Name: Tiffany Cheung

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ James R. Sigel Date: 4/8/2020

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Attorney's Signature: /s/ Edward C. Eberspacher IV Date: 4/8/2020

Attorney's Printed Name: Edward C. Eberspacher IV

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INTRODUCTION AND RULE 35(b) STATEMENT

The panel here created a class-action exception to settled personal-jurisdiction principles. Decades of Supreme Court precedent bar plaintiffs from haling a defendant into a distant State's courts to answer claims unconnected to the defendant's activities in that State. The Supreme Court recently concluded that plaintiffs cannot evade this black-letter rule by combining claims into a single mass action. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781-82 (2017). But the panel here green-lighted such evasion so long as the out-of-state claims are combined in a *class* action.

Similarly, the Supreme Court has repeatedly recognized that Rule 4(k) generally requires federal courts to enforce the same personal-jurisdiction limitations as forum state courts. But the panel here reached the novel conclusion that Rule 4(k) does not limit federal courts' exercise of personal jurisdiction, instead governing only service of process.

These errors on an exceptionally important issue merit reconsideration. Since *Bristol-Myers*, many courts have addressed this question and are divided on its resolution. Indeed, the day before the panel's decision here, the D.C. Circuit decided a case raising this issue, and the only judge addressing its merits endorsed IQVIA's position. *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 301 (D.C. Cir. 2020) (Silberman, J., dissenting). And the panel decision will have

serious consequences for defendants and courts. Under the panel's reasoning, a defendant could be haled into *state* court to face a nationwide class action even if virtually all class claims arose from out-of-state conduct.

Rehearing is necessary to correct the panel's departure from bedrock personal-jurisdiction principles and provide guidance to the many courts facing this significant issue.

BACKGROUND

A. District Court Proceedings

IQVIA Inc. ("IQVIA") provides its healthcare clients with information, technology solutions, and contract research services. R.26. It is incorporated in Delaware and has a principal place of business in Pennsylvania. R.26. IQVIA sent two faxes to Florence Mussat in Illinois, inviting Mussat to join a market research study collecting data from physician practices to track disease patterns. App.28, 30.

Based on those two Illinois faxes, Mussat filed a putative class-action suit against IQVIA under the Telephone Consumer Protection Act, 47 U.S.C. § 227, in Illinois federal district court. App.16-30. Mussat proposed a nationwide class of "all persons with fax numbers" who "were sent faxes by or on behalf of defendant IQVIA," regardless whether they received an IQVIA fax in Illinois. App.22.

The district court granted IQVIA's Rule 12(f) motion to strike Mussat's class definition to the extent it included claims from "non-resident putative class members" who "did not receive the alleged faxes in Illinois." R.49; R.50; App.1-15. Applying *Bristol-Myers*'s "core reasoning," it held that "due process requires the defendant be subject to specific jurisdiction not only as to the named plaintiff's claims, but also as to the absent class members' claims." App.10. "'[T]he mere fact' that Mussat received two faxes in Illinois 'does not allow' for an exercise of 'specific jurisdiction over the nonresidents' claims' with respect to faxes received outside of Illinois because those absent class members' claims do not relate to IQVIA's contacts with Illinois." App.10.

B. Court Of Appeals Proceedings

After this Court granted discretionary review, a merits panel reversed. It concluded 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." Op.2.

The panel believed the "critical distinction between this case and *Bristol-Myers*" was that a mass action like that in *Bristol-Myers* "does not involve any absentee litigants," and "all of the plaintiffs are named parties to the case." Op.9. In a class action, "by contrast, the lead plaintiffs earn the right to represent the interests of absent class members by satisfying" Rule 23, and "[t]he absent class members are not full parties to the case for many purposes." Op.9. Thus, the

panel concluded, "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." Op.10.

Turning to Rule 4(k), the panel appeared to recognize that it has been read to provide that "a federal district court has personal jurisdiction only over a party who would be subject to the jurisdiction of the state court where the federal district court is located." Op.11. But the panel nevertheless held that Rule 4(k) merely "governs service of process" and does not "establish[] an independent limitation on a federal court's exercise of personal jurisdiction." Op.10. The panel thus saw "[n]othing in the Federal Rules governing service of process contradict[ing]" its conclusion that "if the court has personal jurisdiction over the defendant with respect to the class representative's claim, the case may proceed" as to out-of-state claims as well. Op.11.

