ORAL ARGUMENT NOT YET SCHEDULED

No. 18-7162

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

WHOLE FOODS MARKET GROUP, INC.,

Defendant-Appellant,

v.

MICHAEL MOLOCK, *ET AL.*,

Plaintiffs-Appellees.

On Appeal from the United States District Court
for the District of Columbia
No 16-cv-02483, Hon. Amit P. Mehta, U.S.D.J.

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae Public Citizen

April 5, 2019

CERTIFICATE AS TO PARTIES, RULINGS, RELATED CASES, FILING OF SEPARATE BRIEF, AND RULE 26.1 DISCLOSURE

As required by Circuit Rules 26.1, 28(a)(1), and 29(d), and Federal Rule of Appellate Procedure 26.1, counsel for amicus curiae Public Citizen, Inc., hereby certify as follows:

A. Parties and Amici

All parties, intervenors, and amici appearing in the lower court and this Court are listed in the certificates to the opening briefs of the appellant and the appellees, expect for amicus curiae Public Citizen, Inc., the filer of this brief. Public Citizen is appearing with consent of both parties in support of the plaintiffs-appellees and affirmance. Public Citizen is a nonprofit corporation that has not issued shares or debt securities to the public. It has no parent companies, and no publicly held company has any form of ownership interest in it. The general purpose of the organization is to advocate for the interests of consumers and the general public on a range of issues, and it has a particular interest in procedural issues involving class actions.

B. Rulings Under Review

References to the district court decision under review appear in the certificate to the opening brief of the appellant.

C. Related Cases

Accurate descriptions of related cases appear in the certificates to the opening briefs of the appellant and the appellees.

D. Separate Brief

Public Citizen is not aware of the intention of any other amicus curiae to file a brief supporting plaintiffs-appellees and hence has filed its own brief. *See* D.C. Cir. R. 29(d).

Respectfully submitted,

/s/ Scott L. Nelson

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

April 5, 2019

Attorneys for Amicus Curiae

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CAFA Class Action Fairness Act of 2005

STATUTES AND REGULATIONS

Applicable statutes and regulations are listed in the Brief of Appellant Whole Foods Market Group, Inc.

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has a longstanding interest in issues of court procedure that affect both the availability of judicial fora in which injured consumers, workers, and members of the public may seek redress and the courts' ability to provide such redress efficiently and effectively.

In particular, Public Citizen is concerned that restrictive views of the scope of the courts' personal jurisdiction may unduly limit injured plaintiffs' access to justice. That concern is heightened when personal jurisdiction doctrine is employed to impair the utility of the class action

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[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party. No party or counsel for a party, and no person other than the amicus curiae or its counsel, contributed money intended to fund the brief's preparation or submission.

as an efficient tool for seeking justice, in situations where a defendant's wrongful conduct has allegedly harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In such circumstances, class actions offer the best means for individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of claims on a broad basis, consistent with due process. Restricting the availability of class actions in federal court based on inapplicable concerns about the limits of the authority of state courts would impair those aims without meaningfully advancing the interests served by Fourteenth Amendment limits on state-court authority.

Public Citizen respectfully submits this brief in the hope that it may assist the Court to recognize the proper bounds of the jurisdictional principles at issue in this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), the Supreme Court held that, in an action brought by an individual, a state court cannot exercise personal jurisdiction based on contacts between the defendant and the forum state that are not

specifically related to that individual's claim. The case did not involve a class action, and the Court expressly stated that its opinion did not address "restrictions on the exercise of personal jurisdiction by a federal court." *Id.* at 1784. Nonetheless, defendant-appellant Whole Foods Markets Group insists that the holding in *Bristol-Myers* extends to an uncertified, putative class action in a federal court and requires dismissal for lack of personal jurisdiction of class claims that are not yet even before the court.

That view of *Bristol-Myers* is fundamentally misguided. *Bristol-Myers* rests on limitations on the sovereign authority of state courts that, the Supreme Court has explained, inhere in our federalist system. The authority of federal courts is not similarly limited, and the Constitution itself does not restrict a federal court from asserting authority over litigants without regard to the extent of their contacts with the particular state in which the court sits. Rather, limits on state courts' personal jurisdiction are relevant to actions in federal courts only because, under Federal Rule of Civil Procedure 4, federal courts are often (but not always) required to obtain personal jurisdiction over a defendant using the forms of service that would be available in an

action in state court. Thus, in the case of a putative class action brought against a non-resident defendant, acquisition of personal jurisdiction over the defendant will often depend on whether state law (constrained by Fourteenth Amendment due process limits) authorizes service of the named plaintiffs' complaint on the defendant.

