App. 1

United States Court of Appeals
For the First Circuit

No. 20-1997

JOHN WATERS,
individually and for others similarly situated,

Plaintiff, Appellee,

v.

DAY & ZIMMERMANN NPS, INC.

Defendant, Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nathaniel M. Gorton, U.S. District Judge]

Before

Thompson, Dyk,* and Barron,
Circuit Judges.

David B. Salmons, with whom Michael J. Puma, James D. Nelson, and Morgan, Lewis & Bockius LLP were on brief, for appellant.

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* Of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Richard J. (Rex) Burch, with whom Michael A. Josephson, Richard M. Schreiber, Taylor A. Jones, Bruckner Burch PLLC, and Josephson Dunlap LLP were on brief, for appellee.

Daryl Joseffer, Jonathan D. Urick, Nicole A. Saharsky, Andrew J. Pincus, Archis A. Parasharami, Minh Nguyen-Dang, and Mayer Brown LLP on brief for Chamber of Commerce of the United States of America, amicus curiae.

January 13, 2022

DYK, **Circuit Judge**. John Waters filed suit for overtime wages pursuant to § 216(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–219, in the United States District Court for the District of Massachusetts. The defendant was Day & Zimmermann ("D&Z"), a company incorporated in Delaware that maintains its principal place of business in Pennsylvania.

Waters's suit alleged that D&Z failed to pay him and other similarly situated employees and former employees their FLSA-required overtime wages. In accord with the FLSA's procedures governing what are often referred to as "collective actions," more than 100 current and former D&Z employees from around the country filed "opt-in" consent forms with the district court electing to participate as plaintiffs in Waters' suit.

D&Z moved to dismiss for lack of personal jurisdiction. This motion was based on Bristol-Myers Squibb v. Superior Court of California ("BMS"), 137 S. Ct. 1773, 1779, 1781 (2017), holding that in view of the Fourteenth Amendment, state courts cannot entertain a state-law mass action—an aggregation of individual actions—if it includes out-of-state plaintiffs with no connection to the forum state. Here, the claims subject to the motion to dismiss were the claims of the current and former D&Z employees who had opted in to the collective action but, who, unlike Waters, had worked for the company outside of Massachusetts. Notwithstanding that D&Z had been properly served with process, it claimed that under BMS, these claims could not be brought in a Massachusetts federal court, even though a federal court's jurisdiction is determined by the Fifth Amendment Due Process Clause. This is so, D&Z argued, because Federal Rule of Civil Procedure ("FRCP" or "Rule") 4(k)(1) independently limits a federal court's exercise of personal jurisdiction with respect to out-of-state opt-in claimants added after service of process has been effectuated. The district court denied D&Z's motion, declining to extend BMS's personal jurisdiction requirements to FLSA cases in federal court. Waters v. Day & Zimmermann NPS, Inc., 464 F. Supp. 3d 455, 461 (D. Mass. 2020).

On this interlocutory appeal, we now affirm the district court's denial of D&Z's motion.[1]

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[1] We acknowledge with appreciation the assistance of the amicus curiae in this case.

I.

The following facts are not in dispute. Waters formerly worked for D&Z in Plymouth, Massachusetts. He served as a mechanical supervisor for the company, which provides services to power plants.

On July 22, 2019, Waters filed an FLSA-based "collective action" complaint against D&Z. That complaint alleged that D&Z violated the FLSA's overtime-wage provisions, see § 207(a)(1), because it "paid Waters and other workers like him the same hourly rate for all hours worked, including those in excess of 40 in a workweek." Waters sought unpaid overtime wages as liquidated damages, and attorneys' fees on behalf of himself and "the Putative Class Members."

About two weeks later, on August 8, 2019, Waters served the complaint on D&Z pursuant to 4(c) of the FRCP, utilizing the provisions of Massachusetts' long-arm statute. Mass. Gen. Laws ch. 223A, § 3. The following month, others claiming to be current or former D&Z employees filed written "opt-in" consent forms pursuant to § 216(b) in the district court to participate in the collective action that Waters had filed.

The standard opt-in consent form contained the following language:

> 1. I hereby consent to participate in a collective action lawsuit against Day & Zimmermann to pursue my claims of unpaid overtime during the time that I worked with the company.

> 2. I understand that this lawsuit is brought under the Fair Labor Standards Act, and consent to be bound by the Court's decision.
>
> 3. I designate the law firm and attorneys at JOSEPHSON DUNLAP and BRUCKNER BURCH as my attorneys to prosecute my wage claims.
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> 4. I authorize the law firm and attorneys at JOSEPHSON DUNLAP and BRUCKNER BURCH to use this consent to file my claim in a separate lawsuit, class/collective action, or arbitration against the company.

To date, over 100 opt-ins claiming to be current and former D&Z employees have filed consent forms electing to participate in the FLSA collective action that Waters filed.

On September 12, 2019, D&Z moved pursuant to FRCP 12(b)(2) to dismiss the claims of those opt-ins who had not been employed by D&Z in Massachusetts. D&Z explained that, in so moving, it did not seek to "challenge personal jurisdiction as to the named Plaintiff's [i.e., Waters's] individual claim, as he allege[d] that he previously worked for [D&Z] in Massachusetts." Nor did D&Z contend that it had not properly been served with process or that anyone other than the named plaintiff was required to serve D&Z with process. Instead, D&Z's motion and accompanying memorandum of law claimed that BMS required the dismissal of the opt-in claims because the district court

lacked either general or specific personal jurisdiction as to those claims.

In BMS, the Supreme Court held that the Fourteenth Amendment's Due Process Clause prevented a California state court from exercising specific personal jurisdiction over nonresident plaintiffs' state-law claims when those claims had no connection to the forum state. 137 S. Ct. at 1781. The decision expressly reserved the separate question "whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." Id. at 1784.

On June 2, 2020, the district court here denied D&Z's motion to dismiss the opt-in claims based on BMS. It determined that the Supreme Court's ruling in that case had no bearing on its exercise of personal jurisdiction over the opt-ins because Waters's suit was brought in federal court pursuant to the FLSA's provisions governing collective actions, and the opt-ins had joined his suit in accord with that statute's procedures for doing so. Waters, 464 F. Supp. 3d at 461. In reaching this decision, the district court noted that BMS was "specifically limited to 'the due process limits on the exercise of specific jurisdiction by a State'" and did not resolve "whether the Fifth Amendment imposes the same restrictions" on a federal court. Id. (quoting BMS, 137 S. Ct. at 1783–84).

Following the denial, D&Z moved in the district court for a certificate of appealability under 28 U.S.C. § 1292(b), which the district court granted, see Waters v. Day & Zimmermann NPS, Inc., No. 19-cv-11585-NMG,

2020 WL 4754984, at *1 (D. Mass. Aug. 14, 2020). This court granted D&Z's timely petition for permission to bring an interlocutory appeal on October 14, 2020.[2] We have appellate jurisdiction under 28 U.S.C. § 1292(b).

II.

