No. _____

In the
Supreme Court of the United States

DAY & ZIMMERMANN NPS, INC.,

Petitioner,

v.

JOHN WATERS,
individually and for others similarly situated,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1780-81 (2017), this Court held that the Fourteenth Amendment requires dismissing out-of-state plaintiffs seeking to join a mass action in a state court that lacks general personal jurisdiction over the defendant. Relying on *Bristol-Myers Squibb*, the Sixth and Eighth Circuit have dismissed out-of-state plaintiffs seeking to join collective actions under the Fair Labor Standards Act. These Circuits applied *Bristol-Myers Squibb* because Federal Rule of Civil Procedure 4(k)(1)(A) allows federal courts to exercise personal jurisdiction over a defendant *only* to the extent that the forum state's courts could exercise personal jurisdiction.

In the decision below, the First Circuit broke with the Sixth and Eighth Circuits, openly acknowledging it was creating a circuit conflict. It held that Rule 4(k)(1)(A) applies only to the initial service of summons. On this view, once a single in-state FLSA claim has been properly served, thousands of out-of-state plaintiffs may later opt into the federal action, even if the state courts in the forum could not exercise personal jurisdiction with respect to those claims.

The question presented is:

Whether out-of-state plaintiffs seeking to opt into an FLSA collective action pending in federal court must demonstrate that the forum state's courts would have personal jurisdiction over their claims.

PARTIES TO THE PROCEEDING

Petitioner Day & Zimmermann NPS, Inc. was defendant in the district court and appellant in the court of appeals.

Respondent John Waters was plaintiff in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Day & Zimmermann NPS, Inc. is a nongovernmental corporate entity. The Day & Zimmermann Group, Inc. is the parent corporation of Day & Zimmermann NPS, Inc.

RELATED PROCEEDINGS

United States District Court (D. Mass.):

Waters v. *Day & Zimmermann NPS, Inc.*, No. 19-cv-11585 (June 2, 2020)

Waters v. *Day & Zimmermann NPS, Inc.*, No. 19-cv-11585 (Aug. 14, 2020)

United States Court of Appeals (1st Cir.):

Waters v. *Day & Zimmermann NPS, Inc.*, No. 20-1831 (Oct. 14, 2020)

Waters v. *Day & Zimmermann NPS, Inc.*, No. 20-1977 (Jan. 13, 2022)

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INTRODUCTION

"Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler AG* v. *Bauman*, 571 U.S. 117, 125 (2014). That is because Federal Rule of Civil Procedure 4(k)(1)(A) requires that, unless a federal statute provides otherwise, service of process in a federal suit can establish personal jurisdiction over a defendant *only* if the defendant "is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." In other words, in the absence of a statute authorizing nationwide service of process, the forum state's long-arm statute and the Fourteenth Amendment's due-process limits apply to the federal court action. See *Omni Cap. Int'l* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 103 n.6, 106-08 (1987); *Daimler*, 571 U.S. at 125.

This case involves application of this Court's Fourteenth Amendment cases governing personal jurisdiction, and in particular this Courts' decision in *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1780-81 (2017), to collective actions filed in federal court under the FLSA. In *Bristol-Myers Squibb*, this Court held that the Fourteenth Amendment requires dismissing out-of-state plaintiffs seeking to join a mass action in a state court that lacks general personal jurisdiction over the defendant. Since that decision, many federal courts, including three courts of appeals, have addressed a similar situation under the FLSA, where plaintiffs from around the country with no connection to the

forum have sought to "opt in" to a federal FLSA collective action originally filed and served by an in-state plaintiff whose claims arise from the defendant's contacts with the forum.

The Sixth and Eighth Circuits have held that Rule 4(k)(1)(A)'s restriction that federal courts may only exercise personal jurisdiction consistent with the Fourteenth Amendment's limitations on the forum state court's exercise of personal jurisdiction is not time-specific and applies throughout the federal court action. In other words, the Sixth and Eighth Circuits held that even if some plaintiffs' claims are added to a case after the service of summons, those claims still must satisfy the Fourteenth Amendment. For, as this Court made clear in *Bristol-Myers Squibb*, personal jurisdiction must be decided on a claim-by-claim basis. 137 S. Ct. at 1781. Both Circuits also went on to hold that *Bristol-Myers Squibb* requires dismissal of the out-of-state plaintiffs' FLSA claims, since they did not relate to any conduct within the forum.

By contrast, the First Circuit below expressly rejected the Sixth and Eighth Circuits' reading of Rule 4(k)(1)(A), openly acknowledging that it was creating a circuit conflict in the process. Instead, the First Circuit adopted a narrow and idiosyncratic view that Rule 4(k)(1)(A) applies the Fourteenth Amendment only at the time of service of summons. So, while an original plaintiff's claims must satisfy that standard, any number of plaintiffs and claims

may be added to a case after service—through joinder, intervention, FLSA opt-in, or otherwise—without any need to pass Fourteenth Amendment muster.

Judge Barron dissented, correctly observing that the First Circuit majority's interpretation of Rule 4(k)(1)(A) "creates a direct conflict with the ruling of two circuits" and does so in a way that "will have seemingly wide-ranging effects on a slew of cases." App. 33. Indeed, the First Circuit's resolution of the threshold personal jurisdiction issue will upend current jurisdictional practice far beyond the important FLSA collective-action context presented here. The decision below provides a clear roadmap for evading any meaningful limits on a federal court's exercise of personal jurisdiction in direct contradiction of this Court's precedents and Congress's directive in Rule 4(k)(1)(A).

This Court's immediate review is needed to resolve the acknowledged circuit split on jurisdictional rules governing federal courts under Rule 4(k). Restoration of uniform jurisdictional practice is needed to avoid abusive forum shopping for multi-plaintiff actions and restore predictability to would-be defendants about where they may be sued. This case provides the ideal vehicle for resolving this threshold jurisdictional issue, which is the only issue related to the application of *Bristol-Myers Squibb* on

which the federal courts of appeal currently disagree.[1]

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App., *infra*, 1-47) is reported at 23 F.4th 84. The opinion of the district court (App. 58-70) is reported at 464 F. Supp. 3d 455.

The district court's order granting the motion to certify an interlocutory appeal (App. 50-57) is unreported but accessible at 2020 WL 4754984 (D. Mass. Aug. 14, 2020). The court of appeals' order granting the interlocutory appeal (App. 48-49) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2022. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

FEDERAL RULE AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 4(k)(1) provides:

(k) Territorial Limits of Effective Service.