REASONS FOR GRANTING REHEARING

I. THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT PERSONAL-JURISDICTION PRECEDENTS

A. Under Settled Principles Reaffirmed In *Bristol-Myers*, Courts Lack Specific Jurisdiction Over Class Claims Arising Outside The Forum State

1. Courts must have personal jurisdiction over each claim in a suit

Personal jurisdiction is an "essential element" of judicial authority, "without which the court is 'powerless to proceed to an adjudication.'" *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999). "A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011).

Two types of personal jurisdiction exist: "general" and "specific." *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014). General jurisdiction can be exercised only where the defendant is "fairly regarded as at home"—for corporate defendants, generally their state of incorporation or principal place of business. *Goodyear*, 564 U.S. at 924. A court with general jurisdiction may "hear any and

all claims against" a defendant, even if they arise "from dealings entirely distinct from" its "operations within [the] state." *Daimler*, 571 U.S. at 127.[1]

Specific jurisdiction is different. It is "confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Goodyear*, 564 U.S. at 919. It requires an analysis of whether "the in-state activities of the corporate defendant" gave "rise to the liabilities sued on." *Daimler*, 571 U.S. at 126.

Critically, specific jurisdiction is determined claim-by-claim. A plaintiff "must secure personal jurisdiction over a defendant with respect to each claim she asserts." 4A Wright & Miller § 1069.7; *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 275 n.6 (5th Cir. 2006) ("[S]pecific personal jurisdiction must independently exist for each claim"). That is because "due process prohibits the exercise of jurisdiction over any claim that does not arise out of or result from forum contacts, even though there may be other claims in the action that do arise from forum contacts and over which the court may legitimately exercise its jurisdiction." 16 Moore's Federal Practice § 108.42.

The Supreme Court applied these "settled principles regarding specific jurisdiction" in *Bristol-Myers*. 137 S. Ct. at 1781. That case involved a California state-court suit in which more than 600 plaintiffs sued Bristol-Myers for injuries

[1] Mussat does not dispute that IQVIA is not subject to general jurisdiction in Illinois. App.10.

allegedly caused by its drug, Plavix. *Id.* at 1777. Only 86 plaintiffs were California residents. *Id.* at 1778. The remaining 592 nonresident plaintiffs did not obtain Plavix through California physicians and were not injured by Plavix in California. *Id.* The California Supreme Court nonetheless held that Bristol-Myers was subject to specific jurisdiction for all claims because "the claims of the nonresidents were similar in several ways to the claims of the California residents." *Id.* at 1779.

The United States Supreme Court reversed, reaffirming that specific jurisdiction cannot be exercised without the requisite connection between the defendant's conduct in the forum and each claim in the suit. The Court explained that specific jurisdiction requires "a connection between the forum and the specific claims at issue." *Id.* at 1781. "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." *Id.*

2. Bristol-Myers*'s logic applies equally to class actions*

While the Supreme Court in *Bristol-Myers* had no occasion to decide whether the same limit on personal jurisdiction applies to class actions, *id.* at 1789 n.4 (Sotomayor, J., dissenting), the decision's "logic dictates that it does," *Molock*, 952 F.3d at 306 (Silberman, J., dissenting). As the leading class-action treatise

explains, "the Supreme Court's recent cases point to the conclusion that neither general nor specific jurisdiction exists over nationwide class suits except in the defendant's home states." 2 Newberg on Class Actions § 6:26.

A class action is merely "a species" of "traditional joinder" that "enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). Class actions, like traditional joinders, "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights"; they "alter only how the claims are processed." *Id.* Thus, "procedural tools like class actions and mass actions are not an exception to ordinary principles of personal jurisdiction." *Molock*, 952 F.3d at 310 (Silberman, J., dissenting).

For these reasons, the "settled principles" that "control[led]" in *Bristol-Myers* apply equally to class actions and preclude exercise of specific jurisdiction over claims unconnected to the defendant's forum-State activities. 137 S. Ct. at 1781. Specific jurisdiction requires "a connection between the forum and the *specific claims at issue*," regardless of the procedural device used to aggregate them. *Id.* (emphasis added). That is because "[a] court that adjudicates claims asserted on behalf of others in a class action exercises coercive power over a defendant just as much as when it adjudicates claims of named plaintiffs in a mass action." *Molock*, 952 F.3d at 307 (Silberman, J., dissenting). After all, "the goal

of a nationwide class action is 'a binding judgment over the defendant as to the claims of the entire nationwide class—and the deprivation of the defendant's property accordingly.'" *Id.* Defendants are thus "entitled to due process protections—including limits on assertions of personal jurisdiction—with respect to all claims in a class action for which a judgment is sought." *Id.*

Here, plaintiffs seek to use an Illinois court's coercive power to order out-of-state defendant IQVIA to pay damages to plaintiffs with claims unconnected to Illinois and to enjoin IQVIA's conduct nationwide. Bedrock principles of personal jurisdiction prohibit that.