Before addressing the merits of D&Z's appeal, we first consider an issue that neither party raises, but that could affect our appellate jurisdiction: whether the opt-in plaintiffs were parties to the action in the district court. If the dismissed opt-in plaintiffs were not parties to the action, we may lack jurisdiction to consider the propriety of their dismissal. See Campbell v. City of Los Angeles, 903 F.3d 1090, 1105 (9th Cir. 2018) ("All 'those that properly become parties[] may appeal an adverse judgment.'" (quoting Marino v. Ortiz, 484 U.S. 301, 304 (1988))). The opt-ins' party status hinges on the question whether they become parties as a result of filing opt-in notices, or they could become parties only after the district court conditionally certified that they were "similarly situated."

The FLSA provides that employees serving as named plaintiffs can bring collective actions on "behalf of * * * themselves and other employees similarly situated." § 216(b). The FLSA does not provide for conditional certification, but in the "absence of statutory or case law guidance," district courts at or around the pleading stage have developed a "loose consensus"

[2] The district court has stayed the proceedings below pending our resolution of D&Z's interlocutory appeal.

regarding conditional certification procedures. Campbell, 903 F.3d at 1108–09. This process entails a "lenient" review of the pleadings, declarations, or other limited evidence, id. at 1109 (citation omitted), to assess whether the "proposed members of a collective are similar enough to receive notice of the pending action," Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 436 (5th Cir. 2021).

Conditional certification has no bearing on whether the opt-in plaintiffs become parties to the action. The FLSA provides that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." § 216(b). This provision makes clear that in collective actions, opt-in plaintiffs become parties to the proceedings when they give "consent in writing to become such a party and such consent is filed in the court."[3] Id.

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[3] The relevant portion of subsection (b) reads as follows, 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.

Conditional certification cannot be the cornerstone of party status because it is not a statutory requirement; rather, certification "is a product of interstitial judicial lawmaking or ad hoc district court discretion * * * nothing in section 216(b) expressly compels it." Campbell, 903 F.3d at 1100; see also Myers v. Hertz Corp., 624 F.3d 537, 555 n.10 (2d Cir. 2010) ("Thus 'certification' is neither necessary nor sufficient for the existence of a representative action under [the] FLSA, but may be a useful 'case management' tool for district courts to employ in 'appropriate cases.'" (quoting Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169, 174 (1989))).

Both the Supreme Court and nearly all of our sister circuits that have considered the question agree that opt-in plaintiffs become parties to the action without regard to conditional certification. Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 75 (2013), concerned the justiciability of an FLSA collective action when the named plaintiff's claims became moot and no opt-in plaintiffs had joined in the action prior to that occurring. See Symczyk v. Genesis Healthcare Corp., 656 F.3d 189, 197 (3d Cir. 2011) (noting that "no other potential plaintiff ha[d] opted in to the suit"). The Supreme Court rejected the idea that the action was not moot because it could be remanded to conditionally certify the collective, since "'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees

* * * who in turn become parties to a collective action only by filing written consent with the court." Genesis Healthcare, 569 U.S. at 75 (first citing Hoffmann-La Roche, 493 U.S. at 171–72; then citing § 216(b)).

Almost all circuits to address this issue interpret the statute as making opt-in plaintiffs parties to the action as soon as they file consent forms. See, e.g., Campbell, 903 F.3d at 1104 ("The FLSA leaves no doubt that 'every plaintiff who opts in to a collective action has party status.'" (quoting Halle v. W. Penn Allegheny Health Sys. Inc., 842 F.3d 215, 225 (3d Cir. 2016))); Mickles v. Country Club Inc., 887 F.3d 1270, 1278 (11th Cir. 2018) ("The plain language of § 216(b) supports that those who opt in become party plaintiffs upon the filing of a consent and that nothing further, including conditional certification, is required."); Simmons v. United Mortg. and Loan Inv., LLC, 634 F.3d 754, 758 (4th Cir. 2011) ("[I]n a collective action under the FLSA, a named plaintiff represents only himself until a similarly-situated employee opts in as a 'party plaintiff' by giving 'his consent in writing to become such a party and such consent is filed in the court in which such action is brought.'" (quoting § 216 (b)); Anson v. Univ. of Tex. Health Sci. Ctr. at Hous., 962 F.2d 539, 540 (5th Cir. 1992) ("Under Section 216(b), an employee may become an 'opt-in' party plaintiff to an already filed suit by filing written consent with the court where the suit is pending."). D&Z also agrees that once an opt-in plaintiff "file[s] their consent with the court, [they] have full party status." Appellant's Br. 26 (emphasis in original); see also id. at 2.

The sole possible exception to the general recognition that opt-in plaintiffs become parties to the action upon filing consent forms is the Seventh Circuit's decision in Hollins v. Regency Corp., 867 F.3d 830, 833 (7th Cir. 2017), which held that appellate review of a named plaintiff's adverse summary judgment decision was not precluded by the presence of other parties when "the collective action has never been conditionally certified and the court has not in any other way accepted efforts by the unnamed members to opt in or intervene." The decision attributed significance to the district court's failure to conditionally certify the collective action, or to "accept[] efforts by the unnamed members to opt in or intervene." Id. at 833–34. There is no indication that the Hollins court would find lack of party status in a case like this, in which the opt-in forms were accepted as filed by the district court.

Although Canaday v. Anthem Cos., 9 F.4th 392 (6th Cir. 2021), and Vallone v. CJS Solutions Group, 9 F.4th 861 (8th Cir. 2021), reached a different ultimate result on the question of personal jurisdiction, both support our view that the dismissed opt-in plaintiffs were parties to the action. In Canaday and Vallone, the Sixth and Eighth Circuits faced the same BMS-based personal jurisdiction challenge that D&Z raises now. In those cases, opt-in plaintiffs had joined the action by filing consent forms. Both district courts resolved the defendants' personal jurisdiction challenges and dismissed the out-of-state opt-in claims before reaching the merits of the in-state plaintiffs' requests for conditional certification, signifying that it was not

necessary to decide the certification issue first. See Canaday v. Anthem Cos., 439 F. Supp. 3d 1042, 1049 (W.D. Tenn. 2020); Vallone v. CJS Sols. Grp., 437 F. Supp. 3d 687, 691 (D. Minn. 2020). The Sixth Circuit explicitly agreed that the nonresident opt-in plaintiffs became parties regardless of conditional certification, stating that "[o]nce they file a written consent, opt-in plaintiffs enjoy party status as if they had initiated the action," Canaday, 9 F.4th at 394, and "once they opt in, these plaintiffs become 'party plaintiff[s]' * * * enjoying 'the same status in relation to the claims of the lawsuit as do the named plaintiffs,'" id. at 402–03 (first quoting § 216(b); then quoting Prickett v. DeKalb County, 349 F.3d 1294, 1297 (11th Cir. 2003)).[4]

We note that collective actions are distinct from FRCP 23 class actions in that the latter's putative class members do not become parties until after certification, see Smith v. Bayer Corp., 564 U.S. 299, 315 (2011), and putative class members who have not intervened in an action cannot appeal denials of class certification, Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 330, 332 n.5 (1980) (citing United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977)); see also Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 298 (D.C. Cir. 2020) ("Putative class members become parties to an action—and thus subject to dismissal—only after class certification."). These Rule 23 class

[4] The Eighth Circuit did not appear to address this question but did not disagree with the district court's approach.

action cases have no bearing on whether the opt-in plaintiffs here became parties to the action.