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[1] The petition filed in *Canaday* v. *The Anthem Cos.*, No. 21-1098 (Feb. 2, 2022), largely ignores the threshold jurisdictional question on which the circuits are divided and focuses instead on the split among district courts over the requirements of *Bristol-Myers Squibb* in the FLSA context. See Part C.3, *infra*.

> (1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
>
> (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
>
> (B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or
>
> (C) when authorized by a federal statute.

The Fair Labor Standards Act, 29 U.S.C. 216(b), provides, in part:

> * * * An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. * * *

STATEMENT

A. Background

Federal Rule of Civil Procedure 4(k) establishes territorial limits on the proper service of summons and exercise of personal jurisdiction in federal cases. While the rest of Rule 4 deals with the proper method for service of summons, Rule 4(k) addresses federal courts' exercise of "personal jurisdiction." Fed. R. Civ. P. 4(k)(1). The location of this jurisdictional principle within the summons rule makes sense because "Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process." *BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1555 (2017).

In most cases, Rule 4(k) permits a federal court to exercise "personal jurisdiction over a [domestic] defendant"—i.e., a defendant that is subject to jurisdiction in at least one state's courts—only if that defendant "is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). In other words, for all cases governed by this rule, federal courts must look to the forum state's long-arm statute and the Fourteenth Amendment, which govern forum state courts' jurisdiction. *Walden* v. *Fiore*, 571 U.S. 277, 283 (2014) (under Rule 4(k)(1)(A), federal courts must "ask whether the exercise of jurisdiction 'comports with the limits imposed by federal due process'" on courts in the forum state).

Rule 4(k)(1) applies in all federal cases—both diversity and federal question—save three narrow exceptions. See Fed. R. Civ. P. 4(k)(1)(B) (joined party served 100 miles or less from original summons), 4(k)(1)(C) (Congress "authorize[s]" nationwide jurisdiction by providing for nationwide service in a "federal statute"), and 4(k)(2)(A) (a defendant is foreign, i.e., "not subject to jurisdiction in any state's courts"). Indisputably, none of these exceptions applies in this case. Indeed, they rarely apply, which is why "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler*, 571 U.S. at 125.

Thus, the general framework Congress enacted makes the default personal jurisdiction inquiry in federal court turn on whether the Fourteenth Amendment rules governing state courts are satisfied, *unless* Congress indicated otherwise in the federal statute at issue by providing nationwide service of process. *Omni Cap. Int'l*, 484 U.S. at 108 (where a federal statute "does not authorize [nationwide] service of summons," federal courts look to the Fourteenth Amendment). By contrast, the Fifth Amendment applies to personal jurisdiction in cases involving federal statutes in which Congress has provided for nationwide service. *Ibid.*; Fed. R. Civ. P. 4(k)(1)(C).

The FLSA, the federal statute at issue below, "does not authorize nationwide service of process." App. 16. Moreover, it makes clear FLSA collective actions may be brought in either state or federal

courts—and makes no indication that the jurisdictional rules (or results) should differ between the two. See 29 U.S.C. 216(b) (FLSA collective action "may be maintained against any employer * * * in any Federal or State court of competent jurisdiction"). The FLSA also makes clear that all members of a "collective" action are "party plaintiff[s]" who must affirmatively opt into the action to be bound by or benefit from it. *Ibid.* An original plaintiff may not represent or control the litigation on behalf of other plaintiffs, who must "commence[]" their own "cause of action" in order to stop their statute of limitations from running, just like additional named plaintiffs joining a mass action. 29 U.S.C. 255(a), 256; see, e.g., *Campbell* v. *City of Los Angeles*, 903 F.3d 1090, 1105 (9th Cir. 2018) (describing FLSA collective action as "a kind of mass action" where later-joined plaintiffs have "the same status in relation to the claims of the lawsuit" as the original plaintiff).

B. Facts And Procedural History

1. Petitioner Day & Zimmerman NPS, Inc. employs people across the nation, though it is incorporated in Delaware and its principal place of business is in Pennsylvania. Dist. Ct. Dkt. 16-1 at 6.

2. John Waters, a former supervisor for Petitioner in Massachusetts, filed a collective action under the FLSA in the District of Massachusetts. Dist. Ct. Dkt. 1. He alleged a failure to fully compensate for overtime work and hopes to bring suit on behalf

of all individuals working for Petitioner who allegedly were undercompensated for overtime, in any state. See *id.* ¶ 9.

3. Simultaneously with Waters' complaint, an out-of-state opt-in plaintiff filed a written consent to join the collective action. See Dist. Ct. Dkt. 1, Ex. A. A couple weeks after filing the complaint, Waters served it on Petitioner. App. 4. In September 2019, many more individuals filed written consents to join the action as opt-in party plaintiffs, Dist. Ct. Dkts. 7-9, and since then over one-hundred opt-ins have joined the case, App. 5. See generally Dist. Ct. Dkt. (containing written consents).

4. Nearly all these opt-in plaintiffs (109 out of 112 as of August 14, 2020) have not worked for Petitioner in Massachusetts. App. 54-55. Instead, they worked in other states, *ibid.*, and thus their claims for overtime compensation did not relate to any activity by Petitioner in the forum state. Nothing would have stopped these plaintiffs from filing suit in Pennsylvania, where Petitioner is headquartered and thus subject to general jurisdiction, but they did not. App. 58, 64. Petitioner moved to dismiss all these out-of-state opt-in plaintiffs for lack of personal jurisdiction under this Court's decision in *Bristol-Myers Squibb*, 137 S. Ct. at 1780-81.

5. The district court denied Petitioner's motion. App. 70. The court began by correctly recognizing that the FLSA does not provide for nationwide service of process, so personal jurisdiction was governed

by Rule 4(k)(1)(A), which requires "the same personal jurisdiction inquiry as in a diversity case." App. 61. In other words, the district court had to apply the forum state's long-arm statute and the Fourteenth Amendment's specific-jurisdiction rules (given Petitioner is not subject to general jurisdiction in Massachusetts). App. 61-63. Yet, the district court went on to hold that the out-of-state opt-in plaintiffs need not be dismissed under *Bristol-Myers Squibb* because, in the district court's view, opt-in party plaintiffs are not real parties in interest in FLSA collective actions—holding that the only relevant "suit" for personal jurisdiction purposes was between Waters and Petitioner. App. 68. Animating the court's decision were policy concerns about the scope of FLSA collective actions. App. 69-70.

6. Petitioner filed a motion for certification of interlocutory appeal, which the district court granted—agreeing that district courts are divided over whether *Bristol-Myers Squibb* requires dismissing out-of-state FLSA opt-in plaintiffs, a purely legal question that could end the case in that court for nearly all the opt-in plaintiffs. App. 50-57. The court of appeals granted Petitioner's subsequent motion for interlocutory review under 28 U.S.C. 1292(b). App. 48-49.

