ORAL ARGUMENT NOT YET SCHEDULED
Case No. 18-7162

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHOLE FOODS MARKET GROUP, INC.,

Appellant,

v.

MICHAEL MOLOCK, *et al.*,

Appellees,

On Appeal from the U.S. District Court
for the District of Columbia
Case No. 16-cv-02483-APM

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties and *Amici.* All parties, intervenors, and *amici* appearing before this Court are listed in the Certificate as to Parties, Rulings, and Related Cases filed by Appellant Whole Foods Market Group, Inc., except for Washington Legal Foundation (WLF), which is filing this *amicus curiae* brief in support of Appellant.

Rulings Under Review. The rulings under review are set for in the Certificate as to Parties, Rulings, and Related Cases filed by Whole Foods.

Related Cases. Counsel for WLF is unaware of any related cases before this Court. The U.S. Court of Appeals for the Seventh Circuit recently granted a petition for leave to appeal under Fed.R.Civ.P. 23(f) in an unrelated case involving very similar due-process issues. *Mussat v. IQVIA*, No. 18-8024 (7th Cir., Jan. 25, 2019).

/s/ Richard A. Samp
Richard A. Samp

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Fed.R.App.P. 26.1, and Circuit Rule 26.1, the undersigned counsel states that *amicus curiae* Washington Legal Foundation (WLF) is a non-profit corporation; it has no parent corporations, and no publicly-held company has a 10% or greater ownership interest.

Pursuant to Circuit Rule 26.1(b), WLF describes its general nature and purpose as follows. WLF is a public-interest law and policy center that regularly appears in this Court in cases raising public policy issues. WLF has no financial ties with any party to this appeal.

/s/ Richard A. Samp
Richard A. Samp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

* Authorities on which we chiefly rely are marked with asterisks

Page(s)

Page(s)

Statutes and Constitutional Provisions:

Miscellaneous:

Page(s)

GLOSSARY

District	District of Columbia
SAC	Second Amended Class Action Complaint
WFMI	Whole Foods Market, Inc.
Whole Foods	Whole Foods Market Group, Inc.
WLF	Washington Legal Foundation

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation is a public-interest law firm and policy center with supporters in all 50 States and the District of Columbia.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared frequently in this and other federal courts in cases involving personal jurisdiction issues, to support defendants seeking to avoid being subject to a court's coercive powers when assertion of jurisdiction does not comply with traditional notions of fair play and substantial justice. *See, e.g., Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017); *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

In its seminal *Bristol-Myers* decision, the Supreme Court held that the U.S. Constitution imposes strict limits on the personal jurisdiction of state courts over nonresident defendants. 137 S. Ct. at 1779-81. It explained that specific jurisdiction over nonresidents "is confined to adjudication of issues deriving from, or connected with the very controversy that establishes jurisdiction." *Id.* at 1780 (quoting

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[1] Pursuant to Fed.R.App.P. 29(a)(4)(E), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

Goodyear, 564 U.S. at 919). It held further that these due-process requirements must be met as to the claims of each plaintiff; a court may not assert personal jurisdiction over a plaintiff's claim simply because it may constitutionally assert personal jurisdiction over similar claims filed by another plaintiff against the same defendant. *Id.* at 1781. The Court held in *Daimler AG v. Bauman*, 571 U.S. 117 (2011), that identical due-process considerations apply to federal-court proceedings in which personal jurisdiction is invoked under a State's long-arm statute. 571 U.S. at 125.

WLF is concerned that the decision below largely nullifies the protections granted by *Bristol-Myers*. The district court held that even though *Bristol-Myers* bars exercise of personal jurisdiction over an individual's claims that do not arise out of or relate to the defendant's contacts with the District of Columbia, it could hear the same claims by including that individual as an absent member of a certified Rule 23 class. WLF is filing this brief to explain why *Bristol-Myers* applies just as fully to class actions as it does to mass actions.

STATEMENT OF THE CASE

Appellant Whole Foods Market Group, Inc. ("Whole Foods") appeals from the district court's denial (in relevant part) of its Rule 12(b)(2) motion to dismiss the Second Amended Class Action Complaint (SAC). Whole Foods contends that the district court lacks personal jurisdiction over the claims of nonresident absent

members of the putative class, in the absence of evidence that the nonresidents' claims bear any relationship to the District of Columbia ("the District"). This Court granted Whole Foods's petition for interlocutory review on October 11, 2018.