In short, the FLSA's text, Supreme Court precedent, and a majority of circuit court decisions compel only one conclusion: the opt-ins who filed consent forms with the court became parties to the suit upon filing those forms. Nothing else is required to make them parties. Because more than 100 current and former D&Z employees filed consent waivers in the district court, there are that many opt-in party-plaintiffs before this court. We proceed to decide whether the district court properly denied D&Z's motion to dismiss the nonresident opt-in claims for lack of personal jurisdiction.

III.

D&Z argues that BMS requires our dismissal of the nonresident opt-in claims because the Massachusetts district court lacked either general or specific personal jurisdiction as to those claims. A detailed description of BMS provides helpful context. In BMS, a group of nearly 700 plaintiffs filed eight separate complaints in California state court alleging state-law products liability, negligent misrepresentation, and misleading advertising claims. 137 S. Ct. at 1778. The plaintiffs' purported injuries all stemmed from Plavix, a drug manufactured and sold by BMS. Id. Pursuant to a California procedural rule that permitted post-hoc consolidation of the eight separate complaints, the plaintiffs combined their suits into one mass-tort

action.[5] See Bristol-Myers Squibb Co. v. Superior Court of California, 175 Cal. Rptr. 3d 412, 416 (Ct. App. 2014). The combined suit consisted of a majority of non-resident plaintiffs, none of whom obtained Plavix in California, used the drug there, or received treatment for their injuries there. Id. BMS did, however, sell 187 million Plavix pills in California, and it earned more than $900 million from those sales. Id.

Citing these "extensive contacts with California" and the similarity of the resident and nonresident claims, the California Supreme Court held that the state could properly exercise specific jurisdiction over the mass-action. Id. at 1779. Rejecting this conclusion, the U.S. Supreme Court held that the Fourteenth Amendment's Due Process Clause prohibits state courts from exercising specific personal jurisdiction over state-law claims asserted by nonresident plaintiffs absent a "connection between the [state] forum and the specific claims at issue." Id. at 1781, 1783. Similarities between the nonresident claims and the claims of residents or those who were injured in California were insufficient to establish that connection. Id. at 1781.

The decision emphasized that the "burden on [a] defendant"—the "primary concern" animating jurisdictional restrictions—encompasses more than just the "practical problems resulting from litigating in the

[5] In California, "coordination" allows complex civil actions that are "pending in different courts," but that share "a common question of fact or law" to be consolidated in one proceeding. Cal. Civ. Proc. § 404.

forum." Id. at 1780. These restrictions also protect defendants from "submitting to the coercive power of a State that may have little legitimate interest in the claims in question," a "federalism interest" that is "at times * * * decisive." Id. The Supreme Court explained:

> [E]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Id. at 1780–81 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980)).

The Court's reasoning in BMS rests on Fourteenth Amendment constitutional limits on state courts exercising jurisdiction over state-law claims. Here, it is agreed that the Fourteenth Amendment does not directly limit a federal court's jurisdiction over purely federal-law claims. Rather, as a constitutional matter, the "constitutional limits" of a federal court's jurisdiction over federal-law claims "are drawn in the first instance with reference to the [D]ue [P]rocess [C]lause of the [F]ifth [A]mendment," a point which D&Z concedes, as it must. See Lorelei Corp. v. County of Guadalupe, 940 F.2d 717, 719 (1st Cir. 1991). The Fifth Amendment does not bar an out-of-state plaintiff from

suing to enforce their rights under a federal statute in federal court if the defendant maintained the "requisite 'minimum contacts' with the United States."[6] See United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085 (1st Cir. 1992). There is no contention here that the opt-in plaintiffs lack such contacts with the United States; that the Fifth or Fourteenth Amendments themselves bar suit by the nonresident opt-in plaintiffs; or that BMS directly governs a suit in federal court under a federal statute, such as this one. Nor is there any contention that D&Z was not properly served with process pursuant to FRCP 4(c) and the Massachusetts long-arm statute.

Nonetheless, D&Z claims that the Fifth Amendment is "wholly irrelevant" to the personal jurisdiction question before us—notwithstanding that this is a federal question case being heard in federal court—because Rule 4(k) "incorporates the Fourteenth Amendment's limits on the jurisdiction of federal courts wherever a federal statute does not provide for nationwide service of process." In other words, they propose that Rule 4 is not concerned merely with service of process, but with personal jurisdiction generally. Thus, D&Z argues, because there is no dispute that the FLSA does not authorize nationwide service of process, Rule

[6] "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 but not of any particular State." J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (plurality opinion).

4(k) independently makes the holding of BMS applicable to the FLSA opt-ins.

This argument depends on the contention that Rule 4(k)(1) governs not just service of a summons, but also limits a federal court's jurisdiction after the summons is properly served. We must decide whether D&Z is right that Rule 4(k)(1) operates as a free-standing limitation on the exercise of personal jurisdiction in collective actions such as those enabled by the FLSA. We do not find D&Z's contention persuasive, as we now discuss.

IV.

The question before us is one of rule interpretation. As such, our review is de novo. See Sam M. ex rel. Elliott v. Carcieri, 608 F.3d 77, 86 (1st Cir. 2010) (citing NEPSK, Inc. v. Town of Houlton, 283 F.3d 1, 5 (1st Cir. 2002)).

A.

We start with the relevant text. The text reveals that Rule 4 is limited to setting forth various requirements for effectively serving a summons on a defendant in federal court, thereby establishing personal jurisdiction over the defendant. BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1556 (2017) ("[A] basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction." (citing Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987));

see also Walden v. Fiore, 571 U.S. 277, 283 (2014) ("[A] federal district court's authority to assert personal jurisdiction in most cases is linked to service of process on a defendant."); Canaday, 9 F.4th at 395 ("Over time, service of process became a prerequisite for obtaining authority over a defendant, making it appropriate to say that 'service of process conferred jurisdiction.'" (quoting Burnham v. Superior Ct. of Cal., 495 U.S. 604, 613 (1990))).

Indeed, Rule 4's title, "Summons," suggests that it is concerned only with service. The notes accompanying the committee's 1993 amendment to Rule 4 reveal that the title was changed from "Process" to "Summons" to show that the rule's requirements "applie[d] only to that form of legal process." Amendments to Fed. R. Civ. P. 4, 146 F.R.D. 401, 559 (1993).

Turning to subsection (k) of Rule 4, it is apparent that it addresses an aspect of how a summons may be served. Like the rule as a whole, it, too, bears a title that adverts to the requirements for effecting service of a summons: "Territorial Limits of Effective Service." Specifically, paragraph (1) of subsection (k) limits the instances in which "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant":

> (k) Territorial Limits of Effective Service.
>
> (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 federal statute.

Fed. R. Civ. P. 4(k)(1)(A)–(C) (emphasis added). Thus, while the text states that personal jurisdiction can be "establishe[d]" by "[s]erving a summons" so long as any of these three criteria is met, it nowhere suggests that Rule 4 deals with anything other than service of a summons, or that Rule 4 constrains a federal court's power to act once a summons has been properly served, and personal jurisdiction has been established.

We see no textual basis in Rule 4 for concluding that the district court's exercise of jurisdiction over the opt-in claims would be improper when "there is no dispute the named plaintiff properly served [D&Z]" by serving a summons in accord with Rule 4(c); D&Z does not contend that such service failed to satisfy the territorial limits of Rule 4(k)(1)(A) given that Waters had been employed by D&Z in Massachusetts; see United Electric, 960 F.2d at 1087 (citing Mass. Gen. Laws ch.