Once service has been effected, however, whether the action may proceed as a class action, and the scope of any class, depends not on whether a *state* court would have authority to adjudicate claims asserted on behalf of class members, but on whether Federal Rule of Civil Procedure 23 authorizes certification of a class. If so, the action may proceed as a class action. The rules impose no additional requirements for the assertion of personal jurisdiction over the defendant with respect to the class claims, and nothing in the Constitution limits a federal court's authority in adjudicating such claims to that which a state court would possess.

Accordingly, even if *Bristol-Myers* could be extended to *state*-court class actions (although the case did not involve a class action), it would remain inapplicable to a class action in federal court. This case thus

provides no occasion for exploring *Bristol-Myers*'s potential application to state-court class actions.

ARGUMENT

I. *Bristol-Myers* rests on constitutional principles that limit only state-court authority.

The Supreme Court's holding in *Bristol-Myers* construed the limits on personal jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment, *see* 137 S. Ct. at 1779, which "sets the outer boundaries of a *state tribunal's* authority to proceed against a defendant," *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011) (emphasis added). The requirement of due process is typically a "flexible" one, commanding procedures that are fairly suited to the "particular situation." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). In the context of state-court personal jurisdiction, however, the Supreme Court has emphasized that the Fourteenth Amendment also reflects limits on "the power of a sovereign to resolve disputes through judicial process." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011) (plurality opinion of Kennedy, J.). In this sense, "jurisdiction is in the first instance a question of authority rather than fairness," *id.* at 883, and Fourteenth Amendment limits on personal jurisdiction reflect

the Court's view that a state court possesses adjudicative authority only over those who are properly subject to the state's sovereign power as a result of presence within the state or purposeful direction of conduct toward persons within the state. *See id.* at 880–81. This concept of limited state authority, rather than "[f]reeform notions of fundamental fairness," *id.* at 880, has driven holdings of the Court that limit state-court personal jurisdiction.

Bristol-Myers's holding that a state court cannot assert personal jurisdiction over a defendant in an individual personal-injury action when the defendant neither is "at home" in the state, 137 S. Ct. at 1780, nor has engaged in any forum-related activity that is connected to the individual plaintiff's "specific claims," *id.* at 1781, reflects these same concerns about "territorial limitations on the power of the respective states," *id.* at 1780 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). Such limitations, the Court stressed, are related not to fairness concerns, but to the "federalism interest," *id.* at 1780, in confining institutions of each state—including courts—within the limits of their sovereign authority to avoid infringements "on the sovereignty of [their]

sister States," *id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

In short, *Bristol-Myers* solely concerns the extent of "the State['s] … power to render a valid judgment." *Id.* at 1781 (quoting *World-Wide Volkswagen*, 444 U.S. at 294). The Court repeatedly emphasized that the decision is grounded in the Fourteenth Amendment's limits on the powers of state courts. *Id.* at 1779. Indeed, the Court explicitly recognized that, because its decision "concerns the due process limits on the exercise of specific jurisdiction by a State," it does not address whether and to what extent "the Fifth Amendment" restricts "the exercise of personal jurisdiction by a federal court." *Id.* at 1783–84.

II. The Fourteenth Amendment does not by its own force limit the personal jurisdiction of federal courts.

Bristol-Myers's disclaimer as to its possible effect on federal courts was no accident: It reflects a wealth of precedent differentiating potential due process limits on federal-court personal jurisdiction from the constraints the Fourteenth Amendment imposes on state courts. As a formal matter, as *Bristol-Myers* recognized, *see id.*, any due process limits on the federal courts find their source in the Fifth Amendment rather than the Fourteenth, as the federal courts are not state

institutions. That distinction carries consequences of substance: To the extent that the Fourteenth Amendment incorporates the limits on the sovereign power of states vis-à-vis other states and their citizens that are inherent in a federal system, the limits to which the federal government and its institutions are subject under the Fifth Amendment are different. Unlike state authority, federal power is not, as a constitutional matter, limited by state lines. The federal government has "its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it," without regard to their relationship with any particular state. *Nicastro*, 564 U.S. at 884 (plurality opinion) (citation omitted).