7. A divided panel of the court of appeals affirmed. App. 33.

a. The majority declined to dismiss the out-of-state opt-in plaintiffs, but for a different reason than the district court. Rather than evaluate whether

there is personal jurisdiction over the claims of opt-in plaintiffs under *Bristol-Myers Squibb* or this Court's other Fourteenth Amendment cases, the majority held Rule 4(k)(1)(A) does not "operate[] as a free-standing limitation on the exercise of personal jurisdiction" throughout a case. App. 17. It further held that Rule 4(k)(1)(A) makes "the due process standard of the Fourteenth Amendment applicable to federal-question claims in federal court" only at the time of service of summons, and it does not govern any claims or plaintiffs added to a case "after a summons has been properly served." App. 20. Because Waters' in-forum claims satisfied specific-jurisdiction principles under the Fourteenth Amendment at the time of service, none of the claims of out-of-forum plaintiffs who later opted into Waters' suit need to satisfy those same principles. App. 20-21; App. 25 ("although serving a summons in accordance with state * * * law is necessary to establish jurisdiction over a defendant in the first instance, the Fifth Amendment's constitutional limitations [not the Fourteenth Amendment's] limit the authority of the court after service has been effectuated").

The First Circuit acknowledged it was opening a circuit conflict by disagreeing with contrary holdings of the Sixth and Eighth Circuits. Those courts—in *Vallone* v. *CJS Solutions Group*, 9 F.4th 861 (8th Cir. 2021) (Colloton, J.), and *Canaday* v. *Anthem Companies*, 9 F.4th 392 (6th Cir. 2021) (Sutton, J.)—both held that Rule 4(k)(1) requires application of the Fourteenth Amendment through an entire case, including to the claims of opt-in plaintiffs added to

an FLSA collective action after the service of process. App. 28. The First Circuit noted, but disregarded, the Sixth Circuit's warning that a narrow, time-specific view of Rule 4(k)(1) would create an imbalance between the jurisdictional rules governing original and all later-added plaintiffs *and* encourage an end-run around the bedrock jurisdictional principle that federal courts are governed by the Fourteenth Amendment absent a federal statute authorizing nationwide service. App. 30-32. Indeed, until the First Circuit's decision below, no federal court to consider *Bristol-Myers Squibb*'s application to FLSA collective actions adopted a narrow, time-of-service construction of Rule 4(k)(1), although they differed as to whether *Bristol-Myers Squibb* required dismissal of out-of-state opt-in plaintiffs.[2]

Because of its unprecedented holding that the Fourteenth Amendment does not apply after an initial service of summons in federal court, the First Circuit never answered whether this Court's *Bristol-Myers Squibb* decision requires dismissing the claims of out-of-state opt-in plaintiffs in FLSA collective actions. But the majority agreed with Petitioner and the Sixth and Eighth Circuits that FLSA opt-in plaintiffs are real "parties" to the action, App.

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[2] See, e.g., *Hickman* v. *TL Transp., LLC*, 317 F. Supp. 3d 890, 899 n.2 (E.D. Pa. 2018); *Garcia* v. *Peterson*, 319 F. Supp. 3d 863, 880 (S.D. Tex. 2018); *Seiffert* v. *Qwest Corp.*, 2018 WL 6590836, at *3-4 (D. Mont. Dec. 14, 2018); *Hammond* v. *Floor & Decor Outlets of Am., Inc.*, 2020 WL 2473717, at *15 (M.D. Tenn. May 13, 2020).

7-13, undermining the core logic supporting the district court's denial of the motion to dismiss. App. 68. This strongly suggests that, but for its erroneous holding that Rule 4(k)(1) precludes application of Fourteenth Amendment due-process requirements in federal court after an initial service of summons, the First Circuit would have ordered dismissal of out-of-state opt-ins to the collective action, consistent with the Sixth and Eighth Circuits' decisions. See App. 32 ("We agree that FLSA collective actions and Rule 23 class actions are dissimilar in myriad ways.").

b. Judge Barron dissented, noting that the majority's holding created "a direct conflict with the ruling of two circuits" and "will have seemingly wide-ranging effects on a slew of cases" far beyond "the specific dispute at hand." App. 33.

Judge Barron identified several problems with the majority's holding. Not only does it "directly conflict[]" with other circuits, but Judge Barron could not find "any case in which any court * * * has ever read Rule 4(k)(1)(A) in the narrow, time-of-service-limited way that the majority reads it." App. 40. Rather, the common practice among federal courts is to apply Fourteenth Amendment due-process limits "throughout a suit's duration"—i.e., to new claims and new plaintiffs added after service of process. App. 40-41. Judge Barron also explained that the majority's new rule will require "federal courts in our circuit * * * to change how they have been doing

things in many cases"—as they now must assess personal jurisdiction under one standard for original claims and a different standard for later-added claims. App. 41-42. Finally, Judge Barron noted that several commentators have called for Congress to amend Rule 4(k) to permit aggregation of claims outside the shadow of the Fourteenth Amendment—calls that make no sense if the majority is correct that this is already permissible under the unamended Rule. See App. 33-35, 39.

Given the far-reaching consequences of the majority's holding, Judge Barron ended his dissent by noting he would not have granted interlocutory review in this case. App. 42-43. But the First Circuit did grant such review, and the majority unequivocally held that Rule 4(k)(1) does not govern federal cases after the service of summons. That novel holding now binds federal courts in the First Circuit, and clearly warrants this Court's review.

REASONS FOR GRANTING THE PETITION

The First Circuit below acknowledged it was creating a circuit conflict on an important and recurring question of federal court jurisdiction under Federal Rule of Civil Procedure 4(k)(1)(A). Specifically, the First Circuit rejected the holdings of the Sixth and Eighth Circuits that the Fourteenth Amendment governs personal jurisdiction with respect to all claims and parties—no matter when added—in federal cases under Rule 4(k)(1)(A). The First Circuit expressly disagreed in holding that Rule 4(k)(1)(A)

only incorporates the Fourteenth Amendment at the time of service of summons, such that additional claims and plaintiffs may be added later and thereby escape the due-process scrutiny they would have experienced if they were in the case from the start.

This Court should grant review to resolve this unseemly conflict over a core jurisdictional rule in federal court and proper interpretation of the federal civil rules. The First Circuit majority's decision creates a gaping loophole through this Court's repeated directives that personal jurisdiction is a claim-specific inquiry and that, under Rule 4(k), the Fourteenth Amendment governs all federal question cases where the statute does not provide for nationwide service of process. Undeterred, the First Circuit now holds that the Fifth Amendment applies to plaintiffs added to a case after service, despite no indication from Congress that a different due-process standard applies at different times in a case.