3. The panel's attempts to distinguish class actions lack merit

The panel's attempts to draw a "distinction between this case and *Bristol-Myers*" do not withstand scrutiny. Op.9.

a. The linchpin of the panel's reasoning was its belief that "absent class members are not full parties to the case" for purposes of personal jurisdiction. Op.9. But "the party status of absent class members" is "irrelevant" to the personal-jurisdiction inquiry. *Molock*, 952 F.3d at 307 (Silberman, J., dissenting). "[L]imits on personal jurisdiction protect a defendant from out-of-state *claims*," not just out-of-state *parties*. *Id.*; *see Bristol-Myers*, 137 S. Ct. at 1781 (specific jurisdiction requires an "adequate link between the State and the nonresidents' *claims*" (emphasis added)). Regardless of absent class members' party status, a

defendant is subject to absent class members' claims—and thereby "expose[d]" to the "court's coercive power." *Molock*, 952 F.3d at 307 (Silberman, J., dissenting). A court's assertion of jurisdiction over those claims thus "must comport with due process of law." *Id.*

The panel also reasoned that class actions "are different from many other types of aggregate litigation" because "the lead plaintiffs earn the right to represent the interests of absent class members by satisfying" Rule 23's requirements. Op.8-9. But the "careful procedural protections outlined in Rule 23" (Op.8) have no bearing on personal-jurisdiction limitations, which protect the *defendant's* due-process rights. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (the "primary concern" of specific jurisdiction is the "burden on the defendant"). Rule 23's "procedural protections" "protect the rights of *absent class members*." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847 (1999) (emphasis added). The Rule's "[p]rocedural formalities" ensure that class members are not bound "to the outcome of a suit" without (among other things) notice and adequate representation. Op.8.

Specific jurisdiction, by contrast, is a "*defendant*-focused" inquiry that depends on the "relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (emphasis added). Rule 23 does nothing to protect defendants from "the coercive power of a State that may have

little legitimate interest in the claims in question." *Bristol-Myers*, 137 S. Ct. at 1780. Whether plaintiffs' claims are aggregated through traditional joinder or class certification, the court's coercive power is invoked to adjudicate them. "Rule 23's standards" thus are not "an adequate substitute for normal principles of personal jurisdiction." *Molock*, 952 F.3d at 307 (Silberman, J., dissenting).

b. Contrary to the panel's assertion, there was no pre-*Bristol-Myers* "general consensus" that "due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court." Op.5. The panel identified no pre-*Bristol-Myers* cases addressing the issue at all, let alone holding personal-jurisdiction requirements inapplicable to class claims. Many specific-jurisdiction issues were not litigated until the Supreme Court "imposed substantial curbs on the exercise of general jurisdiction" over the past decade. *Bristol-Myers*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting). Indeed, the specific-jurisdiction issue in *Bristol-Myers* did not arise until the California court "changed its decision on the question of general jurisdiction" after *Daimler* significantly narrowed the scope of that doctrine. *Id.* at 1778 (majority opinion). That "challenges to class actions on" personal-jurisdiction "grounds were not raised" before *Bristol-Myers* does not mean those challenges lack merit. *Molock*, 952 F.3d at 310 n.13 (Silberman, J., dissenting).

c. The panel's remaining rationales also fail. The panel asserted (without citation) that if a representative such as an executor or administrator "is a defendant, the court will assess personal jurisdiction with respect to that person, not with respect to the person being represented." Op.11. To the contrary, courts require an adequate connection between the claims and the *represented party's* forum activities. *E.g.*, *Crosson v. Conlee*, 745 F.2d 896, 901 (4th Cir. 1984) (Virginia court properly exercised personal jurisdiction over executor based on *decedent's* transacting business in Virginia); *Willis v. Willis*, 655 F.2d 1333, 1337 (D.C. Cir. 1981) (District of Columbia court lacked personal jurisdiction over executor because *decedent* had insufficient D.C. contacts); *Martel v. Stafford*, 992 F.2d 1244, 1247 (1st Cir. 1993) (Massachusetts court lacked personal jurisdiction over Massachusetts-based executor because *testator* "forged no links of any kind with Massachusetts in her lifetime"). Once again, the *claim*, not the party, controls personal jurisdiction.