Named as plaintiffs in the SAC were seven individuals currently or formerly employed at Whole Foods grocery stores. They allege that Whole Foods improperly operated its Gainsharing "bonus" program, with the result that they and other employees (or "Team Members") at grocery stores in at least 26 States and the District were paid less than they were entitled to receive. They seek to represent a class consisting of current and former employees of those stores; it is uncontested that most of the putative class members (as well as three of the seven named plaintiffs) were never employed by Whole Foods in the District.

Whole Foods's motion to dismiss asserted, among other things, that the district court lacked personal jurisdiction over many of the SAC's claims. In its March 15, 2018 Memorandum Opinion and Order (JA1- JA33), the district court agreed in part. It dismissed all claims against Whole Foods's parent corporation, Whole Foods Market, Inc. (WFMI), on the ground that the plaintiffs did not allege facts demonstrating contacts between WFMI and the District. JA13-JA17.

The court also dismissed the claims of two named plaintiffs (Sarah Strickland and Carl Bowens) for lack of personal jurisdiction, noting that Strickland and Bowens

neither resided in the District nor had been employed by Whole Foods there. JA10-JA13. It concluded that the Supreme Court's *Bristol-Myers* decision precluded Strickland's and Bowens's assertion that personal jurisdiction could be based on the factual similarity of their claims to the claims of other plaintiffs who had worked for Whole Foods in the District. JA11 ("[A]s in *Bristol-Myers*, the 'mere fact' that the other five Plaintiffs in this action either resided or were employed with Whole Foods in the District of Columbia—and 'allegedly sustained the same injuries' as Bowens and Strickland—does not confer specific jurisdiction over their claims.") (quoting *Bristol-Myers*, 137 S. Ct. at 1780). The court held that *Bristol-Myers*'s constitutional limitations on personal jurisdiction were fully applicable in federal-court proceedings, "particularly where, as here, the federal court sits in diversity and assesses state law claims." JA12.

The court was unwilling, however, to impose those *Bristol-Myers* limitations on the class claims, and it denied Whole Foods's motion to dismiss the claims of nonresident putative class members. JA13-JA14. The court focused on what it deemed the material differences between mass tort actions (such as *Bristol-Myers*, which involved several hundred named plaintiffs from numerous States) and class actions governed by Fed.R.Civ.P. 23. It stated that in a class action (unlike in a mass action involving nonresident plaintiffs): (1) none of the nonresident absent class

members is an actual party to the civil action; and (2) Rule 23 "contains due process safeguards not applicable in the mass tort context" and thereby provides defendants with a layer of protection (against unwarranted litigation) that is unavailable outside the class-action context. JA14.

On June 11, 2018, the district court granted Whole Foods's § 1292(b) motion to certify for interlocutory appeal "that portion of the court's March 15, 2018 order" holding that *Bristol-Myers* "does not preclude this court from exercising personal jurisdiction over the claims of unnamed, nonresident putative class members." JA43.

SUMMARY OF ARGUMENT

The U.S. Constitution prohibits the district court from exercising personal jurisdiction over the claims of unnamed, nonresident putative class members, in the absence of factual allegations that their claims "arise out of or relate to [Whole Foods's] contacts with the forum." *Bristol-Myers*, 137 S. Ct. at 1780. Well-established due-process principles protect a defendant that is not "at home" in the forum from being haled into court there when, as here, a plaintiff raises claims that focus solely on events arising in other States. That is so, both because the Due Process Clause "act[s] as an instrument of interstate federalism" and because the burdens of being required to defend litigation under those circumstances are deemed constitutionally excessive. *Id.* at 1780-81.

The district court held that those principles are inapplicable in the class-action context. It reasoned that the due-process protections afforded to defendants by Rule 23 serve as an adequate substitute for the due-process protections recognized in *Bristol-Myers* and the long line of Supreme Court decisions governing specific personal jurisdiction, dating back to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

But the due-process interests protected by Rule 23 are dissimilar to those protected by *Bristol Myers*. Rule 23—by limiting class certification to cases in which all class members are adequately represented and in which there are issues of fact and law common to all class members—protects a defendant's due-process interest in ensuring that absent class members will be bound by any judgment. It does not protect defendants from the burden of having to defend claims in a forum that lacks any meaningful relationship to the claims. Indeed, the burden of defending such claims is likely to be particularly acute in the class-action context. *Bristol-Myers* held that due process protects defendants against such burdens, and nothing in the decision suggests that the principles it laid down are inapplicable in the class-action context.

Appellees' (collectively, "Molock") reliance on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), is misplaced. In the district court, Molock cited *Shutts* for the proposition that the *International Shoe* due-process limitations on specific

jurisdiction are inapplicable to class-action defendants. But *Bristol-Myers* expressly rejected that interpretation of *Shutts*, stating that "since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here." *Bristol-Myers*, 137 S. Ct. at 1783.