This Court's guidance is urgently needed to correct the circuit split, prevent the abusive forum shopping in both FLSA collective actions and other joinder cases that will undoubtedly result, and return predictability to defendants about where they may be sued for certain claims. And this case is the ideal vehicle for this Court to answer the crucial jurisdictional issue presented here.

A. The Circuits Are Divided Over What Personal Jurisdiction Standard Applies To The Claims Of Plaintiffs Joining A Federal Action.

1. The First Circuit majority held that plaintiffs whose claims cannot satisfy this Court's Fourteenth Amendment personal jurisdiction rules nevertheless may join a case after the service of summons and thereby avoid just that inquiry. According to the First Circuit, Rule 4(k)(1)(A) incorporates the Fourteenth Amendment in federal question cases in federal court—but only for the plaintiff serving summons and only for his claims at the time of that service. App. 19-20. It does not, according to the First Circuit, require evaluating personal jurisdiction under that standard for any plaintiff or claim later added to the case. App. 19-20; see App. 25. In its view, Rule 4(k) is merely a rule governing service of summons; it does not "operate[] as a free-standing limitation on the exercise of personal jurisdiction." App. 17.

So, in cases like the FLSA collective action here, so long as one plaintiff whose claims relate to the forum files service, any number of additional plaintiffs (here, over a hundred) whose claims have no relation to the forum may later join the case with no such forum-specific scrutiny. App. 19-20; see also App. 28-32 (asserting that Rule 4(k)'s title means it "logically cannot be read to limit a federal court's jurisdiction after a summons is properly served," even

though it does so at the time of service, and disagreeing with courts holding the opposite); App. 36-37 (dissent noting majority reads Rule 4(k)(1)(A) to have "an implicit time-of-service-based limitation").

The First Circuit majority never addressed whether *Bristol-Myers Squibb* precludes FLSA opt-in plaintiffs with claims unrelated to the forum from joining a collective action against a defendant not subject to general jurisdiction in the forum. While the First Circuit suggested it may agree with the Sixth and Eighth Circuits on *that* question, App. 7-13 (holding that FLSA opt-in plaintiffs are "parties to the suit" just like the original plaintiff); App. 32 (recognizing "myriad" dissimilarities between "FLSA collective actions and Rule 23 class actions"), it never reached it due to its erroneous interpretation of Rule 4(k).

The dissenting opinion below disagreed with the majority's reading of Rule 4(k)(1)(A)—noting it was not "aware of any other case in which any court * * * has ever read Rule 4(k)(1)(A) in the narrow, time-of-service-limited way that the majority reads it." App. 40. The dissent also recognized that the majority's view would require a sea change in how federal courts treat later-added claims in both federal-question and state-law cases under Rule 4(k)(1)(A). App. 41 & n.16.

2. Other Circuits have rejected the First Circuit majority's interpretation of Rule 4(k)(1)(A)—and none has adopted it.

The First Circuit opinion itself recognizes that it creates a conflict with the other Circuits that have decided the issue. See App. 28 ("[T]he Sixth and Eighth Circuits, faced with *BMS*-based personal jurisdiction challenges to FLSA collective actions, disagree with the decision that we reach today."); App. 28 (disagreeing with those courts' holdings that for "amended complaints and opt-in notices, the district court remains constrained by * * * the host State's [] personal jurisdiction limitations" (citation omitted)). The First Circuit "majority's reading of Rule 4(k)(1)(A) * * * directly conflicts * * * with that of other circuits." App. 40 (Barron, J., dissenting); App. 33 (First Circuit "create[d] a direct conflict with the ruling of two circuits").

a. The Sixth Circuit in *Canaday*, 9 F.4th 392, held that opt-in plaintiffs whose claims did not relate to the forum must be dismissed from an FLSA collective action, specifically holding that Rule 4(k)(1)(A) requires all plaintiffs' claims to satisfy the Fourteenth Amendment's personal jurisdiction standard—even if they are added after the service of summons. *Id.* at 400. Writing for the court, Judge Sutton noted that Congress's practice when it wants defendants to be subject to personal jurisdiction for a federal claim in any federal court is to provide nationwide service of process to trigger Rule 4(k)(1)(C); when it chooses not to, it limits available forums to those permitted under the Fourteenth Amendment under Rule 4(k)(1)(A). *Id.* at 398-99. The reality that later-joining plaintiffs may not need to serve summons under Rule 4 "does not eliminate Civil

Rule 4(k)'s requirement that the defendant be amenable to" personal jurisdiction "for that claim." *Id.* at 400.

A contrary result, the Sixth Circuit explained, would render Rule 4(k)'s personal jurisdiction constraints obsolete for any amended complaint (with new claims and/or new parties). *Ibid.* The Rule includes no indication that was Congress's intent, so "[e]ven with amended complaints and opt-in notices, the district court remains constrained by Civil Rule 4(k)'s—and the host State's—personal jurisdictional limitations." *Ibid.*; see also *Lyngaas* v. *Ag*, 992 F.3d 412, 438-39, 442-44 (6th Cir. 2021) (Thapar, J., concurring and dissenting in part) (explaining that the crucial question in all cases governed by Rule 4(k)(1)(A) is "what the Fourteenth Amendment allows," because that rule "incorporates the Fourteenth Amendment's protections").

b. The Eighth Circuit in *Vallone*, 9 F.4th 861, also concluded that out-of-state FLSA opt-in plaintiffs must be dismissed after explicitly holding that Rule 4(k) requires, in the absence of nationwide service of process, that federal courts look to the forum state's long-arm statute and thus the Fourteenth Amendment for all personal jurisdiction questions—including those involving later-added opt-in plaintiffs. *Id.* at 865. Under Rule 4(k) and *Bristol-Myers Squibb*, "[p]ersonal jurisdiction must be determined on a claim-by-claim basis," so each later-added plaintiff's

claims must pass Fourteenth Amendment constitutional muster. *Ibid.*; see App. 28 (acknowledging conflict with *Vallone*).

c. The First Circuit majority also recognized that its decision conflicted with Judge Silberman's dissent in *Molock* v. *Whole Foods Market Group*, 952 F.3d 293 (D.C. Cir. 2020). See App. 30 (describing Judge Silberman as "suggesting that Rule 4(k) must be interpreted broadly to ensure that 'litigants [cannot] easily sidestep the territorial limits on personal jurisdiction simply by adding claims—or by adding plaintiffs, for that matter—after complying with Rule 4(k)(1)(A) in their first filing'"). Judge Silberman's opinion did more than "suggest[]" as much. App. 30. It explained in no uncertain terms that, "in the absence of another statute or Rule expanding the reach of effective service of process, a district court's analysis of personal jurisdiction in a civil action will be *identical* to the Fourteenth Amendment inquiry undertaken by the relevant state court"—and this standard governs all claims and parties, no matter when added to the case. *Molock*, 952 F.3d at 308-09 (emphasis added). Judge Silberman further explained that the opposite holding would allow litigants to "easily sidestep the territorial limits on personal jurisdiction simply by adding claims—or by adding plaintiffs, for that matter—after complying with Rule 4(k)(1)(A) in their first filing. That * * * is decidedly not the law." *Id.* at 309.