Nor does the Rule 23 advisory committee's reference to courts considering "the desirability or undesirability of concentrating the litigation of claims in the particular forum" support the panel's holding. *Contra* Op.11 (citing Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment). No one denies that "a class action may extend beyond the boundaries of the state where the lead plaintiff brings the case." Op.11. Plaintiffs can bring a nationwide class action "without

any personal jurisdiction difficulties" in a state where the defendant is subject to general jurisdiction. *Molock*, 952 F.3d at 309 (Silberman, J., dissenting). In any event, the advisory committee's view of where claims "would ordinarily be brought" in 1966 has little relevance today given changes in personal-jurisdiction law in the ensuing decades. *See supra* p. 11.

B. Rule 4(k) Requires The Same Results In State And Federal Courts

The panel's discussion of Rule 4(k) is equally flawed. Under Rule 4(k), the personal jurisdiction of federal courts is generally coextensive with that of forum state courts. In holding otherwise, the panel contravened clear Supreme Court precedent.

Unless a federal statute authorizes nationwide service of process—and it is undisputed the TCPA does not (App.9-10)—Rule 4(k)(1)(A) governs federal courts' exercise of personal jurisdiction. Rule 4(k)(1)(A) provides that service of a summons (or waiver of service) "establishes personal jurisdiction over a defendant" only when the defendant is "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." That means federal-court plaintiffs must "secure personal jurisdiction under state law" through the forum state's long-arm statute, which typically "permits service to the constitutional limits of its power." *Ariel Investments, LLC v. Ariel Capital Advisors LLC*, 881 F.3d 520, 521 (7th Cir. 2018).

A federal court's exercise of personal jurisdiction therefore is ordinarily subject to the same "federal due process" limits imposed by the Fourteenth Amendment on forum state courts. *Daimler*, 571 U.S. at 125 ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons."); *Walden*, 571 U.S. at 283 (same). Thus, contrary to the panel's apparent view (Op.8, 12), the Fourteenth Amendment rather than the Fifth Amendment supplies the relevant personal-jurisdiction limit here. And because the Fourteenth Amendment prohibits state courts from exercising specific jurisdiction over class claims unconnected to the defendant's forum-state activities, federal courts in that State also lack specific jurisdiction over such claims. *Molock*, 952 F.3d at 308-09 (Silberman, J., dissenting); A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction over Absent Class Member Claims Explained*, 39 REV. LITIG. 31, 42 (2019) (Rule 4(k)(1)(A) establishes "the jurisdictional reach of a district court presented with a class action").[2]

The panel acknowledged that "a federal district court has personal jurisdiction only over a party who would be subject to the jurisdiction of the state court where the federal district court is located." Op.11. But the panel's personal-jurisdiction analysis contradicted this principle. Its premise was that Rule 4(k)

[2] Professor Spencer is a member of the U.S. Judicial Conference Advisory Committee on Civil Rules and co-author of Wright & Miller's *Federal Practice and Procedure*.

"merely" requires "that a plaintiff comply with state-based rules on the service of process," but does not "establish[] an independent limitation on a federal court's exercise of personal jurisdiction." Op.10. Yet the Supreme Court has expressly said the opposite, holding that Rule 4(k) addresses both "the method of service" (*i.e.*, a summons or waiver) *and* "amenability to service" (*i.e.*, personal jurisdiction). *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 103 n.6 (1987). The Rule "link[s]" a "federal district court's authority to assert personal jurisdiction in most cases" to "service of process on a defendant 'who is subject to the jurisdiction of'" a forum-state court. *Walden*, 571 U.S. at 283. If a claim could not be brought against a defendant in state court, Rule 4(k)(1)(A) prohibits a federal court in that forum from exercising personal jurisdiction over the claim.

That Rule 4 imposes no obligation on unnamed class members to serve process is immaterial. *Contra* Op.10-11. Rule 4(k)(1)'s prescribed "method of service"—a summons or waiver—applies "only when the suit is initiated." *Molock*, 952 F.3d at 309 (Silberman, J., dissenting). But its "territorial limitations on amenability to service"—and therefore on personal jurisdiction—"remain operative throughout the proceedings." *Id.* Thus, Rule 4(k)(1)(A)'s personal-jurisdiction limitations apply to a new plaintiff added under Rule 20 or who intervened under Rule 24, even though "neither of these parties is required to serve process on the defendant under Rule 4." Spencer, *supra*, at 43-44. "Otherwise,

litigants could easily sidestep the territorial limits on personal jurisdiction simply by adding claims" or plaintiffs "after complying with Rule 4(k)(1)(A) in their first filing." *Molock*, 952 F.3d at 309 (Silberman, J., dissenting). For the same reasons, Rule 4(k)(1)(A)'s personal-jurisdiction limitations apply to the claims of unnamed class members joined under Rule 23.