Thus, "personal jurisdiction requires a … sovereign-by-sovereign analysis," *id.*, under which the power of a state court to render judgment against a defendant does not, as a constitutional matter, control that of a federal court, wherever located, to exercise its adjudicative authority over the same defendant. "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States" without regard to whether it may be haled into the courts "of any particular State." *Id.*

Indeed, "[f]or jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of *any* individual State." *Id*. (emphasis added).

For these reasons, as the Supreme Court long ago recognized, nothing in the *Constitution* prevents "the process of every District Court" from "run[ning] into every part of the United States." *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925). As far as the Fifth Amendment Due Process Clause's limits on the adjudicative power of the federal courts are concerned, a federal court may constitutionally exercise personal jurisdiction over any person that has minimum contacts with the *United States* as opposed to any particular state or states within the union. *See Repub. of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619–20 (1992) (determining federal-court personal jurisdiction over a foreign entity by considering whether the entity had minimum contacts with the United States sufficient to find that it purposefully availed itself of the privilege of conducting activities within the country); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 56 (D.C. Cir. 2017) ("Under the Fifth Amendment, which defines the reach of federal courts, contacts with the United States as a whole are relevant.");

Mwani v. bin Laden, 417 F.3d 1, 11 (D.C. Cir. 2005) ("Whether the exercise of jurisdiction is consistent with the Constitution turns on whether a defendant has sufficient contacts with the nation as a whole to satisfy due process."); *SEC v. Bilzerian*, 378 F.3d 1100, 1106 n.8 (D.C. Cir. 2004) ("[M]inimum contacts with the United States suffice" to satisfy Fifth Amendment due process where a federal court is authorized to serve process extraterritorially); *cf. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (noting but not ruling on view that Fifth Amendment requires minimum contacts with the nation as a whole).

III. The Federal Rules of Civil Procedure look to state law only for purposes of service of process.

Because domestic persons and entities, by definition, have the requisite minimum contacts with the United States, the scope of a federal court's personal jurisdiction over such defendants, and the manner in which it exercises that jurisdiction, is principally limited by statutes, or rules promulgated pursuant to statutory authority, rather than by the Constitution. *See Omni Capital*, 484 U.S. at 108–09. Since 1948, when a longstanding statutory limitation on extraterritorial service of process by federal courts was repealed in the course of the

comprehensive revisions to Title 28 of the U.S. Code, *see id.* at 109 n.10, the issue has been left primarily to judicial rulemaking (except with respect to the few federal statutes that expressly or impliedly specify the scope of service of process for rights of action they create, *see*, *e.g.*, *FC Inv. Group LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1099–1100 (D.C. Cir. 2008); *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 250–52 (D.C. Cir. 2005)). Importantly, the Supreme Court has held that defining the scope of federal courts' personal jurisdiction is a matter of procedure and a proper subject for rulemaking because the assertion of personal jurisdiction by a federal court that has subject matter jurisdiction and venue does not "extend or limit the jurisdiction of the district courts" in violation of Federal Rule of Civil Procedure 82, nor "abridge, enlarge, []or modify the substantive rights of any litigant" in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b). *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 444–46 (1946).

Under the Federal Rules of Civil Procedure, the federal district courts' personal jurisdiction is governed in the first instance by Rule 4's provisions regarding service of process, which function as the

gatekeeper over the courts' exercise of personal jurisdiction. As the Supreme Court has explained:

> Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444–445 (1946). Thus, before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.

Omni Capital, 484 U.S. at 409.

Rule 4, in turn, looks primarily to state law to determine the amenability of an out-of-state domestic defendant to service. *See* Fed. R. Civ. P. 4(k)(1)(A). Under Rule 4, in the absence of a federal statute authorizing nationwide service or other service beyond the bounds of the district, "a federal court normally looks … to the long-arm statute of the State in which it sits to determine whether a defendant is amenable to service, a prerequisite to its exercise of personal jurisdiction." *Omni*, 484 U.S. at 410. Because state long-arm jurisdiction is in turn limited by (and often, expressly or by state judicial construction of governing

statutes, defined by) the Fourteenth Amendment's requirements, those Fourteenth Amendment limits are often relevant to whether a federal court can obtain personal jurisdiction under Rule 4. *See*, *e.g.*, *Walden v. Fiore*, 571 U.S. 277, 283 (2014); *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014).