Bristol-Myers expressly declined to address whether the Fifth Amendment's Due Process Clause limits Congress's power to grant a federal court personal jurisdiction over state-law claims arising in States other than the one in which the court is located. *Id.* at 1783-84. But that issue is irrelevant here; Congress has adopted no statutes granting such jurisdiction. Certainly, Rule 23 itself cannot be the source of any such expanded federal-court jurisdiction. To the contrary, the Rules Enabling Act expressly "forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights.'" *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 367 (2011) (citing 28 U.S.C. § 2072(b)). Interpreting Rule 23 as authorizing the claims of nonresident absent class members to be heard by federal district courts in the District would constitute a major abridgement of Whole Foods's due-process rights.

The issue raised by this appeal has been addressed by numerous federal district courts in the nearly two years since *Bristol-Myers* was decided, with widely divergent results. Among the courts that have agreed with the district court's views in this case, several cited the Supreme Court's decision in *Shady Grove Orthopedic Associates*,

P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010), in support of their expansive view of a federal court's personal jurisdiction in class actions. But *Shady Grove* is inapposite; it had nothing to say about the personal jurisdiction of federal courts. The Court ruled merely that, by certifying a plaintiff class despite the defendant's argument that New York did not want its state laws enforced via class-wide litigation, federal courts were not abridging the defendant's "substantive" rights. 559 U.S. at 410 (stating that a class certification authorized by Rule 23 is valid "regardless of its incidental effect upon state-created rights"). The Court never suggested that Rule 23 authorizes certification of a class even when doing so would abridge the defendant's due-process rights.

Other district-court decisions that support the result below have suggested that federal courts are authorized to exercise "pendent" jurisdiction over the claims of nonresident class members once they have established personal jurisdiction over the defendant with respect to the substantially similar claims of at least one named plaintiff. But although *Bristol-Myers* did not use the term "pendent" jurisdiction, that is the precise form of personal jurisdiction that the Supreme Court *rejected* when it held that a trial court could not piggy-back its personal jurisdiction over a defendant with respect to one plaintiff as a basis for asserting jurisdiction over the substantially similar claims of nonresident plaintiffs over which personal jurisdiction was otherwise

lacking.

Molock has pointed to no federal statute that authorizes pendent *party* personal jurisdiction, and there is none. The Supreme Court has expressly held that the federal courts lack the power to create new "pendent" jurisdiction in the absence of congressional authorization. Some federal courts have recognized pendent *claim* personal jurisdiction—that is, when a federal statute authorizes a federal court to exercise personal jurisdiction over one claim asserted by Plaintiff A against Defendant B, the court may also exercise jurisdiction over another claim asserted by A against B when the claims arise from the same nucleus of operative facts, particularly when the second claim could not otherwise be asserted in any court within the United States. But no federal appeals court has ever recognized pendent *party* personal jurisdiction—that is, authority to assert pendent personal jurisdiction over the claims of additional parties simply because the claims are similar to the claims of the original plaintiff.

Molock argued below that asserting personal jurisdiction over the claims of non-resident absent class members promotes judicial efficiency by permitting all "Gainsharing" claims against Whole Foods to be heard in a single proceeding. But if consolidating all claims in a single proceeding is Molock's principal goal, there is a simple solution: he can file a putative class action in Delaware or Texas, the two

States in which Whole Foods is "at home" and thus subject to general personal jurisdiction. More importantly, *Bristol-Myers* explicitly rejected such efficiency concerns as a basis for depriving defendants of their due-process rights.

ARGUMENT

I. THE DUE PROCESS CLAUSE PROTECTS DEFENDANTS FROM THE BURDENS OF DISTANT LITIGATION, AND RULE 23 IS NOT INTENDED TO SERVE AS A SUBSTITUTE FOR THOSE PROTECTIONS

As the Supreme Court has repeatedly reminded, the Due Process Clause imposes strict limits on the authority of a court to exercise personal jurisdiction over defendants who reside outside the forum. *See, e.g., J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter"). In re-affirming those limits, *Bristol-Myers* recognized no exceptions, stating categorically that a court may not exercise personal jurisdiction over a nonresident defendant unless the plaintiff's claims "arise out of or relate to the defendant's contacts with the forum." 137 S. Ct. at 1780. Molock does not allege facts suggesting that putative class members who worked for Whole Foods outside the District have claims that relate to Whole Foods's contacts with the District. It follows that the district court lacks personal jurisdiction over Whole Foods with respect to those claims.