Rule 4(k) is not the only Rule the panel misapprehended. The panel believed that "IQVIA's position is in tension with" Rule 82, "which stipulates that the rules 'do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.'" Op.10. But Rule 82 refers to "jurisdiction of the subject matter," not "jurisdiction over the person of the party served." *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946). Indeed, the civil "rules can and did extend jurisdiction over the person"; before Rule 4(k)'s predecessor, federal courts could exercise personal jurisdiction only over a defendant served within the forum State's borders. 12 Wright & Miller § 3141. Rule 82 does not override Rule 4(k)'s command that the same personal-jurisdiction protections apply in state and federal courts.

II. THE CASE PRESENTS AN EXCEPTIONALLY IMPORTANT ISSUE

This Court should grant rehearing because the question whether personal-jurisdiction protections apply to class actions is critically important to courts and litigants in this Circuit and across the country.

This case is "an important follow-up" to *Bristol-Myers*. Sue Reisinger, *Closing the Split: Company Asks Appeals Court to Limit Class Action Jurisdiction*, CORPORATE COUNSEL (Apr. 24, 2019). The issue has arisen frequently since *Bristol-Myers* and is the subject of substantial disagreement. Judge Silberman, the only other appellate judge to opine on the issue's merits, reached the opposite conclusion as the panel here. *Molock*, 952 F.3d at 301 (Silberman, J., dissenting).[3] And district courts remain deeply divided on *Bristol-Myers*'s effect on class actions. *Cruson v. Jackson Nat'l Life Ins. Co.*, No. 18-40605, 2020 WL 1443531, at *2 n.4 (5th Cir. Mar. 25, 2020) ("To date, courts have split on how *Bristol-Myers* applies to class actions brought in federal court.").

If left standing, the panel's decision will have serious consequences for courts and litigants. It will encourage abusive forum shopping by class-action plaintiffs. Federal courts in Illinois, Indiana, and Wisconsin will become magnets for nationwide class actions—even where those States have no "legitimate interest" in the vast majority of the putative class's claims. *Bristol-Myers*, 137 S. Ct. at 1780.

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[3] The *Molock* majority did not reach the merits because it concluded the defendant's Rule 12(b)(2) motion to dismiss the nonresident putative class members was "premature" before "class certification." *Molock*, 952 F.3d at 296. Here, however, Mussat has never argued that IQVIA's Rule 12(f) motion to strike was premature, and for good reason. Rule 12(f) is the proper mechanism for "excis[ing] allegations from a complaint" that "a court will ultimately be unable to adjudicate" because of "a lack of personal jurisdiction." Spencer, *supra*, at 50.

And that effect could extend beyond federal courts. While the panel described its holding in terms of "a nationwide class action filed in federal district court under a federal statute," its analysis of class actions is not limited to federal courts or federal claims. Op.2. To the contrary, the panel's conclusion that absent class members' claims do not count under the Due Process Clause means a nationwide class action could proceed against an out-of-state defendant in *state* court. That undermines the basic federalism principles underlying longstanding personal-jurisdiction requirements. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (personal-jurisdiction restrictions "are a consequence of territorial limitations on the power of the respective States"). Rehearing is necessary to restore the critical protections guaranteed by the Due Process Clause.

CONCLUSION

Rehearing or rehearing en banc should be granted.

Dated: April 8, 2020

Respectfully submitted,

/s/ Joseph R. Palmore

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), counsel for Defendant-Appellee IQVIA Inc. hereby certifies as follows:

1. This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,836 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, including serifs, using Microsoft Office Word 2016, in Times New Roman 14-point font.

Dated: April 8, 2020

/s/ Joseph R. Palmore
Joseph R. Palmore

ADDENDUM

In the

United States Court of Appeals

For the Seventh Circuit

No. 19-1204

FLORENCE MUSSAT, M.D., S.C., on behalf of itself and all others similarly situated,

Plaintiff-Appellant,

v.

IQVIA, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 17 C 8841 — **Virginia M. Kendall**, *Judge.*

ARGUED SEPTEMBER 27, 2019 — DECIDED MARCH 11, 2020

Before WOOD, *Chief Judge*, and KANNE and BARRETT, *Circuit Judges*.

WOOD, *Chief Judge*. Florence Mussat, an Illinois physician doing business through a professional services corporation, received two unsolicited faxes from IQVIA, a Delaware corporation with its headquarters in Pennsylvania. These faxes failed to include the opt-out notice required by federal statute. Mussat's corporation (to which we refer simply as Mussat)

brought a putative class action in the Northern District of Illinois under the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of itself and all persons in the country who had received similar junk faxes from IQVIA in the four previous years. IQVIA moved to strike the class definition, arguing that the district court did not have personal jurisdiction over the non-Illinois members of the proposed nationwide class.