Decidedly not the law—that is, everywhere except the First Circuit.

B. The First Circuit's Personal Jurisdiction Holding Conflicts With This Court's Cases And The Text Of Rule 4(k).

In addition to creating an intractable circuit split, the First Circuit's decision conflicts with two important aspects of this Court's personal jurisdiction cases and with the plain terms of Rule 4(k).

1. The decision below runs headlong into this Court's cases holding that Rule 4(k)(1)(A) applies the Fourteenth Amendment to federal-question cases absent an express decision by Congress to provide for nationwide service of process. See, e.g., *Omni Cap. Int'l*, 484 U.S. at 108. In "most cases," then, federal courts can "assert personal jurisdiction" over a defendant only if that defendant would be "subject to the jurisdiction of a court of general jurisdiction" in the forum state. *Walden*, 571 U.S. at 283.

The First Circuit declared it would be an "anomaly" to follow the Sixth and Eighth Circuits' approach because it applies "the Fourteenth Amendment to federal-law claims that are governed only by the Fifth Amendment." App. 31; see App. 20-21 (claiming it would be "anomalous to apply" the Fourteenth Amendment's jurisdictional limits to federal cases). But that is exactly what this Court has repeatedly held is required by the Federal Rules in most federal cases, including those involving federal claims. See, e.g., *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 (noting in another federal question

case that under Rule 4(k)(1)(A), federal courts typically must "ask whether the exercise of jurisdiction 'comports with'" the Fourteenth Amendment).

Congress, through Rule 4(k)(1), set up a system where the Fourteenth Amendment by default applies to federal-law claims unless Congress expressly indicates otherwise by providing for nationwide service of process. *Omni Cap. Int'l*, 484 U.S. at 108 (holding that where a federal statute "does not authorize [nationwide] service of summons," federal courts must look only to the "long-arm statute of the [forum] State" and the Fourteenth Amendment). Because "Congress knows how to authorize nationwide service of process when it wants to," the absence of express language makes clear it did not intend for that result to follow. *Id.* at 106 (noting other federal statutes in which Congress has provided for nationwide service); see also 4 Federal Practice and Procedure § 1068.1 (4th ed. 2021) [hereinafter Wright & Miller] ("[T]he Court in *Omni Capital* determined that the jurisdiction of a federal court, even in federal question cases, in the absence of a statutory provision for service, was limited by the forum state's long-arm statute as a result of the incorporation of that methodology by former Rule 4(e).").

Indeed, the very legislative history for Rule 4(k) that the First Circuit majority cited makes clear that the Fourteenth Amendment applies to "all actions" against domestic defendants where Congress has not "provided for nationwide service." Amendments to Fed. R. Civ. P. 4, 146 F.R.D. 401, 559, 571 (1993).

The Fifth Amendment applies *only* when the defendant is not subject to jurisdiction in any state or where nationwide service is authorized. *Id.* at 571; see Daniel R. Coquillette, et al., 16 Moore's Federal Practice § 108.123 (3d ed. 2021).[3]

Here, Congress did not provide for nationwide service of process in the FLSA—despite doing so in several contemporaneous statutes like the Clayton Act,[4] the 1934 Securities Exchange Act,[5] and the Employment Retirement Income Security Act.[6] Thus, Congress's "intention" was not to allow suit outside the bounds of the Fourteenth Amendment. *Omni Cap. Int'l*, 484 U.S. at 106.

Congress made this purpose crystal clear in the FLSA by permitting collective actions in both state and federal courts, with no indication that the rules governing jurisdiction should differ between the two. 29 U.S.C. 216(b) (permitting collective actions in "any Federal or State court of competent jurisdiction"). But the First Circuit has now invented such

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[3] This proposition was so well settled before the First Circuit majority's decision that even the district court decision below (which the First Circuit affirmed on different grounds) recognized that because the FLSA "is silent on the availability of nationwide service of process," the court had to "conduct the same personal jurisdiction inquiry as in a diversity case under the Massachusetts long-arm statute" under Rule 4(k)(1)(A). App. 61.

[4] 15 U.S.C. 22; 28 U.S.C. 1391.

[5] 15 U.S.C. 78aa.

[6] 29 U.S.C. 1132(e)(2).

a distinction out of whole cloth—as it permits residents of any and every state to join a collective action filed in federal court in Massachusetts (as here), while only Massachusetts residents may join an FLSA collective action in Massachusetts state court.

The decision below flips the basic jurisdictional framework on its head. In FLSA cases and many others involving joinder or amendments, federal courts in that Circuit no longer will "ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler*, 571 U.S. at 125. Instead, they will apply a different standard to all plaintiffs and claims added after service despite Congress's—and this Court's—instruction otherwise. And they will do so despite the illogic of applying different due-process standards at different points in a case. Indeed, under the First Circuit's logic, plaintiffs who opt into an FLSA collective action *before* service of summons, as can happen and did happen in this case, Dist. Ct. Dkt. 1, Ex. A, would be subject to the Fourteenth Amendment, but opt-ins added later are subject to the Fifth Amendment. This interpretation undermines Congress's carefully crafted jurisdictional framework.

2. The decision below also conflicts with this Court's holding in *Bristol-Myers Squibb*, which confirms that personal jurisdiction is a claim-by-claim inquiry that every plaintiff must satisfy. 137 S. Ct. at 1780-81. Personal jurisdiction over a defendant must be established on equal footing with respect to each plaintiff's claims, even if out-of-state plaintiffs

whose claims don't relate to the forum join a case with in-state plaintiffs whose claims do relate to the forum. *Id.* at 1781.