The district court held that *Bristol-Myers*'s due-process principles are inapplicable in the context of class actions. But the sweeping language of *Bristol-Myers* and similar specific-jurisdiction decisions dating back to *International Shoe* includes no hint that the Court recognizes an exception for class actions. Recognizing that exception results in anomalous results. For example, in the absence of factual allegations that the claims of plaintiffs Strickland and Bowen (neither of whom ever worked for Whole Foods in the District) related in any way to Whole Foods's contacts with the District, the district court concluded that *Bristol-Myers* required dismissal of their claims. JA12. Yet, under the district court's understanding of *Bristol-Myers*, any certified class could encompass the claims of those same two individuals.

The district court reasoned that Whole Foods has no need for the due-process protections afforded by *Bristol-Myers* because Rule 23 provides its own set of due-process protections for class-action defendants:

> [U]nlike a mass tort action, "for a case to qualify for class action treatment, it needs to meet the additional due process standards for class certification under Rule 23—numerosity, commonality, typicality, adequacy of representation, predominance, and superiority." These additional elements of a class action supply due process safeguards not applicable in the mass tort context.

JA14 (quoting *In re Chinese-Manufactured Drywall Product Liability Litig.*, 2017 WL 5971622, at *14 (E.D. La., Nov. 30, 2017)).

But the district court failed to explain how those Rule 23 requirements protect the due-process interests that *Bristol-Myers* sought to protect, such as the interest in avoiding the burden of defending claims in a distant forum. As the Supreme Court explained in *Shutts*, the Rule 23 requirements cited by the district court serve primarily to protect *absent plaintiffs'* constitutional rights; indeed, unless those requirements are satisfied, the Due Process Clause provides that they cannot be bound by any judgment awarded in a certified class action. 472 U.S. at 812. *Shutts* went on to explain that class-action rules also protect defendants' due-process interests by providing assurances that a defense victory in the class action can be enforced in subsequent litigation. *Id.* at 805.[2] But those due-process interests are far afield from the interests protected by *Bristol-Myers*; and so the protections afforded to defendants by Rule 23 are not an adequate substitute. And while certified class actions can on occasion be less burdensome to defendants than mass tort actions involving hundreds of individual plaintiffs, the due-process protections outlined in *Bristol-Myers* apply to all lawsuits, regardless whether there are two or two hundred individual plaintiffs.

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[2] The Court explained, "Whether it wins or loses on the merits, [a defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members." *Ibid.*

In the district court, Molock cited *Shutts* in support of his claim that the *International Shoe* due-process limitations on specific jurisdiction are inapplicable to class-action defendants. Noting that this case is a putative class action and *Bristol-Myers* was not, Molock asserted, "This is an important distinction, because '[a] class-action plaintiff, however, is in quite a different posture.'" Opp. Br. at 13 (quoting *Shutts*, 472 U.S. at 808). Molock misconstrues *Shutts*. The Supreme Court was not drawing a contrast between class actions and non-class actions. Rather, its point was that an absent class plaintiff drawn involuntarily into a class action faces burdens far lighter than those imposed on the defendant—and thus that such a plaintiff is entitled to a lesser degree of due-process protection. *Shutts*, 472 U.S. at 808. Far from suggesting that class-action defendants were entitled to fewer constitutional protections than defendants in other lawsuits, the Court stated, "These burdens [imposed on a class-action defendant] are substantial, and the minimum contacts requirement of the Due Process Clause prevents the forum State from unfairly imposing them upon the defendant." *Ibid.*

Indeed, *Bristol Myers* expressly held that *Shutts* had "no bearing" on defendants' rights because it "concerned the due process rights of *plaintiffs*." *Bristol-Myers*, 137 S. Ct. at 1783 (emphasis in original). It added, "The Court [in *Shutts*] stated specifically that its 'discussion of personal jurisdiction [did not] address class

actions where the jurisdiction is asserted against a *defendant* class.'" *Ibid* (emphasis in original) (quoting *Shutts*, 472 U.S. at 812 n.3).[3]

II. RULE 23 DOES NOT EXPAND THE JURISDICTION OF FEDERAL COURTS

The fact that this diversity-jurisdiction case is being heard in federal court does not meaningfully distinguish it from *Bristol-Myers*, which arose in the California state courts. A district court's authority to exercise personal jurisdiction over nonresident defendants is in most cases identical to the authority of state courts located within the same State. That is so because "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. See Fed. Rule. Civ. Proc.