223A, § 3), and D&Z conceded that the opt-ins are not "responsible" for serving a summons.[7]

To be sure, Rule 4(k)(1)(A) does make the due process standard of the Fourteenth Amendment applicable to federal-question claims in federal court when a plaintiff relies on a state long-arm statute for service of the summons. Rule 4(k)(1)(A) requires looking to state law to determine whether service is effective to confer jurisdiction, and "because state law is subject to Fourteenth Amendment limitations, the minimum contacts doctrine, while imposing no direct state-by-state constraint on a federal court in a federal question case, acts indirectly as a governing mechanism for the exercise of personal jurisdiction." United Electric, 960 F.2d at 1086. But this is not the same thing as saying that Rule 4 or the Fourteenth Amendment governs district court jurisdiction in federal question cases after a summons has been properly served; had it been the FRCP drafters' intention to have Rule 4 govern more than the service of a summons, they could have simply said that additional plaintiffs may be added to an action if they could have served a summons on a defendant consistent with Rule 4(k)(1)(A). But that was not the choice the drafters made, and for good reason. It would be anomalous to apply the Fourteenth Amendment, rather than the Fifth Amendment, to federal

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[7] The Sixth Circuit in Canaday agreed that the opt-ins have no service obligations under Rule 4. 9 F.4th at 399–400 ("After Anthem appeared in the case in response to Canaday's service of the complaint, it is true, the nonresident plaintiffs * * * had no additional service obligation under Civil Rule 4(k).").

causes of action after a summons is properly served.[8] Significantly, FRCP 82 also states that "[t]hese rules do not extend or limit the jurisdiction of the district courts." Fed. R. Civ. P. 82; see also Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946) ("Rule [4(k)(1)(A)] serves only to implement the jurisdiction * * * Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained.")

B.

Apart from the text of Rule 4(k), its history shows that its limited purpose was to govern service of a summons, not to limit the jurisdiction of the federal courts after a summons has been served. The first version of Rule 4(f), (now Rule 4(k)) entitled "Territorial Limits of Effective Service," required that for process to be effectively served, it must be physically served "anywhere within the territorial limits of the state in which the district court is held" unless a federal statute authorized service "beyond the territorial limits of that

[8] The dissent cites various law review articles suggesting changes to Rule 4(k) that would expand the jurisdiction of federal courts. See Scott Dodson, Personal Jurisdiction and Aggregation, 113 NW. U. L. REV. 1, 37–40 (2018); see also Stephen E. Sachs, How Congress Should Fix Personal Jurisdiction, 108 NW. U. L. REV. 1301, 1316 (2014); A. Benjamin Spencer, The Territorial Reach of Federal Courts, 71 FLA. L. REV. 979, 990–91 (2019). With one exception, see infra note 12, none of the articles discusses the particular issue addressed here: whether Rule 4(k) continues to apply after service of process has been effectuated.

state." Fed. R. Civ. P. 4(f) (1937). This geographical limit prevented a plaintiff from serving a defendant anywhere outside of the state in which the underlying lawsuit would take place, consistent with the then-geographically-based concept of "tag" jurisdiction. See Pennoyer v. Neff, 95 U.S. 714, 733 (1878).

Due to the "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity," business operations transcended the bounds of any one state, rendering jurisdiction based on physical presence largely obsolete. Daimler AG v. Bauman, 571 U.S. 117, 126 (2014) (quoting Burnham, 495 U.S. at 617). Responding to this change, International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 221 U.S. 457, 463 (1940)), eliminated the physical presence requirement, holding that Fourteenth Amendment due process is satisfied for jurisdictional purposes when a defendant has "certain minimum contacts [with the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

The 1963 version of Rule 4(f), also entitled "Territorial Limits of Effective Service," reflected the principles set forth in International Shoe. Citing "[a]n important and growing class of State [long-arm] statutes [that] base personal jurisdiction over nonresidents on the doing of acts or on other contacts within the State," Rule 4 was amended to "expressly allow[] resort in original Federal actions to the procedures provided by State law for effecting service on nonresident

parties." Amendments to Fed. R. Civ. P. 4, 31 F.R.D. 587, 627–28 (1963). Specifically, Rule 4(f) was "amended to assure the effectiveness of service outside the territorial limits of the State" when allowed by state law. Id. at 629 (emphasis added). The amended text allowed process to be served "anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state." Id. at 594.

Later amendments to other provisions of Rule 4 also show that the rule evolved to simplify service, not to govern jurisdiction after service. The 1980 amendments expanded the category of individuals who could act as process servers from marshals, deputies, and individuals specifically appointed by the court to include any person "authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made." Amendments to Fed. R. Civ. P. 4, 85 F.R.D. 521, 524 (1980). Despite this expansion, the 1983 amendments recognized that the job of serving process still largely fell on marshals in states that did not authorize additional process servers, and they also reflected views that mail service and other methods of service prescribed by state law were of paramount importance. Amendments to Fed. R. Civ. P. 4, 96 F.R.D. 81, 118–19 (1983). The 1983 amendments overhauled Rule 4(c) (now Rule 4(c), (e)) to allow a summons to "be served by any person who is not a party and is not less than 18 years of age" and permitted service "by mailing

a copy of the summons * * * to the person to be served." Id. at 82–83. In response to efforts to "delete[] the provision" authorizing service pursuant to the law of the forum state, the 1983 amendments "saw no reason to forego systems of service that had been successful in achieving effective notice," and incorporated that provision into the new version of Rule 4(c). Id. at 83, 119.

The final amendment to Rule 4(k) occurred in 1993. Subdivision (f) became subdivision (k), and the committee notes emphasized that the amendment's purpose was to "facilitate the service of the summons and complaint" and to "explicitly authorize[] a means for service of the summons and complaint on any defendant." 146 F.R.D. at 558. The amended rule "retain[ed] the substance of the former rule" by "explicitly authorizing the exercise of personal jurisdiction over persons who can be reached under state long-arm law." Id. at 570.

The fact that 4(k)(1)(A) provides that "service of a summons" establishes personal jurisdiction over defendants by utilizing a given state's long-arm statute incorporating Fourteenth Amendment requirements does not show that the Fourteenth Amendment applies to federal-law claims after service is satisfied. See 4 Charles A. Wright, Arthur R. Miller & Adam N. Steinman, Federal Practice and Procedure § 1007 (4th ed. 2021) ("The rule was also amended to clarify when service of a summons would establish personal jurisdiction in federal court."). In fact, the advisory committee notes make clear that a federal court's jurisdiction

once service has been effectuated is determined by the Fifth Amendment's Due Process Clause at least in federal actions. 146 F.R.D. at 566 ("Service of the summons under this subdivision does not conclusively establish the jurisdiction of the court over the person of the defendant. A defendant may assert the territorial limits of the court's reach set forth in subdivision (k), [i.e. whether the service is effective under state or federal law to confer jurisdiction] including the constitutional limitations that may be imposed by the Due Process Clause of the Fifth Amendment."). Thus, although serving a summons in accordance with state or federal law is necessary to establish jurisdiction over a defendant in the first instance, the Fifth Amendment's constitutional limitations limit the authority of the court after service has been effectuated at least in federal-law actions.