As explained above, however, Fourteenth Amendment limits do not apply of their own force to the federal courts, and there is no other constitutional basis for limiting federal courts' powers to those state courts would possess. Rather, federal courts look to Fourteenth Amendment standards only because, under Rule 4, "a federal district court's authority to assert personal jurisdiction in most cases is linked to service of process on a defendant 'who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.'" *Walden*, 571 U.S. at 283 (quoting Fed. R. Civ. P. 4(k)(1)(A)). And only in clearing the initial hurdle of obtaining valid service do the federal rules incorporate limits on state-court personal jurisdiction.

At the time of service of process, and at all times unless and until it is certified as a class action, a putative class action is an individual action between the named plaintiff or plaintiffs and the defendant or

defendants. *See Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011); *see also Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013). Whether that action may be served on a nonresident defendant under Rule 4 thus depends on whether the named plaintiffs' claims against the defendant fall within the scope of the relevant state long-arm statute as limited by the Fourteenth Amendment. And for purposes of this appeal, Whole Foods' brief does not contest that the claims of the five remaining named plaintiffs provided a sufficient basis for service of process on it under applicable law of the District of Columbia. Those plaintiffs thus properly haled Whole Foods into the federal district court.

Once a federal court has properly acquired personal jurisdiction over a defendant through valid service under Rule 4, due process limits on state-court authority drop out of the picture: The scope of the action, the court's authority to render a judgment binding particular persons, and other procedural matters are governed by the Federal Rules of Civil Procedure, not by state law. *See*, *e.g.*, *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 n.7 (1996); *Burlington N.R.R. Co. v.*

Woods, 480 U.S. 1, 4–5 (1987); *Hanna v. Plumer*, 380 U.S. 460, 469–74 (1965).

IV. A federal court's authority to entertain a class action is determined by Rule 23, not by Fourteenth Amendment limits on state courts.

Because the Federal Rules of Civil Procedure govern the conduct of an action once a federal district court acquires personal jurisdiction, a federal court's authority to entertain a class action is not constrained by whether a state court would have the power to do so; its authority depends solely on whether Federal Rule of Civil Procedure 23 authorizes certification of a class. *Shady Grove*, 559 U.S. at 398. Rule 23 is unquestionably a valid rule of procedure under the Rules Enabling Act. *See id.* at 407–08 (plurality opinion of Scalia, J.); *id.* at 432 (Stevens, J., concurring in part and in the judgment). Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Id.* at 398 (majority opinion). The Rule "*automatically* applies 'in all civil actions and proceedings in the United States district courts.'" *Id.* at 400. And nothing in the Rule requires additional service of process on a defendant already brought before the court by the named plaintiff's

valid service of process under Rule 4, otherwise incorporates potential restrictions on state-court authority to entertain a class action, or subjects the federal court's power to due process limitations that exceed those applicable to the court under the Fifth Amendment.

In sum, it is irrelevant to the outcome of *this* case whether Fourteenth Amendment due process principles limit the power of a *state* court to issue a judgment in a class action that benefits a class member whose claims the state court could not, under *Bristol-Myers*, adjudicate in an action brought by the class member individually. A federal court in which an individual named plaintiff has properly served the defendant under Rule 4 has authority under Rule 23 to adjudicate the plaintiff's claims on behalf of a class of similarly situated persons if Rule 23's criteria are satisfied. Indeed, the court must do so if the plaintiff so requests and the case meets Rule 23's standards. *See Shady Grove*, 559 U.S. at 399–400. The due process constraints to which the federal court is subject in considering class certification emanate from the Fifth Amendment, not the Fourteenth, and those constraints do not

include territorial restrictions based on limited state sovereignty.[2] Such restrictions come into play only at the initial step of the individual named plaintiffs' service of process on the defendant, and only to the extent Rule 4 incorporates state law as the basis for service.