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[3] As an additional reason for concluding that defendants in class actions are entitled to fewer due-process protections than defendants in mass actions such as *Bristol-Myers*, the district court stated, "[I]n a mass tort action, each plaintiff is a real party in interest to the complaints; by contrast, in a putative class action, 'one or more plaintiffs seek to represent the rest of the similarly situated plaintiffs, and the named plaintiffs are the only plaintiffs actually named in the complaint.'"JA14 (quoting *Fitzhenry-Russell v. Dr. Pepper Snapple Group*, 2017 WL 4224723, at *5 (N.D. Cal., Sept. 22, 2017)). But the district court never explained why, in determining whether a district court may exercise personal jurisdiction over a nonresident defendant with respect to the claims of absent class members, it should make a difference whether plaintiffs are "actually named in the complaint." It is well established that absent class members "may be parties for some purposes but not for others." *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002). "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." *Ibid.* Observing that nonresident absent class members are not listed by name in the complaint does nothing to resolve whether the Due Process Clause protects a nonresident defendant from being forced to answer their claims.

4(k)(1)(A) (service of process is effective to establish 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.'" *Daimler AG v. Bauman,* 571 U.S. 117, 125 (2014).[4]

The applicable long-arm statute, D.C. Code § 13-423(a), authorizes the District of Columbia Superior Court, and thus federal courts located within the District, to exercise jurisdiction over parties to the full extent permitted by the Fourteenth Amendment. *FC Investment Group LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1091-92 (D.C. Cir. 2008).[5] *Bristol-Myers* held that the Fourteenth Amendment confines state courts' jurisdiction over nonresidents "to adjudication of issues deriving from, or connected with the very controversy that establishes jurisdiction." 137 S. Ct. at 1780. Because the court below is exercising jurisdiction over Whole Foods pursuant to Rule 4(k)(1)(A), its jurisdiction is similarly confined.

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[4] *Daimler* involved a suit raising federal questions and filed in a federal court. But because the plaintiff had invoked personal jurisdiction under Rule 4(k)(1)(A), the Court applied its Fourteenth Amendment Due Process Clause case law in determining whether the district court could exercise personal jurisdiction over the defendant with respect to the plaintiffs' federal claims.

[5] This Court has recognized that even in cases arising in the District, the scope of personal jurisdiction in cases arising under Rule 4(k)(1)(A) is governed by the Fourteenth Amendment's Due Process Clause, not the Fifth Amendment's Due Process Clause. *Livnat v. Palestinian Authority*, 851 F.3d 45, 54 (D.C. Cir. 2017).

A. Even Assuming that Congress Possesses Authority to Abridge Protections Afforded by *Bristol-Myers*, It Has Not Exercised That Authority

Rule 4(k)(1) provides federal district courts with an alternative method of exercising personal jurisdiction over out-of-state defendants: it may do so "when authorized by a federal statute." Fed.R.Civ.P. 4(k)(1)(C). Congress on occasion adopts statutes authorizing any federal district court in the United States to exercise personal jurisdiction over claims arising under specified federal laws, even if personal jurisdiction could not be effectuated under the local State's long-arm statute. *See, e.g.*, 18 U.S.C. § 1965(d) (authorizing service of process in civil actions filed under the Racketeer Influenced and Corrupt Organizations Act (RICO) "in any judicial district" in which the defendant "resides, is found, has an agent, or transacts his affairs").[6] But that additional source of personal jurisdiction is irrelevant here, because Congress has not adopted a federal statute expanding federal-court personal jurisdiction over state-law claims, and Molock does not claim otherwise.

Indeed, there is serious reason to question whether such a statute could pass

[6] The Supreme Court interprets statutory language authorizing service of process as an indication that Congress is providing for expanded federal-court personal jurisdiction. *BNSF Railway*, 137 S. Ct. at 1555 (stating that "Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process" and citing 15 U.S.C. § 22 (Clayton Act) and § 53(a) (Federal Trade Commission Act) as examples).

muster under the Fifth Amendment's Due Process Clause.[7] At the very least, a federal statute authorizing nationwide service of process in diversity-jurisdiction cases would create divergent results depending on whether plaintiffs filed suit in federal or state court—an outcome at odds with the *Erie* doctrine. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) ("the nub of the policy that underlies *Erie R. Co. v. Tompkins* [304 U.S. 64 (1938)] is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of a State court a block away, should not lead to a substantially different result."). But whether such a statute would violate the Fifth Amendment need not be decided here, in the absence of a statute.

Certainly, Rule 23 itself cannot be the source of any such expanded federal-court jurisdiction. To the contrary, the Rules Enabling Act expressly "forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights.'" *Wal-Mart Stores*, 564 U.S. at 367 (citing 28 U.S.C. § 2072(b)). Interpreting Rule 23 as authorizing the claims of nonresident absent class members to be heard by federal district courts in the District would constitute a major abridgement of Whole Foods's due-process rights. The Rules Enabling Act prevents the federal courts from acting on their own to expand jurisdiction, to the detriment of defendants. *See also Omni*

[7] *Bristol-Myers* did not address the question. It stated explicitly, "We leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." 137 S. Ct. at 1784.