C.

Another reason that we cannot read Rule 4(k)(1)(A) as limiting the court's authority over the added plaintiffs is that FRCP 20 already defines that authority. Rule 20 sets the limit for allowing additional parties to join a pre-existing lawsuit, permitting joinder of those parties with claims arising out of the "same transaction [or] occurrence" and presenting common "question[s] of law or fact." Fed. R. Civ. P. 20(a)(1)(A), (B). The FLSA's "similarly situated" limitation for collective actions displaces Rule 20 and limits the range of individuals who may be added as opt-in plaintiffs by requiring that they be "similarly

situated." See, e.g., Cruz v. Bristol-Myers Squibb Co., PR, 699 F.3d 563, 569 (1st Cir. 2012) (The similarly situated "requirement is even less stringent than the test for party joinder" (citations omitted)); Campbell, 903 F.3d at 1104–05 ("The natural parallel is to plaintiffs * * * later added under the ordinary rules of party joinder."); Chamber of Comm. Br. 12 ("[T]he FLSA's opt-in provision is properly viewed as a rule of joinder." (citation omitted)). We are not aware of, and D&Z has not cited, a case in which a court held that Rule 4 applies to plaintiffs joined under Rule 20.

Finally, the FLSA and its legislative history show that Congress created the collective action mechanism to enable all affected employees working for a single employer to bring suit in a single, collective action. The FLSA's purpose was to allow efficient enforcement of wage and hour laws against large, multistate employers, a "broad remedial goal" that the Supreme Court has instructed "should be enforced to the full extent of its terms." Hoffman-La Roche, 493 U.S. at 173.

The FLSA's original premise was to target those employers engaged in interstate commerce, defined as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." Fair Labor Standards Act of 1938, ch. 676, §3(b), 52 Stat. 1060. Specifically, the legislative history evinces congressional intent to "provide a living wage" for workers at large, multi-state businesses, such as Sears Roebuck, General Motors, and Coca-Cola. 82 Cong. Rec. 1815–16 (1937) (remarks of Rep. Adolph Sabath); see also 93

Cong. Rec. 2182 (1947) (remarks of Sen. Donnell) (contemplating a suit in which "John Smith files a suit on behalf of himself and all other employees of the United States Steel Corporation" (emphasis added)). The congressional debates also reveal a clear intent for a collective action to allow a "suit by one or more employees, for himself and all other employees similarly situated," regardless of the state in which they were employed. Id. (emphasis added).

Interpreting the FLSA to bar collective actions by out-of-state employees would frustrate a collective action's two key purposes: "(1) enforcement (by preventing violations and letting employees pool resources when seeking relief); and (2) efficiency (by resolving common issues in a single action)." Swales, 985 F.3d at 435 (citing Bigger v. Facebook, 947 F.3d 1043, 1049 (7th Cir. 2020)); see also Hoffman-La Roche, 493 U.S. at 170 ("A collective action allows * * * plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.").

Holding that a district court lacks jurisdiction over the non-resident opt-in claims would "force[] those plaintiffs to file separate lawsuits in separate jurisdictions against the same employer based on the same or similar alleged violations of the FLSA." Canaday, 9 F. 4th at 415–16 (Donald, J., dissenting). That is not what the FLSA contemplated.

V.

As we have noted earlier, the Sixth and Eighth Circuits, faced with BMS-based personal jurisdiction challenges to FLSA collective actions, disagree with the decision that we reach today. Neither decision suggests that the Fourteenth Amendment directly limits federal-court authority to entertain multi-state collective actions. Both opinions instead rely on an erroneous reading of Rule 4, and fail to successfully confront the fact that Rule 4(k) is a "territorial limit" on "effective service" of a summons, and thus logically cannot be read to limit a federal court's jurisdiction after a summons is properly served.

In this respect, the Eighth Circuit, with little discussion, reached the same result as the Sixth Circuit, ruling it "a given" that the Fourteenth Amendment, by way of Rule 4, limited the court's jurisdiction with respect to all of the claims, including those of the opt-in plaintiffs. Vallone, 9 F.4th at 865. The Sixth Circuit opinion is more expansive.[9] It concluded that even for "amended complaints and opt-in notices, the district court remains constrained by * * * the host State's [] personal jurisdiction limitations." Canaday, 9 F.4th at 400 (citing Tamburo v. Dworkin, 601 F.3d 693, 700–01 (7th Cir. 2010)). But Tamburo, the only case cited in support of this proposition, is silent on whether Rule 4 concerns the scope of personal jurisdiction after service of a summons. The case involved only a single, original

[9] The Sixth Circuit's decision was an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). See Canaday, 9 F.4th at 395.

plaintiff and the original defendants. The sole plaintiff served a summons under Rule 4 and the state's long-arm statute. See 601 F.3d at 698, 700. Since the personal jurisdiction issue in Tamburo concerned only the original plaintiff's state-law claims, id. at 700–01, the court had no occasion to consider its jurisdiction over federal claims or parties added after a summons was properly served.[10]

The other authorities relied on by the Sixth Circuit do not come close to addressing whether 4(k) and the Fourteenth Amendment apply to federal-law claims after a summons has been properly served pursuant to a state long-arm statute.[11] See Handley v. Ind. & Mich. Elec. Co., 732 F.2d 1265, 1269 (6th Cir. 1984) (affirming district court's exercise of jurisdiction over nonresident defendant served by original plaintiff pursuant to Rule 4); SEC v. Ross, 504 F.3d 1130, 1138–40 (9th Cir. 2007) (holding that a court lacked jurisdiction over a defendant who was never served with or named

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[10] The Seventh Circuit affirmed the district court's 12(b)(6) dismissal of the federal-law claims before addressing personal jurisdiction over the state-law claims. Tamburo, 601 F.3d at 699–700.

[11] The dissent here also cites Old Republic Insurance Co. v. Continental Motors, Inc., 877 F.3d 895, 902–03 (10th Cir. 2017), for the proposition that a "plaintiff's amended complaint is 'the operative one' for the purpose of analyzing" a defendant's motion to dismiss for lack of personal jurisdiction. Old Republic is similar to Tamburo, as it also involved neither federal claims nor the application of Rule 4 to parties added after service of process had been effectuated.

as a party in the federal-law complaint, despite statute's nationwide service of process provision).[12]

The Sixth Circuit opinion rests on a supposed anomaly resulting from our interpretation—that added parties and added claims are not subject to Rule 4's limitations. The Sixth Circuit warned that reading Rule 4(k)(1)(A) as applying only to plaintiffs responsible for serving a summons risks "limitations on judicial power [being] one amended complaint—with potentially new claims and new plaintiffs—away from obsolescence." Canaday, 9 F.4th at 400; see also Molock, 952 F.3d at 309 (Silberman, J., dissenting) (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").