The district court granted the motion to strike, reasoning that under the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), not just the named plaintiff, but also the unnamed members of the class, each had to show minimum contacts between the defendant and the forum state. Because IQVIA is not subject to general jurisdiction in Illinois, the district court turned to specific jurisdiction. Applying those rules, see *Walden v. Fiore*, 571 U.S. 277, 283–86 (2014), it found that it had no jurisdiction over the claims of parties who, unlike Mussat, were harmed outside of Illinois. We granted Mussat's petition to appeal from that order under Federal Rule of Civil Procedure 23(f). We now reaffirm the Rule 23(f) order, and we 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. We reverse the order of the district court and remand for further proceedings.

I

Before examining the personal-jurisdiction issue, we must assure ourselves that this appeal falls within the scope of Rule 23(f), which "permit[s] an appeal from an order granting or denying class-action certification under this rule." Fed. R. Civ. P. 23(f). IQVIA argues that the order before us neither grants nor denies class status and thus it is an ordinary interlocutory

order that must await final judgment before review is possible. See 28 U.S.C. § 1291. It is true that the district court's order does not say, in so many words, that it is granting or denying class certification. But that is not the end of the story. Here is what the district court did: pursuant to Federal Rule of Civil Procedure 12, it granted IQVIA's motion to strike Mussat's class definition, insofar as Mussat proposed to assert claims on behalf of people with no contacts to Illinois. IQVIA observes that Mussat is still free to seek certification of an Illinois-only class. More fundamentally, it contends that the plain language of Rule 23(f) forecloses jurisdiction over this appeal because the order responded to a motion to strike, not a motion to certify (or decertify) a class. Because Rule 23(f) allows interlocutory appeals only from orders "under *this* rule," IQVIA concludes, an appeal is not permitted here, where the district court made its decision pursuant to Rule 12. We review this jurisdictional question *de novo*. *Marshall v. Blake*, 885 F.3d 1065, 1071 (7th Cir. 2018).

This is not the first time we have seen a Rule 12 motion to strike used this way in a putative class action. In *In re Bemis Co., Inc.*, 279 F.3d 419 (7th Cir. 2002), the Equal Employment Opportunity Commission (EEOC) brought a lawsuit against Bemis Company on behalf of a class of African American employees. Bemis answered, arguing that the EEOC had not complied with Rule 23. The EEOC moved to strike that part of the answer, and the district court granted the motion. Bemis then appealed under Rule 23(f). Just as IQVIA has done here, the EEOC argued that this court had no jurisdiction to hear the appeal "because the district court's order did not grant or deny class certification." 279 F.3d at 421. We were not persuaded. We concluded that "[t]he rejection of [Bemis's] position was the functional equivalent of denying a motion to

certify a case as a class action, a denial that Rule 23(f) makes appealable." *Id*.

Our holding in *Bemis* has received the endorsement of the Supreme Court. In *Microsoft v. Baker*, 137 S. Ct. 1702 (2017), the Court confirmed that "[a]n order striking class allegation is functionally equivalent to an order denying class certification and therefore appealable under Rule 23(f)." *Id*. at 1711 n.7. In so doing, it cited *Bemis* with approval. *Id.* Given the Court's endorsement of our reasoning, we see no reason to find that *Bemis* was wrongly decided, as IQVIA urges. The cases are clear: Rule 23(f) grants 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.

The fact that Mussat still has an opportunity to seek certification of a much narrower class does not change anything. 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. To the contrary, we have held that Rule 23(f) permits a party to appeal the partial denial of a class. See *Matz v. Household Int'l Tax Reduction Inv. Plan*, 687 F.3d 824, 826 (7th Cir. 2012) (holding that the court had jurisdiction under Rule 23(f) over a district court order partially decertifying a class by eliminating 3,000 to 3,500 members); see also *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1076 (7th Cir. 2014) (holding that orders modifying class definitions may be appealed so long as the alteration is "material").

The district court's order striking the nationwide class was the functional equivalent of an order denying certification of the class Mussat proposed. We therefore have jurisdiction over this appeal under Rule 23(f).

II

On to personal jurisdiction. IQVIA makes two principal arguments: first, it contends that the Supreme Court's decision in *Bristol-Myers* requires a decision in its favor; and second, it urges that Federal Rule of Civil Procedure 4(k) does the same. We address these points in that order.