This Court thus has no occasion to consider the underlying premise of Whole Foods' argument—that *Bristol-Myers* precludes a state court from certifying a class action with members who could not obtain personal jurisdiction over the defendant if they sued as individuals in the courts of that state. That premise is itself highly dubious, as it disregards that when a class is cohesive enough to permit certification, it "acquires an independent legal status once it is

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[2] Fifth Amendment due process principles might limit the exercise of federal personal jurisdiction as a matter of fairness—not as a matter of limits on the court's authority—in circumstances where, under a typical procedural due process balancing inquiry, unusual and undue burdens on the defendant of litigating in a distant forum would outweigh other considerations, including the interests of plaintiffs, indicating the appropriateness of the plaintiffs' chosen forum. Whole Foods has not alleged any such due process violation, but relies solely on its attempt to extend to this case the Fourteenth Amendment's restrictions on state-court authority, which, where applicable, exist even when considerations of fairness and efficiency strongly favor the state-court forum. *See Bristol-Myers*, 137 S. Ct. at 1780–81. And even if Whole Foods had attempted to invoke due process considerations of fairness and efficiency, such arguments would be futile in the circumstances of this case. Indeed, Rule 23's requirements ensure the protection of fairness interests of both plaintiffs and defendants.

certified." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013). Specific, claim-related forum contacts that give rise to state-court personal jurisdiction over the named plaintiff's personal claims thus necessarily bear a similar relationship to the claims he or she asserts as representative of the class itself, and supply the "connection between the forum and the specific claims at issue" that is absent when the plaintiffs are merely an aggregation of individuals pursuing claims on behalf only of themselves. *Bristol-Myers*, 137 S. Ct. at 1781. This Court, however, need not and should not reach that question, which is not presented here and does not control a federal court's authority to entertain a class action.

Extending *Bristol-Myers* both to class actions and to class actions in federal courts would be particularly unwarranted given the jurisdictional provisions of the Class Action Fairness Act, 28 U.S.C. § 1332(d) (CAFA). In CAFA, Congress exercised its authority to extend the district courts' subject-matter jurisdiction over diversity cases to include multistate class actions that do not meet the complete-diversity and amount-in-controversy limitations on conventional diversity jurisdiction. CAFA represented Congress's considered decision that

large, "national" class actions, with members who have suffered injuries in multiple states, "properly belong in federal court," S. Rep. No. 109-14, at 5 (2005), which Congress saw as "the appropriate forum to decide most interstate class actions." *Id.* at 27. Whole Foods' view, however, would disable both state *and* federal courts from entertaining most such class actions, except in the relatively infrequent circumstance when a multistate class sues a corporate defendant in its home jurisdiction. Such home-court suits, however, were not Congress's principal concern. *See id.* at 6–27. For all other class actions, Congress's goal of "enabling federal courts to hear more class actions," *id.* at 27, would be hindered by the adoption of Whole Foods' expansive reading of *Bristol-Myers*, which effectively precludes maintenance of a state-law class action involving plaintiffs suffering injuries in multiple states and forces plaintiffs to balkanize class actions into single-state cases that may not satisfy the jurisdictional requirements of §1332(d) or may fall within its exceptions.

If the Constitution itself dictated Whole Foods' view, of course, Congress's contrary intentions would be unavailing. But there is no argument that Fourteenth Amendment limitations apply of their own

force to federal courts. Rather, Whole Foods' argument actually rests on an expansive reading of Rule 4 as not only incorporating limits on state-court personal jurisdiction at the service-of-process stage, but also subjecting the entire conduct of an action in federal court to constraints properly applicable only to the authority of state courts. That such an odd reading of Rule 4 would so profoundly distort Congress's work in the Class Action Fairness Act is an additional reason to reject it.

CONCLUSION

For the foregoing reasons, this Court should affirm the challenged portion of the order of the district court denying Whole Foods' motion to dismiss class claims on behalf of persons residing outside the District of Columbia for lack of personal jurisdiction.

Respectfully submitted,

/s/ Scott L. Nelson
Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae Public Citizen

April 5, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Amicus Curiae Public Citizen in Support of Plaintiffs-Appellees and Affirmance complies with the type-volume limitations of FRAP 32(a)(7)(B) and 29(d). The brief is composed in a 14-point proportional typeface, Century Schoolbook. As calculated by my word processing software (Microsoft Word 2016), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 3,802 words.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that, on April 5, 2019, this Brief of Amicus Curiae Public Citizen in Support of Plaintiffs-Appellees and Affirmance was served through the Court's ECF system on counsel for all parties.

/s/ Scott L. Nelson
Scott L. Nelson