There is no anomaly. As discussed above, Rule 4 is concerned with initial service, not jurisdictional limitations after service. And the consequence is not that additional parties and claims can be added to escape jurisdictional limitations. In both the case of added

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[12] The opinion also relied on an article that states "courts regularly apply Rule 4(k)(1)(A) limitations to the claims appearing in amended complaints," but this proposition is also supported only by Tamburo. See A. Benjamin Spencer, Out of the Quandary: Personal Jurisdiction Over Absent Class Member Claims Explained, 39 REV. LITIG. 31, 43–44 (2019). Another statement cited in Canaday, see 9 F.4th at 400, that "Rule 4(k) remain[s] the operative constraint[ ] that district courts apply to * * * new claims by newly joined parties," cites the same article, which cites no support, see 39 REV. LITIG. at 44.

parties and claims, the court's jurisdiction is still subject to constitutional limitations—in the case of federal-law claims, the Fifth Amendment—and statutory limitations governing subject matter jurisdiction and venue. See 7 Charles A. Wright, Arthur R. Miller & Adam N. Steinman, Federal Practice and Procedure § 1659 (3d ed.) ("[T]he statutory jurisdiction and venue requirements are fully applicable to Federal Rule of Civil Procedure 20 and may restrict the ability to join parties.")[13] If there is any anomaly, it is the approach suggested by the Sixth Circuit—applying the Fourteenth Amendment to federal-law claims that are governed only by the Fifth Amendment.

The Sixth Circuit also relied on the FLSA's failure to authorize nationwide service of process, urging that because the FLSA lacks a nationwide service of process provision, that left Rule 4(k)(1)(A) as the only basis for establishing jurisdiction. See Canaday, 9 F.4th at 396. We agree that "a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction," BNSF, 137 S. Ct. at 1556 (citing Omni Capital, 484 U.S. at 104), and 4(k)(1)(A) is the sole basis for service when nationwide service is not authorized. But the absence of a nationwide-service provision in the FLSA only requires resort to state law for service of process. See United States v. Swiss Am. Bank, Ltd.,

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[13] Also, claims "radically different from those set out in the original pleading," may require courts to "direct personal service of the new pleading on the [defendant] pursuant to Rule 4." 4B Charles A. Wright, Arthur R. Miller & Adam N. Steinman, Federal Practice and Procedure § 1146 (4th ed.).

274 F.3d 610, 618 (1st Cir. 2001) ("[I]n federal question cases * * * a plaintiff need only show that the defendant has adequate contacts with the United States as a whole * * * [H]owever, the plaintiff must still ground its service of process in a federal statute or civil rule.") It says nothing about whether 4(k)(1)(A) constrains the court's jurisdiction once service is effectuated.[14]

Finally, much of the Sixth Circuit opinion sought to distinguish FLSA collective actions and Rule 23 class actions, likening collective actions to the mass action in BMS. See Canaday, 9 F.4th at 402–03. We agree that FLSA collective actions and Rule 23 class actions are dissimilar in myriad ways. The paramount similarity, and the only one that matters for purposes of assessing the district court's jurisdiction here, is that the named plaintiff in both actions is the only party responsible for serving the summons, and thus the only party subject to Rule 4.[15]

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[14] The Sixth Circuit contended that such an interpretation would render nationwide service of process provisions pointless. Canaday, 9 F.4th at 399 ("What indeed would be the point of these provisions if Civil Rule 4(k) already allowed jurisdiction and service?"). But our interpretation of Rule 4(k) does not allow nationwide service in all cases. Initial service must still rely on state law when there is no nationwide service provision.

[15] A separate Sixth Circuit opinion recently held that the personal jurisdiction inquiry in a Rule 23 class action is required only for a named plaintiff's claims because "a class action is formally one suit in which, as a practical matter, a defendant litigates against only the class representative," and "absent class members are not considered 'parties,' as a class representative is, for certain jurisdictional purposes." See Lyngaas v. Curaden AG, 992 F.3d 412, 435 (6th Cir. 2021).

VI.

Accordingly, we **affirm** the district court's denial of D&Z's motion to dismiss the nonresident opt-in plaintiffs. The decision is

Affirmed. Costs to appellee.

–Dissenting Opinion Follows–

BARRON, **Circuit Judge, dissenting.** The majority today decides a significant question of first impression in our Circuit about the meaning of Federal Rule of Civil Procedure 4(k)(1)(A). It does so in a manner that creates a direct conflict with the ruling of two circuits and that will have seemingly wide-ranging effects on a slew of cases that have nothing to do with the specific dispute at hand. In my view, there is no reason for us to decide this question at this time, given the interlocutory posture of this appeal. Thus, I write separately to explain why, for reasons independent of the merits of the majority's ruling, I dissent.

I.

Federal Rule of Civil Procedure 4(k)(1)(A) provides that a summons "establishes" personal jurisdiction over a defendant in a civil action that is brought in federal court if the defendant "is subject to the jurisdiction of a [state] court of general jurisdiction in the state where" the civil action commenced. In response to relatively recent developments in the law that defines the

limits that the Fourteenth Amendment's Due Process Clause places on the exercise of personal jurisdiction over a defendant in a civil action in state court, see Bristol-Meyers Squibb Co. v. Superior Court of California, San Francisco County, 137 S. Ct. 1773 (2017), some commentators have called for amending Rule 4(k)(1)(A). The commentators argue that, due to these recent developments, an amendment to the rule is necessary to ensure that it does not become a bar to the beneficial aggregation of claims in federal court that it was not originally intended to be. See Scott Dodson, Personal Jurisdiction and Aggregation, 113 Nw. U. L. Rev. 1, 37–40 (2018); see also Stephen E. Sachs, How Congress Should Fix Personal Jurisdiction, 108 Nw. U. L. Rev. 1301, 1316 (2014).

The commentators assert that for most of the rule's life Fourteenth Amendment-based due process limits on the exercise of personal jurisdiction in state court were not as strict as the Supreme Court of the United States has deemed them to be in recent rulings, such as Bristol-Meyers Squibb. See Dodson, supra, at 37. The commentators also note that Fifth Amendment-based due process limits on the exercise of personal jurisdiction in federal court are not nearly as strict as the Fourteenth Amendment's parallel limits in state court have been held to be. See A. Benjamin Spencer, The Territorial Reach of Federal Courts, 71 Fla. L. Rev. 979, 990–91 (2019). The commentators thus contend that there is no good reason to saddle federal courts—as Rule 4(k)(1)(A) now saddles them—with the current limits on the exercise of personal

jurisdiction that the federal Constitution imposes only on state courts. See, e.g., the sources cited in Dodson, supra, at 36 n.216.

Nonetheless, no such amendment to Rule 4(k)(1)(A) has been made to this point, and defendants are invoking the rule with seemingly greater frequency to request that federal courts dismiss claims based on limits on the exercise of personal jurisdiction imposed on state courts by the Fourteenth Amendment's Due Process Clause. See, e.g., Lyngaas v. Curaden Ag, 992 F.3d 415 (6th Cir. 2021); Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293 (D.C. Cir. 2020). Indeed, this case reflects the trend, as the defendant here—Day & Zimmermann—contends that Rule 4(k)(1)(A) bars the United States District Court for the District of Massachusetts from exercising personal jurisdiction over certain claims solely because of constraints that a state court in Massachusetts would face in exercising personal jurisdiction over those same claims by virtue of recent Supreme Court precedent interpreting the Fourteenth Amendment's Due Process Clause.