Before the Supreme Court's decision in *Bristol-Myers*, there was a general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court, even if the federal court did not have general jurisdiction over the defendant. See, *e.g.*, *Al Haj v. Pfizer, Inc.*, 338 F. Supp. 3d 815, 818–19 (N.D. Ill. 2018) (noting that the defendant could not produce any pre-*Bristol-Myers* decision holding that "in a class action where defendant is not subject to general jurisdiction, specific jurisdiction must be established not only as to the named plaintiff(s), but also as to the absent class members"). For cases relying on specific jurisdiction over the defendant, minimum contacts, purposeful availment, and relation to the claim were assessed only with respect to the named plaintiffs. Even 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. Once certified, the class as a whole is the litigating entity, see *Payton v. Cnty. of Kane*, 308 F.3d 673, 680–81 (7th Cir. 2002), and its affiliation with a forum depends only on the named plaintiffs.

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 IQVIA raises. See, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (nationwide class action brought in California court; defendant headquartered in Arkansas and incorporated in Delaware); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (nationwide class action brought in Kansas court; defendant headquartered in Oklahoma and incorporated in Delaware); see also *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("Nothing in Rule 23 … limits the geographical scope of a class action that is brought in conformity with that Rule."). Although IQVIA and its *amici* insist that class actions have always required minimum contacts between all class members and the forum, this is nothing more than *ipse dixit.* Decades of case law show that this has not been the practice of the federal courts. What is true, however, is that this issue has not been examined closely. The current debate was sparked by the Supreme Court's decision in *Bristol-Myers*—a case that did *not* involve a certified class action, but instead was brought under a different aggregation device. A closer look at that decision illustrates why it does not govern here.

In *Bristol-Myers*, 600 plaintiffs, most of whom were not California residents, filed a lawsuit in California state court against Bristol-Myers Squibb, asserting state-law claims based on injuries they suffered from taking Plavix, a blood thinning drug. 137 S. Ct. at 1777. Bristol-Myers sold Plavix in California, but it had no other contacts with the state. The plaintiffs 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. That statute provides in relevant part as follows:

> When civil actions sharing a common question of fact or law are pending in different courts, a petition for coordination may be submitted to the Chairperson of the Judicial Council, by the presiding judge of any such court, or by any party … . A petition for coordination … shall be supported by a declaration stating facts showing that the actions are complex … and that the actions meet the standards specified in Section 404.1. On receipt of a petition for coordination, the Chairperson of the Judicial Council may assign a judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate … .

In other words, rather like the multi-district litigation process in federal court, see 28 U.S.C. § 1407, section 404 permits consolidation of individual cases, brought by individual plaintiffs, when the necessary findings are made. The *Bristol-Myers* suit itself began as eight separate actions, brought on behalf of 86 California residents and 592 residents of 33 other states. 137 S. Ct. at 1778.

In the Supreme Court, Bristol-Myers argued that the California courts did not have jurisdiction over it with respect to the claims of the plaintiffs who were not California residents and had not purchased, used, or been injured by Plavix in California. The Court agreed. *Id.* at 1783–84. It noted that its holding constituted a "straightforward application … of settled principles of personal jurisdiction." *Id*. at 1783. (Interestingly, the California courts had held that they had *general* jurisdiction over Bristol-Myers, but that theory dropped out of the

case after the Supreme Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014).)

Although *Bristol-Myers* arose in the context of consolidated individual suits, the district court in our case thought that the *Bristol-Myers* approach to personal jurisdiction should be extended to certified class actions. It held that the Due Process Clause of the Fourteenth Amendment precludes the exercise of personal jurisdiction over a defendant where "nonresident, absent members [of a class] seek to aggregate their claims with an in-forum resident, even though the defendant allegedly injured the nonresidents outside of the forum." (Actually, in federal court it is the Fifth Amendment's Due Process Clause that is applicable, but the mention of the Fourteenth Amendment made no difference here.) This meant, the court realized, that nationwide class actions will, as a practical matter, be impossible any time the defendant is not subject to general jurisdiction. This would have been far from the routine application of personal-jurisdiction rules that *Bristol-Myers* said it was performing. Nonetheless, the district court felt compelled to reach that result.

Procedural formalities matter, however, as the Supreme Court emphasized in *Taylor v. Sturgell,* 553 U.S. 880 (2008), where it stressed the importance of class certification as a prerequisite for binding a nonparty (including an unnamed class member) to the outcome of a suit. *Id.* at 894. With that in mind, it rejected the notion of "virtual representation" as an end-run around the careful procedural protections outlined in Rule 23. *Id.* at 901. Class actions, in short, are different from many other types of aggregate litigation, and that difference matters in numerous ways for the unnamed members of the class.