Capital Int'l, Ltd., v. Rudolf Wolff & Co., 484 U.S. 97, 105, 109 (1987) (stating that "under Rule 4(e), a federal court normally looks either to a federal statute or to the long-arm statute of the State in which it sits" to determine personal jurisdiction and that "[i]t seems likely that Congress has been acting on the assumption that federal courts cannot add to the scope of service of summons Congress has authorized").

B. The Supreme Court's *Shady Grove* Decision Does Not Support Appellees

Federal district courts that have addressed the applicability of *Bristol-Myers* to class actions are sharply divided. Among the courts that have agreed with the district court's views in this case, several cited the Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), in support of their expansive view of a federal court's personal jurisdiction in class actions. *See, e.g.*, *In re Chinese-Manufactured Drywall*, 2017 WL 5971622, at *18 ("Rule 23 'categorical[ly] ... entitle[s] a plaintiff whose suit meets the specified criteria to pursue his [or her] claim as a class action.'") (quoting *Shady Grove*, 556 U.S. at 398). But *Shady Grove* has nothing to say about personal jurisdiction and provides no support for Molock.

Shady Grove involved a diversity-jurisdiction suit filed in federal court by a healthcare provider against an insurance company, alleging that the insurer violated

New York law by failing to pay interest on overdue insurance benefits. The New York statute provided for a $500 statutory penalty for each violation, but it also prohibited lawsuits alleging violations of the statute to be filed as class actions. The Court held that the plaintiff could pursue class-wide relief under Rule 23, notwithstanding the state-law rule barring class actions. At issue was whether Rule 23, as applied to the plaintiff's claim, should be deemed "procedural" or "substantive"; if the latter, then application of Rule 23 would violate the Rules Enabling Act, which states that a federal rule shall not abridge, enlarge, or modify any "substantive right." The Court concluded that Rule 23, as applied to the healthcare provider's claims, was purely procedural—and thus did not violate the Rules Enabling Act; it noted that a Rule 23 class action would not alter "the rules of decision by which the court will adjudicate [the plaintiffs'] rights" and "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." 559 U.S. at 407, 408 (plurality opinion).

The Rule 23 issue arises here in an entirely different context to which *Shady Grove* is wholly inapposite. It is not true here, as it was in *Shady Grove*, that the absent class members are entitled to file "separate suits" if a class is not certified. To the contrary, it is undisputed that current and former nonresident Whole Foods employees who were never employed by Whole Foods in the District (including

Strickland and Bowens) are barred by *Bristol-Myers* from filing "separate suits" against Whole Foods in the district court. So any application of Rule 23 that permits their claims to be heard in the district court as part of a class action constitutes an abridgment of Whole Foods's "substantive right" (under the Due Process Clause) not to be burdened by the need to defend those claims in the District.

In re Chinese Drywall quoted *Shady Grove* out of context when noting the Supreme Court's statement that Rule 23 "categorical[ly] ... entitle[s] a plaintiff whose suit meets the specified criteria to pursue his [or her] claim as a class action." *Shady Grove*, 556 U.S. at 398. *Shady Grove*'s point was that federal courts should not deny class certification based on criteria not set forth in Rule 23. But *Shady Grove* never suggested that Rule 23 can expand federal court jurisdiction so as to permit the adjudication of claims (asserted by absent class members) over which the court otherwise would have lacked personal jurisdiction.[8]

[8] This case has not reached the class-certification stage, so the Court need not confront the issue of whether Molock could demonstrate that his proposed class meets the criteria specified in Rule 23. We note nonetheless that Molock almost certainly could not satisfy Rule 23(b)(3)'s predominance requirement given the huge number of individual issues of fact and law that are sure to arise—*e.g.*, whether individual class members can demonstrate a relationship between their claims and the District.

III. "PENDENT" JURISDICTION PRINCIPLES DO NOT AUTHORIZE ASSERTION OF JURISDICTION OVER CLAIMS OF NONRESIDENT CLASS MEMBERS

Several district court decisions that support the result below have suggested that federal courts are authorized to exercise "pendent" jurisdiction over the claims of nonresident class members once they have established personal jurisdiction over the defendant with respect to the substantially similar claims of at least one named plaintiff. *See, e.g., Allen v. Conagra Foods, Inc.*, 2018 WL 6460451, at *7-*8 (N.D. Cal., Dec, 10, 2018); *Sloan v. General Motors LLC*, 287 F. Supp. 3d 840, 856-64 (N.D. Cal. 2018). But those courts seek recognition of a form of pendent jurisdiction that has never been recognized by the Supreme Court or any federal appeals court. Indeed, the Supreme Court has held explicitly that federal courts lack authority to recognize new forms of pendent jurisdiction, and that any expansion of federal-court jurisdiction must come from Congress.