The First Circuit majority's reasoning is irreconcilable with that holding, since its construction of Rule 4(k) endorses the practice of having just one in-state plaintiff whose claims relate to the forum filing a case and serving summons, and then permitting any number of out-of-state plaintiffs whose claims don't relate to the forum joining that case despite no general jurisdiction. Under the First Circuit's logic, none of those later-added plaintiffs' claims need meet Fourteenth Amendment specific personal jurisdiction standards, merely because the initial plaintiff's claim satisfies due process. In practice, then, this invented rule undoes *Bristol-Myers Squibb*'s key holding that out-of-state plaintiffs may not escape the same personal jurisdiction inquiry that they would have had to endure if they had brought the case themselves. *Id.* at 1781-82.

Take this case. It is undisputed that the more than one hundred out-of-state opt-in plaintiffs could not have independently brought their claims against Petitioner in the District of Massachusetts under the governing personal jurisdiction framework. Yet, the mere fact that they joined a case already filed by an in-state plaintiff means that they can now sue there.

The First Circuit's untenable construction of Rule 4(k) runs directly counter to *Bristol-Myers Squibb* and the claim-specific analysis required to determine personal jurisdiction. Nothing in the

Rule obviates the principle that personal jurisdiction must be satisfied on a claim-by-claim and plaintiff-by-plaintiff basis. The decision below creates an end run around this Court's holding—not just in FLSA cases, but in any federal case involving joinder of claims or parties. As the Sixth Circuit warned, such an approach would mean the "core limitations on judicial power" reflected in Rule 4(k)(1)(A) "would be one amended complaint—with potentially new claims and new parties—away from obsolescence." *Canaday*, 9 F.4th at 400. As Judge Sutton aptly put it for that court: "That is not how it works." *Ibid.* (noting the tension between the logic embraced by the First Circuit and *Bristol-Myers Squibb*).

3. The First Circuit's holding conflicts with the plain terms of Rule 4(k). Specifically, the First Circuit effectively disregards that Rule 4(k)(1)(A) permits "personal jurisdiction over a defendant" only if that defendant "is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1), (1)(A). There is no temporal limit on this requirement. The Rule does not require the defendant to be amenable to personal jurisdiction under the forum state's rules *only at the time of service*. It requires amenability to "jurisdiction" in a state court in the forum. And under *Bristol-Myers Squibb* and this Court's other cases, a general state court in the forum would have to apply the minimum-contacts test with respect to every plaintiff and every claim—no matter when added to the case.

In other words, personal jurisdiction is *not* time-specific in the general course, and the First Circuit majority points to nothing in the text requiring a different, time-specific result here. Rather, the majority's temporal limitation on Rule 4(k)(1)(A)'s application is "implicit." App. 36 (Barron, J., dissenting). Yet, this Court has repeatedly instructed lower courts not to rewrite congressional language. See *Alabama* v. *North Carolina*, 560 U.S. 330, 352 (2010) ("We do not—we cannot—add provisions to a federal statute" because judges are not "lawmakers."); *Hanover Bank* v. *C.I.R.*, 369 U.S. 672, 687 (1962) (judges "are not at liberty * * * to add to or alter the words employed to effect a purpose which does not appear on the face of the statute"). The First Circuit majority added a temporal limitation into Rule 4(k)(1)(A) "in reliance upon [its] supposition of what Congress *really* wanted"—but that is forbidden, especially with respect to a "clear jurisdictional statute" like this one. *Powerex Corp.* v. *Reliant Energy Servs.*, 551 U.S. 224, 236-37 (2007). In addition to pointing to no text showing such a temporal limit should be imposed, the First Circuit majority does not cite a *single case* (or any other authority) for the idea that the Fourteenth Amendment only applies under Rule 4(k)(1)(A) at the time of service. See App. 40 (Barron, J., dissenting) (noting no other case has adopted this narrow rule).

The First Circuit focused on Rule 4's title—"Summons"—and its *other* sections' focus on the logistics and method for the service of summons. App. 18; App. 21-24 (majority's "history" section focusing on

changes to the *method* of service). But it ignored the clear language limiting the "personal jurisdiction" of courts in Rule 4(k)(1)—making other parts of Rule 4 irrelevant. And it ignored that "Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process." *BNSF Ry.*, 137 S. Ct. at 1555-56. It also skipped over parts of the legislative history it cited (at App. 24) that make clear Rule 4(k) is meant not just to govern service but also to "explicitly authoriz[e] the exercise of personal jurisdiction over persons" in some cases, and not others. 146 F.R.D. at 570-71.

As Judge Silberman and others have explained, Rule 4(k)(1) not only establishes the "method" of service for initiating lawsuits but also the "territorial limitations on amenability to service (and therefore personal jurisdiction)." *Molock*, 952 F.3d at 309; see also *Handley* v. *Ind. & Mich. Elec. Co.*, 732 F.2d 1265, 1269-70 (6th Cir. 1984) (explaining separate inquiries under Rule 4(k) regarding (i) whether defendant was properly served and (ii) whether "state provisions on amenability to service" are satisfied); *S.E.C.* v. *Ross*, 504 F.3d 1130, 1138-39 (9th Cir. 2007) (under Rule 4(k), separately evaluating "proper basis for jurisdiction" and "proper service of process").

So, it is inconsistent with Rule 4(k)(1)(A)'s text and illogical to hold that the separate amenability requirement—being subject to jurisdiction in the forum state's courts—falls away just because the initial summons was already served. *Molock*, 952 F.3d

at 309 (the amenability requirement "remain[s] operative throughout the proceedings"). That is why courts consistently have continued applying the Fourteenth Amendment even to amended claims or later-added parties in federal cases. See *Old Republic Ins. Co.* v. *Cont'l Motors, Inc.*, 877 F.3d 895, 902-03 (10th Cir. 2017) (although amended complaints are served under Rule 5(a)(1), the Court still evaluated an amended complaint for personal jurisdiction under Rule 4(k)(1)(A)); *Reedsburg Bank* v. *Apollo*, 508 F.2d 995, 1000 (7th Cir. 1975) ("The general rule is that permissive intervention in an in personam action other than a class action must be supported by independent grounds of jurisdiction * * *."); *Nat'l Am. Corp.* v. *Fed. Republic of Nigeria*, 425 F. Supp. 1365, 1368-69 (S.D.N.Y. 1977) (applying state jurisdictional rules to parties added by permissive intervention). The First Circuit's departure from this practice was unwarranted.