Specifically, Day & Zimmermann contends that, because of the interaction between Rule 4(k)(1)(A) and the Fourteenth Amendment-based due process limits on personal jurisdiction over a defendant in state court that were relatively recently set forth in Bristol-Myers Squibb, the District Court must dismiss the claims of certain of the individuals who have filed written consent forms that signal their intention to participate in the collective action that the named plaintiff here, John Waters, has initiated by the inclusion of a Fair

Labor Standards Act (FLSA) collective action claim in his complaint pursuant to section 216(b) of the FLSA. In that complaint, Waters asserts, alongside his own solely individual claim under the FLSA, an FLSA claim "on behalf of" what his complaint refers to as a "putative class" of certain former employees of Day & Zimmermann who are "similarly situated" to him. See 29 U.S.C. § 216(b).

II.

In rejecting Day & Zimmermann's contention that the District Court erred in denying the motion to dismiss the claims just described, the majority relies on the text and purposes of Rule 4(k)(1)(A). The majority contends based on these interpretive sources that the rule is best read to restrict the scope of the condition that it sets forth that makes it so that a summons "establishes" personal jurisdiction in federal court over the defendant who is served with it—namely, the condition that the defendant "is subject to the jurisdiction of a [state] court of general jurisdiction in the state where the" civil action commenced.

In the majority's view, Rule 4(k)(1)(A) must be read to subject that condition to an implicit time-of-service-based limitation on its scope. The majority therefore rejects the contention—pressed vigorously by Day & Zimmermann—that the rule provides that the condition that it sets forth must be satisfied for the life of the suit.

In other words, the majority embraces a reading of the rule in which that condition need be satisfied only at the time that the summons is served. For this reason, the majority concludes that the condition need not be satisfied, as Day & Zimmermann would have it, as to any claims and plaintiffs that are added after the summons has been served.

The result is that, under the majority's reading of Rule 4(k)(1)(A), Fourteenth Amendment-based due process limits on personal jurisdiction in state court—including those set forth in Bristol-Myers Squibb—can have no application to the claims of those individuals here who have filed written forms in which they have consented to participate in Waters's collective action pursuant to section 216(b) of the FLSA. As the majority explains, such due process limits have no application to those claims by virtue of the Fourteenth Amendment itself, given that the suit is being brought in federal court. And, as the majority emphasizes, those limits also have no application to those claims by virtue of Rule 4(k)(1)(A), because the individuals who filed the written forms in which they consented to participate in Waters's FLSA collective action did so only after Waters had served Day & Zimmermann with the summons.

Thus, according to the majority, it follows that the only bar that could potentially prevent the District Court from exercising personal jurisdiction over Day & Zimmermann as to the claims at issue in this appeal is the bar that the Due Process Clause of the Fifth Amendment might impose. But, as the majority

rightly concludes, Day & Zimmermann has made no argument that the Fifth Amendment's Due Process Clause does impose any such bar here. For that reason, the majority affirms the District Court's denial of the motion to dismiss that is before us in this appeal.

III.

The majority's time-of-service-based reading of Rule 4(k)(1)(A) is internally coherent. The text of that rule is at least arguably ambiguous as to whether the summons "establishes" personal jurisdiction over the defendant for the life of the suit only if that defendant "is" subject to the jurisdiction of the state court for the life of the suit or whether the summons "establishes" personal jurisdiction over the defendant for the life of the suit so long as that defendant "is" subject to the jurisdiction of a state court at the time that the summons is served.

The majority's time-of-service-based reading of the rule also accords with the intuition that it would be odd for a rule that seeks only to describe the means for making service of process effective to make those means dependent on events that might occur after service has been made. It is an arguable virtue of the majority's reading of the rule that one need only attend to what has occurred up until service has been completed to know whether such service has been effective.

The majority's reading of the rule also has going for it one more thing: it helps to ensure that the rule will not prove to be the seemingly unintended obstacle

to the beneficial aggregation of claims in federal court that has provoked some commentators to call for its amendment. That is because, under the majority's reading of the rule, a plaintiff may ensure the beneficial aggregation of such claims in most cases merely by amending the complaint after the summons has been served to include any claims over which a state court would not be able to exercise personal jurisdiction.

These features of the majority's reading of the rule do not, however, spare it from being controversial. The reading is in apparent tension with the broader, life-of-the-suit reading of the rule's condition that would appear to undergird the commentators' calls for its amendment. It would be strange for these commentators to have called for such an amendment if they in fact share the majority's view that the rule's 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 that was operative at the time that the summons was served. See A. Benjamin Spencer, Out of the Quandary: Personal Jurisdiction over Absent Class Members Explained, 39 Rev. Litig. 31, 43 (2019) ("It would be preposterous to suggest that * * * amended complaints * * * may evade the restrictions applicable to claims contained within complaints served under Rule 4, subject only to the limits of the Fifth Amendment's due process clause. Were such the case, the ability to amend would provide a gaping loophole to the ordinary territorial restrictions on federal court jurisdiction that Rule 4(k) imposes.").

The majority's reading of Rule 4(k)(1)(A) also directly conflicts, as the majority itself acknowledges, with that of other circuits. See Canaday v. Anthem Cos., 9 F.4th 392, 400 (6th Cir. 2021) ("Even with amended complaints * * * the district court remains constrained by Civil Rule 4(k)'s—and the host State's—personal jurisdictional limitations."); see also Vallone v. CJS Solutions Grp., LLC, 9 F.4th 861, 865 (8th Cir. 2021). Nor am I aware of any other case in which any court (including our own) has ever read Rule 4(k)(1)(A) in the narrow, time-of-service-limited way that the majority reads it.

Indeed, the common (if, perhaps unreflective) practice of federal courts under this rule appears, as best I can tell, to have been to apply Fourteenth Amendment-based (rather than Fifth Amendment-based) due process limits on personal jurisdiction throughout a suit's duration, and so even as to later-added claims and plaintiffs. See, e.g., Old Republic Ins. Co. v. Cont'l Motors, Inc., 877 F.3d 895, 902–03 (10th Cir. 2017) (noting that the plaintiff's amended complaint is "the operative one" for the purpose of analyzing a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction); see also Spencer, Out of the Quandary, supra, at 43 ("There is no question that—notwithstanding that such amended complaints are not served with a summons under Rule 4—new claims appearing in amended complaints must satisfy the jurisdictional constraints imposed by Rule 4(k); courts regularly apply Rule 4(k)(1)(A) limitations to the

claims appearing in amended complaints.").[16] Thus, it would appear that, given the way that the majority now reads the rule, federal courts in our circuit will have to change how they have been doing things in many cases, and in all cases that involve state law claims. For, under the majority's reading, they will have to assess personal jurisdiction in those cases with exclusive reference to Fifth Amendment-based due process limits (and thus to work their way through all the legal complexity that may arise from their doing so in cases involving state law claims) despite their seeming common practice of not using that lens except in certain classes of cases that involve federal claims, see Fed. R. Civ. P. 4(k)(1)(C); id. 4(k)(2), in which the degree

[16] The majority appears to suggest that even if Rule 4(k)(1)(A) applies to state law claims added post-summons, it does not apply to parties asserting federal claims post-summons. Maj. Op. at 31 n.10. But, nothing in the text of the rule distinguishes between the rule's application to state law claims and its application to federal ones, even though the rule plainly applies to federal claims generally, see Walden v. Fiore, 571 U.S. 277, 283 (2014) (applying Rule 4(k)(1)(A) to a federal law claim), and even though other parts of Rule 4(k) do expressly distinguish between state and federal claims, see Fed. R. Civ. P. 4(k)(2) (drawing that very distinction by way of reference to "a claim that arises under federal law"). Nor does anything in the text of the rule distinguish between the rule's application to claims and its application to parties. Thus, it would appear to be the case that however the rule applies to later-added state law claims must be how it applies to later-added parties asserting federal claims. I add only that the rule's failure to draw a distinction between state and federal claims is precisely what has motivated commentators to recommend that the rule be amended to ensure that federal claims (including, it seems, ones brought by later-added parties) are not subject to the rule in the same way that state law claims are. See Dodson, supra, at 37–40.

of legal complexity that then arises from using that same lens is much less.