The Supreme Court has long recognized a single form of pendent jurisdiction—and it involves subject-matter jurisdiction, not personal jurisdiction. *Mine Workers v. Gibbs*, 383 U.S. 715 (1966), held that when parties are already litigating a federal question in federal court, the court may (in its discretion) also exercise jurisdiction over a state-law question that is closely bound up with the federal question—even when a lack of complete diversity of citizenship means that the court

would otherwise lack subject-matter jurisdiction over the state-law claim. The Court has repeatedly held that *Gibbs* pendent jurisdiction is a limited doctrine—it applies to claims involving parties already before a federal court but does not confer jurisdiction over a party as to whom no independent basis of federal subject-matter jurisdiction exists. *See, e.g.*, *Aldinger v. Howard*, 427 U.S. 1 (1976).

The Court later held explicitly that any expansion of *Gibbs* pendent jurisdiction so as to encompass such "pendent party" subject-matter jurisdiction must originate with Congress. *Finley v. United States*, 490 U.S. 545, 556 (1989). The Court explained that "two things are necessary to create [subject-matter] jurisdiction" in a federal court: Article III of the Constitution must authorize the court to exercise the jurisdiction in question and "an act of Congress must have supplied it." *Id.* at 548. So when Congress has not granted federal courts jurisdiction over the subject matter in question, they may not create it on their own by expanding *Gibbs* so as to encompass "pendent party" subject-matter jurisdiction. *Id.* at 549-551.

Of particular relevance here, the Court in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), rejected efforts to adopt "pendent party" subject-matter in the class-action context. All of the named plaintiffs in a federal-court putative class action could establish subject-matter jurisdiction over their claims—each met the $10,000 jurisdictional amount necessary for diversity jurisdiction. But the Court declined to

adopt pendent-party jurisdiction so as to authorize subject-matter jurisdiction over the claims of the many absent class members who failed to meet the $10,000 jurisdictional amount. *Id.* at 292-94. The Court held that *every* member of a plaintiff class must independently meet the jurisdictional amount necessary to establish subject-matter jurisdiction, even when (as is generally true in class actions) the claims asserted by all class members are substantially similar.[9]

The *Allen* and *Sloan* district courts significantly expanded the concept of "pendent party" jurisdiction by applying it to *personal* jurisdiction. Such expansion is both unprecedented and unwarranted—it violates *Finley*'s admonition that any expansion of federal-court jurisdiction must be the product of congressional legislation.

Judicial recognition of any form of pendent personal jurisdiction is controversial given the absence of a congressional statute authorizing its exercise. *See* 4A Wright & Miller, *Federal Practice & Procedure* § 1069.7 (3d ed. 2002) (stating

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[9] In 1990, Congress took up the invitation extended to it by *Finley* and adopted a statute, 28 U.S.C. § 1367 (entitled "Supplemental Jurisdiction"), that authorizes federal courts to exercise pendent-party subject-matter jurisdiction in some circumstances. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Court determined that Congress's adoption of § 1367 eliminated the *Zahn* requirement that every member of a plaintiff class must independently meet the jurisdiction amount necessary to establish diversity jurisdiction. But *Exxon Mobil* reiterated the general rule set out in *Finley*: federal courts may not unilaterally expand their own pendent jurisdiction but must await congressional authorization.

that pendent personal jurisdiction is "a federal common law doctrine" that has not been authorized by 28 U.S.C. § 1367 or any other federal statute). And while several federal appeals courts have recognized pendent personal jurisdiction in very limited circumstances, they have done so only in the context of pendent *claim* personal jurisdiction, never (as in *Allen* and *Sloan*) in the context of pendent *party* personal jurisdiction. That is, if a plaintiff demonstrates that a federal statute grants personal jurisdiction in the forum court over one of his claims against the defendant but not over a second claim, some federal appeals courts permit exercise of pendent personal jurisdiction over the second claim if the two claims arise from the same nucleus of facts. *See, e.g., United States v. Botefuhr*, 309 F.3d 1263, 1272 (10th Cir. 2002).[10] That limited doctrine can have no application here, where Molock seeks to rely on the district court's personal jurisdiction over the claims of a handful of District-based Whole Foods employees as a basis for asserting personal jurisdiction over the claims of nonresident absent class members.[11]

WLF is aware of only one instance in which this Court exercised pendent

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[10] Pendent claim personal jurisdiction is thus somewhat akin to the pendent subject-matter jurisdiction authorized by *Gibbs*—in both instances, a court agrees to hear an additional claim involving parties who are already properly before the court.