It is also telling that legal commentators are uniform that Rule 4(k)(1), as currently enacted, requires applying the Fourteenth Amendment in the mine-run of federal question cases: including to later-added plaintiffs and claims. See, e.g., Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction over Absent Class Members Explained*, 39 Rev. Litig. 31, 43 (2019) (describing as "pure nonsense" and "preposterous" the idea that Rule 4(k)(1) only applies the Fourteenth Amendment to jurisdiction at the time of service, and explaining that "[t]here is no question that * * * new claims appear-

ing in amended complaints must satisfy the jurisdictional constraints imposed by Rule 4(k)" even if they need not be served under that rule); Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 Nw. U. L. Rev. 1, 37-40 (2018) (noting Rule 4(k)(1) inhibits "multistate joinder" in most federal cases); Louis J. Capozzi, III, *Relationship Problems: Pendant Personal Jurisdiction After* Bristol-Myers Squibb, 11 Drexel L. Rev. 215, 244-45 (2018) (rejecting idea that Rule 4(k)(1) permits parties to bring amended claims without regard to original personal jurisdiction inquiry as "untenable").

These and other scholars recognize the heretofore uncontroversial reality that Congress has limited federal courts' jurisdiction to the Fourteenth Amendment rules—even though many such commentators think Congress should (as a matter of policy) expand federal courts' jurisdiction by amending Rule 4(k) to require compliance with the Fifth Amendment only. See Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 Nw. U. L. Rev. 1301, 1315-16 (2014) (describing current system as "a self-inflicted wound [because] Congress has no obligation to make federal jurisdiction follow state lines"); Dodson, *supra*, at 37-40 (calling for amendment to Rule to allow what article describes as beneficial aggregation of claims in federal court). As the First Circuit dissent noted, "[i]t would be strange for these commentators to have called for such an amendment if * * * the rule's [supposedly] deleterious effects on the beneficial aggregation of claims plainly can be overcome at present by a

means as simple as the post-summons amendment of the complaint." App. 39 (Barron, J., dissenting).

Whatever commentators' or courts' views on the wisdom of the current system, the fact remains that Congress has *not* "grant[ed] nationwide jurisdiction to all federal courts." Sachs, *supra*, at 1316. And the First Circuit's attempt to create such jurisdiction for all later-added plaintiffs should be rejected.

C. The Question Presented Is Exceptionally Important And Deserving Of Immediate Review.

This question of the proper application of personal jurisdiction in federal courts under Rule 4(k)(1) is frequently recurring and exceptionally important. And, as the dissent below recognized, the First Circuit's decision will have "wide-ranging effects on a slew of cases that have nothing to do with the specific dispute at hand," App. 33—mandating a sea change in personal jurisdiction practice by federal courts in all diversity cases and nearly all federal question cases involving joinder or amendment to add new plaintiffs or claims. This Court's intervention is needed to avoid deleterious results, including abusive forum shopping leading to unpredictability for defendants given conflicting interpretations of a federal rule and, specifically here, the scope of employee collective actions under the FLSA.

1. The Court often grants certiorari to resolve important questions under the Federal Rules of Civil

Procedure. See, e.g., *Societe Internationale Pour Participations Industriales Et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 203 (1958) ("Because this decision raised important questions as to the proper application of the Federal Rules of Civil Procedure, we granted certiorari."); *Leishman* v. *Associated Wholesale Elec. Co.*, 318 U.S. 203, 205 (1943) (similar); *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 236 (1958) (Frankfurter, J., dissenting) (discussing need "for nation-wide uniformity in the detailed application of rules of procedure within the federal judicial system"). Moreover, the Rule at issue here governs personal jurisdiction—"an essential element of the jurisdiction of" all federal courts, *Vt. Agency of Nat. Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 779 (2000), and often subject to this Court's review given the crucial role it plays in every federal case. See, e.g., *Ford Motor Co.* v. *Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021); *Bristol-Myers Squibb*, 137 S. Ct. at 1780-81; *BNSF Ry.*, 137 S. Ct. at 1555-56; *Walden*, 571 U.S. at 283; *Daimler*, 571 U.S. at 125.

This case's jurisdictional consequences will reach far beyond the FLSA context. See App. 33, 41-42 (Barron, J., dissenting). The majority's interpretation of Rule 4(k)(1)(A) will permit plaintiffs and claims to be added to any federal case through joinder or intervention or amendment and thereby escape the jurisdictional inquiry they would have experienced if they were in the case from the beginning. Not only is this true in all federal question

cases, like this one, absent a nationwide service provision, but it is also true in every diversity case involving state claims in federal court—which are governed by the same rule. See Wright & Miller § 1068.1 ("[T]he Rule 4(k) framework does not treat federal question cases differently than cases where a federal court adjudicates state-created rights based on diversity of citizenship jurisdiction."); *Astro-Med, Inc.* v. *Nihon Kohden Am., Inc.*, 591 F.3d 1, 8-9 (1st Cir. 2009). Under the First Circuit's reasoning, even mass state-law tort actions, assuming diversity jurisdiction, could proceed in federal court so long as the out-of-state plaintiffs join after an in-state plaintiff serves an initial complaint.

The First Circuit's suggestion that its construction of Rule 4(k) will not impact personal jurisdiction with respect to state law claims in federal court is flatly wrong. App. 29 & nn.10-11. That suggestion is inconsistent with its interpretation of Rule 4(k)(1)(A) as applying the Fourteenth Amendment *only* at the time of service, since nothing "in the text of the rule distinguish[es]" between the rule's application to federal or state claims. App. 41 n.16 (Barron, J., dissenting). Thus, "however the rule applies" to later-added plaintiffs or claims in federal-question cases "must be how it applies" to later-added plaintiffs or claims in diversity cases. *Ibid.*

Put simply, the First Circuit's decision "will be binding in [that] Circuit not only in cases that concern collective actions under the FLSA"—applica-

tion of personal jurisdiction, which itself is an important question for this Court to resolve—"but also in a whole range of cases that also implicate Rule 4(k)(1)(A) but that have nothing to do with FLSA collective actions at all." App. 42 (Barron, J., dissenting). This Court's intervention is needed to avoid the upheaval and confusion to lower courts in a wide variety of cases.

2. The First Circuit's holding also encourages abusive forum shopping in FLSA collective actions and other multi-plaintiff litigations, eviscerating the ability of businesses to predict where they will be sued—a significant feature of current personal jurisdiction rules.