Bristol-Myers neither reached nor resolved the question whether, in a Rule 23 class action, each unnamed member of the class must separately establish specific personal jurisdiction over a defendant. In holding otherwise, the district court failed to recognize the critical distinction between this case and *Bristol-Myers*. The *Bristol-Myers* plaintiffs brought a coordinated mass action, which as we noted earlier does not involve any absentee litigants. In a section 404 case, all of the plaintiffs are named parties to the case. The statute allows the trial court to consolidate their cases for resolution of shared legal issues before moving on to individual issues. In a Rule 23 class action, by contrast, the lead plaintiffs 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). The absent class members are not full parties to the case for many purposes.

The proper characterization of the status of absent class members depends on the issue. As the Supreme Court recognized in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), "[n]onnamed class members … may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Id*. at 9–10. For example, absent class members are not considered parties for assessing whether the requirement of diverse citizenship under 28 U.S.C. § 1332 has been met. *Id.* at 10 ("[N]onnamed class members cannot defeat complete diversity…."). As long as the named representative meets the amount-in-controversy requirement, jurisdiction exists over the claims of the unnamed members. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566–67 (2005) (relying on the supplemental jurisdiction statute, 28 U.S.C. § 1367, and recognizing that the

statute overruled *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973)). Nor are absent class members considered when a court decides whether it is the proper venue. *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 140 (7th Cir. 1974) (holding that Rule 23 does not "require the establishment of venue for nonrepresentative-party class members"). We see 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.

This brings us to IQVIA's second major point: that allowing the non-Illinois unnamed class members to proceed would be inconsistent with Federal Rule of Civil Procedure 4(k), which governs service of process. Rule 4(k)(1) states, in relevant part, that "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." IQVIA reads Rule 4(k) broadly, as not requiring merely that a plaintiff comply with state-based rules on the service of process, but also establishing an independent limitation on a federal court's exercise of personal jurisdiction. Because Illinois law would not authorize some of the absent members of the putative class to sue IQVIA in Illinois, the argument goes, Rule 4(k) prohibits the federal district court in Illinois from exercising jurisdiction.

Aside from the fact that IQVIA's position is in tension with Federal Rule of Civil Procedure 82, which stipulates that the rules "do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts," there is a

simpler problem with it: IQVIA is mixing up the concepts of service and jurisdiction. Rule 4(k) addresses *how* and *where* to serve process; it does not specify *on whom* process must be served. It is true that, with certain exceptions, a federal district court has personal jurisdiction only over a party who would be subject to the jurisdiction of the state court where the federal district court is located. But, as discussed above, a district court need not have personal jurisdiction over the claims of absent class members at all. The rules permit a variety of representatives to sue in their own names: an executor, an administrator, a guardian, and a trustee, to name a few. See Fed. R. Civ. P. 17(a)(1). If any of those is a defendant, the court will assess personal jurisdiction with respect to that person, not with respect to the person being represented. So, too, with class actions: if the court has personal jurisdiction over the defendant with respect to the class representative's claim, the case may proceed. Nothing in the Federal Rules governing service of process contradicts this.

The rules for class certification support a focus on the named representative for purposes of personal jurisdiction. Rule 23(b)(3), for example, governs damages class actions. Among the factors it lists is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." The Committee Note to this provision mentions 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." Fed. R. Civ. P. 23(b)(3), Committee Note to 1966 amendment. These provisions recognize that a class action may extend beyond the boundaries of the state where the lead plaintiff brings the case. And nothing in the Rules frowns on nationwide class

actions, even in a forum where the defendant is not subject to general jurisdiction.

Finally, it is worth recalling that the Supreme Court in *Bristol-Myers* expressly reserved the question whether its holding extended to the federal courts at all. 137 S. Ct. at 1784 ("[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."). In addition, the opinion does not reach the question whether its holding would apply to a class action. *Id*. 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."). Fitting this problem into the broader edifice of class-action law, we are convinced that this is one of the areas *Scardelletti* identified in which the absentees 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.

III

Despite its insistence to the contrary, IQVIA urges a major change in the law of personal jurisdiction and class actions. This change is not warranted by the Supreme Court's decision in *Bristol-Myers*, nor by the alternative arguments based on Rule 4(k) that IQVIA puts forth. We therefore REVERSE the judgment of the district court and REMAND for further proceedings.

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system on April 8, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 8, 2020

/s/ Joseph R. Palmore
Joseph R. Palmore