[11] WLF notes that Molock did not assert a "pendent personal jurisdiction" claim in the district court, nor did the district court recognize such a claim in its March 15, 2018 Order.

personal jurisdiction. The facts of that case, *Oetiker v. Werke*, 556 F.2d 1 (D.C. Cir. 1977), were highly unusual and illustrate the limited nature of the Court's holding. In *Oetiker*, the plaintiff sought to file two claims against a German patent holder: (1) a declaratory-judgment action seeking invalidity of a U.S. patent; and (2) a federal-law damages claim based on misuse of the patent. A federal statute granted the U.S. District Court for the District of Columbia personal jurisdiction over the first cause of action but not the second. The Court nonetheless authorized the exercise of pendent personal jurisdiction over the second claim, noting that both claims arose from "the same core of operative facts." 556 F.2d at 127. The Court's decision may well have been influenced by the fact that the plaintiff could not have obtained personal jurisdiction over the defendant on the second count in any other American court; the plaintiff would have been out of court but for this Court's decision.[12]

Oetiker had at least some basis for concluding that Congress had authorized its holding: it relied in part on a federal statute that expanded federal courts' personal jurisdiction over nonresident defendants. In sharp contrast, *Allen* could point to no

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[12] Other federal appeals court decisions recognizing pendent *claim* personal jurisdiction involved similar factual situations, in which a federal statute authorized personal jurisdiction over only one of several claims, all of which arose from the same set of operative facts. *See, e.g., Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174 (9th Cir. 2004); *Robinson Eng'g Co. Pension Plan and Trust v. George*, 223 F.3d 445 (7th Cir. 2000); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049 (2d Cir. 1993).

federal statute suggesting that Congress authorized its creation of pendent *party* personal jurisdiction. And *Allen* is doubly flawed in that it made no attempt to justify its significant abridgement of the due-process rights of class-action defendants.

Other district courts have declined to follow *Allen*'s lead and have rejected pendent personal jurisdiction as a basis for adding parties to a lawsuit. *See, e.g., Spratley v. FCA US LLC*, 2017 WL 4023348, at *7 (N.D.N.Y., Sept. 12, 2017); *DeMaria v. Nissan N. Am., Inc.*, 2016 WL 374145, at *8 (N.D. Ill., Feb. 1, 2016). *See also,* James Beck, *More Adventures in Personal Jurisdiction – Examining the BMS "Federal Court" Caveat*, Drug & Device Law Blog (Feb. 19, 2018) (available at htttp://www.Druganddevicelawblog.com/2018/02/more-adventures-in-personal-jurisdiction-%E2%88%92-examining-the-bms-federal-court-caveat.html) (collecting cases).

Moreover, although *Bristol-Myers* did not use the term "pendent" jurisdiction, that is the precise form of personal jurisdiction that the Supreme Court *rejected* when it held that a trial court could not piggy-back its personal jurisdiction over a defendant with respect to one plaintiff as a basis for asserting jurisdiction over the substantially similar claims of nonresident plaintiffs over which personal jurisdiction was otherwise lacking. *Allen* and *Sloan* fail to explain why the rationale underlying their pendent-party-personal-jurisdiction approach is not inconsistent with *Bristol-Myers*.

Allen and *Sloan* justified their expansion of pendent personal jurisdiction by claiming that it would increase efficiency. Similarly, Molock argued below that asserting personal jurisdiction over the claims of non-resident absent class members promotes judicial efficiency by permitting all "Gainsharing" claims against Whole Foods to be heard in a single proceeding. But if consolidating all claims in a single proceeding is Molock's principal goal, there is a simple solution: he can file a putative class action in Delaware or Texas, the two States in which Whole Foods is "at home" and thus subject to general personal jurisdiction. More importantly, *Bristol-Myers* explicitly rejected such efficiency concerns as a basis for depriving defendants of their due-process rights. 137 S. Ct. at 1780-81 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)).

CONCLUSION

The Court should reverse the Order denying the motion to dismiss the claims of unnamed, nonresident putative class members.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(c), I hereby certify that the foregoing brief of *amicus curiae* is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 6,487, not including the certificate as to parties, table of contents, table of authorities, glossary, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

February 4, 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court of the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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