As the Sixth Circuit explained, this result will allow the simple step of amendment or joinder to obliterate Congress's choice to apply the Fourteenth Amendment to cases where it has not provided for nationwide service in multi-plaintiff cases. *Canaday*, 9 F.4th at 400; see also *Molock*, 952 F.3d at 309 (noting holding like First Circuit's allows litigants to "easily sidestep the territorial limits on personal jurisdiction"). Indeed, plaintiffs with no connection to a forum will be able to bring their claims against an out-of-state defendant if they can find a single plaintiff whose claims relate to the forum. And there is no logical stopping point for how many additional plaintiffs may join an action based on just one in-state plaintiff's claims. In several FLSA cases, plaintiffs have joined collective actions where a mere 3 or 4 percent of the plaintiffs have any connection

to the forum state. See *Maclin* v. *Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845 (N.D. Ohio 2018) (424 out-of-state plaintiffs attempting to join 14 in-state ones); *Thomas* v. *Kellogg Co.*, 2017 WL 5256634 (W.D. Wash. Oct. 17, 2017) (821 out-of-state plaintiffs seeking to join 37 ones). What's more, those out-of-state plaintiffs could wait to see the judge assignment or whether the initial claims survive a motion to dismiss before deciding whether to join under relaxed jurisdictional rules or file a separate action—further encouraging forum shopping.

Such a loophole to avoid Congress's choice of the appropriate personal jurisdiction rules (and this Court's rule that personal jurisdiction must be satisfied for all plaintiffs' claims) would also eviscerate defendants' rights. See *Fuentes* v. *Shevin*, 407 U.S. 67, 90 n.22 (1972). Predictability as to where potential defendants may be sued for what conduct is an animating feature of this Court's personal jurisdiction rules. See, e.g., *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980) (Due-process rules "give[] a degree of predictability to the legal system" so that "potential defendants" are able to "structure their primary conduct" by knowing where their conduct "will and will not render them liable to suit."). That predictability dissolves if businesses are forced to litigate high-stakes multi-plaintiff actions where they are not at home and where the vast majority of claims do not relate to the forum despite no indication from Congress that they are subject to nationwide service. Relevant witnesses and evidence (including corporate employees formulating

policies at headquarters) will be in other states, increasing the costs to defendants when cases are brought, and increasing litigation risk via uncertainty to all multi-state employers in the meantime.

Harmful consequences also will flow from variation in application of the FLSA in different circuits. For, as it stands, employees can now bring nationwide FLSA collective actions in the First Circuit where the defendant is not at home, but not in the Sixth and Eighth Circuits. That difference makes a mockery of the uniform application of federal law and will encourage forum shopping. (If an out-of-state company has just one employee in the First Circuit, plaintiffs undoubtedly will file nationwide collective actions there, like in this case.) More broadly, because these Circuits now have differing interpretations of Rule 4(k)'s personal jurisdiction requirements for *all* later-added parties and claims, similar forum shopping will result for other multi-plaintiff litigations too. Such jurisdictional "gamesmanship" is a blight on the federal system, e.g., *Carlson* v. *United Nat. Foods, Inc.*, 2021 WL 3616786, at *4 (W.D. Wash. Aug. 14, 2021), warranting this Court's intervention.

3. This case is the ideal vehicle for this Court to address the question presented concerning whether FLSA opt-in plaintiffs must show that a state court in the forum could exercise personal jurisdiction over their claims. There are no disputed issues of fact—only a pure legal question that was squarely

resolved in opposite ways by the Circuits. This important threshold question, moreover, may escape review in other cases, given that a denial of a motion to dismiss later-added plaintiffs for lack of personal jurisdiction is subject to review only if the district and circuit courts grant discretionary interlocutory review (as occurred in this case, App. 48-57, and in *Canaday*, 9 F.4th at 395). Otherwise, it can be raised only months or years later when the case is resolved, and then only if the parties haven't settled.[7]

Importantly, this case is the best one to resolve the crucial question of the temporal scope of Rule 4(k)(1)(A)—which applies to FLSA collective actions *and* many other cases involving joinder or intervention of parties, or amendments to add new claims. To date, this threshold question is the only one that has divided the federal courts of appeals. Even the First Circuit below seemed to agree with the Sixth and Eighth Circuits that if the Fourteenth Amendment applies to FLSA opt-in plaintiffs, they are properly characterized as real parties in interest subject to the requirements articulated in *Bristol-Myers Squibb*. See App. 12-13.

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[7] It is likely that many FLSA collective actions will settle given "intensifying settlement pressure no matter how meritorious the action." *Swales* v. *KLLM Transp. Servs.*, 985 F.3d 430, 435-36 (5th Cir. 2021); accord *Bigger* v. *Facebook, Inc.*, 947 F.3d 1043, 1049 (7th Cir. 2020) (noting inherent "pressure to settle, no matter the [collective] action's merits" (citing *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 171 (1989))).

For this reason, among others, the question presented in the recently filed *Canaday* petition for a writ of certiorari, No. 21-1098 (Feb. 2, 2022), makes it a poor vehicle for review. That petition limits itself to whether FLSA collective actions may include "opt-in plaintiffs who worked for the defendant outside the [forum] state." *Canaday* Pet. at i. That is undoubtedly an important question, but it has not yet divided the courts of appeals. Nor can it logically be reached before deciding the issue squarely presented here regarding which jurisdictional standard applies to later-added claims and plaintiffs under Rule 4(k)(1)(A). Because this jurisdictional issue is a threshold matter that must be resolved before answering the *Canaday* petition's question, and because the proper interpretation of Rule 4(k)(1)(A) will affect federal courts' jurisdiction in many cases beyond the FLSA context, this case is the superior vehicle for this Court's review.[8] At the very least,

[8] The *Canaday* petition asserts that the "procedural posture" of this case somehow undermines its aptitude for certiorari. Pet. at 34-35, *Canaday*, *supra* (No. 21-1098). Not so. There was nothing "contingent," *id.* at 35, about the decision whether to dismiss over one-hundred out-of-state opt-in plaintiffs who had already joined the case, App. 54-55, which is an FLSA collective action, Dist. Ct. Dkt. 1. There is nothing "moot" or "abstract," Pet. at 35, *Canaday*, *supra* (No. 21-1098), about dismissing already opted-in plaintiffs in a collective action if the court lacks personal jurisdiction over their claims.

the Court should not grant the logically subsequent FLSA jurisdiction question without also granting the Rule 4(k) question here.

The Court should take this opportunity to clarify the important federal issue of whether the Fourteenth Amendment's personal jurisdiction rules apply throughout a case, or whether they permit differing jurisdictional rules to govern the original plaintiff and claims versus subsequently added plaintiffs and claims. Immediate action is needed to correct the loophole the First Circuit majority ripped into Congress's preferred jurisdictional tapestry, and this case presents the ideal vehicle for that action.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

More importantly, the First Circuit indisputably resolved the legal issue here, and its holding will bind courts throughout that Circuit. App. 42 (Barron, J., dissenting). The dissent's views on whether the Court should have exercised its discretion to answer that question on an interlocutory appeal is irrelevant—the majority did answer it. App. 42. And this Court's intervention is needed to correct the resulting circuit split and upheaval of Congress's preferred jurisdictional scheme.

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