IV.

In my view, there is no reason to decide in this case whether the majority is right to read Rule 4(k)(1)(A) to be subject to the implicit time-of-service limitation that it discerns on the scope of the condition that the rule sets forth. Given the embryonic state of the FLSA collective action that is before us and the interlocutory nature of this appeal, I would let the suit proceed apace in the District Court rather than attempt to resolve on interlocutory review this substantial question of first impression in our Circuit about the best way to read Rule 4(k)(1)(A). In fact, it seems to me that there is special reason to follow this more restrained course here, because the resolution of the question that the majority chooses to decide in this case's preliminary posture will be binding in our Circuit not only in cases that concern collective actions under the FLSA 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.

I note that the more cautious approach that I favor, which would cause me to dismiss this interlocutory appeal, accords with our general reluctance to hear appeals from denials of motions to dismiss precisely because such appeals necessarily come to us on an interlocutory basis. See Caraballo-Seda v. Municipality of Hormigueros, 395 F.3d 7, 8 (1st Cir. 2005)

(acknowledging "our general rule prohibiting interlocutory appeals from the denial of a motion to dismiss"). Nor do I see a reason to deviate from this tried-and-true stance by making a case-specific exception to it here, even if there might be good reason to make such an exception in some cases that involve requests to appeal from denials of motions to dismiss that are made in connection with collective actions that are brought under section 216(b) of the FLSA.

The underlying (and unsuccessful) motion to dismiss that is at issue here was made before the named plaintiff who filed the complaint asserting the FLSA collective action claim, Waters, has even moved to certify the putative class of "similarly situated" employees on whose behalf he seeks to sue in bringing that claim. See 29 U.S.C. § 216(b). Thus, as Waters pointed out in opposing interlocutory review of the denial of that motion here, still more opt-ins may consent to participate in the collective action that is at issue even after a ruling on the merits of this appeal. Nor do we know for certain at this juncture—as we would if we waited for a motion to certify to be filed—that Waters will seek to bring a collective FLSA action on behalf of every present opt-in, let alone on behalf of each of those opt-ins who would be permitted to sue under the majority's construction of Rule 4(k)(1)(A). Cf. Molock, 952 F.3d at 298–99 ("[P]rior to * * * certification, the potential [collective action] and their potential claims are just that: potentials."). And, of course, it is up to Waters in the first instance whether any individual who might

wish to opt in and participate in the collective action may do so, precisely because he is bringing it.

Reinforcing the reason to adhere in this case (given its nascent nature) to our usual unwillingness to resolve an appeal from a denial of a motion to dismiss is the fact that Day & Zimmermann has made little more than a conclusory showing about the need for us to weigh in now on the District Court's ability to exercise personal jurisdiction over it as to the claims of members of what at this point is only a "putative" class of claimants. That Day & Zimmermann has not made a substantial showing of an unusual need for resolution of that question this early in this case is especially significant because it is not as if Day & Zimmermann is presently at risk of being held liable to any of the so-called opt-ins who might end up being in that still, as-yet-defined class.

If a default judgment were entered against Day & Zimmermann at this point in the case, I do not see how any of those individuals who thus far have filed written consent forms to participate in Waters's collective action under the FLSA could benefit from that judgment any more than they could if they had not filed such forms. That is precisely because the named plaintiff who is bringing the collective action under the FLSA, Waters, has not yet moved for certification of a collective action on their behalf—or, for that matter, on behalf of anyone. Cf. Rodriguez v. Almighty Cleaning, Inc., 784 F. Supp. 2d 114, 129 (E.D.N.Y. 2011) (granting a motion for certification of an FLSA collective action simultaneously with a motion for default judgment).

Thus, while I recognize that an earlier panel of our Court granted the petition for certification of the interlocutory appeal pursuant to 28 U.S.C. § 1292(b), see Waters v. Day & Zimmermann NPS, Inc., No. 20-1831 (1st Cir. Oct. 14, 2020), I am convinced—now that we have had full briefing and oral argument as that panel did not—that the petition was improvidently granted. See Caraballo-Seda, 395 F.3d at 9. I am aware in so concluding of the out-of-circuit precedent that has permitted the interlocutory review of the merits of a ruling on a motion to dismiss the claims of individuals who had opted in to a named plaintiff's collective action claim under the FLSA. But, the cases that have permitted such an appeal were ones not only in which that appeal was from a grant of the motion to dismiss but also in which the appeal was from a ruling on a motion to dismiss that was made at the time of (or in the wake of) a motion to certify a class of similarly situated persons on behalf of whom the named plaintiff was bringing the collective action under the FLSA. See Canaday, 9 F.4th at 395; see also Vallone v. CJS Solutions Grp., LLC, 9 F.4th 861, 864 (8th Cir. 2021) (involving appellate review of a district court's order limiting an FLSA collective action to "employees 'who engaged in out-of-town travel to or from a Minnesota jobsite for [the defendant] or who resided in Minnesota'"). I am not aware of any precedent prior to this case in which a court has permitted interlocutory review of a denial of a motion to dismiss such opt-in claims in an FLSA collective action, let alone any such precedent in a case of that sort in which the denial of the motion to dismiss preceded—as it does here—a

motion to certify the class of "similarly situated" persons on whose behalf the named plaintiff is bringing the collective action under the FLSA.[17]

Accordingly, I would dismiss this appeal. By doing so, we would be following our usual wait-and-see approach when confronted with a request to decide an appeal from a denial of a motion to dismiss, and, by doing so, we also would be ensuring that we would not be deciding a major question about the meaning of the Federal Rules of Civil Procedure in a case in which it may turn out not to be necessary for us to decide that question at all.[18]

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[17] I note that, in other cases in which, like here, the named plaintiff had made no motion to certify the class of "similarly situated" individuals on whose behalf the FLSA collective action would be brought, other district courts have denied motions to certify for interlocutory appeal under 28 U.S.C. § 1292(b) the district court's order denying a Fed. R. Civ. P. 12(b)(2) motion to dismiss the claims of opt-ins. See Murphy v. Labor Source, LLC, No. 19-cv-1929, 2021 WL 527932 (D. Minn. Feb. 12, 2021); Seiffert v. Qwest Corp., No. CV-18-70-GF-BMM, 2019 WL 859045 (D. Mont. Feb 22, 2019).

[18] The majority does undertake an extensive analysis of whether the opt-ins in an FLSA collective action are party-plaintiffs who can appeal a ruling denying certification of a collective action on their behalf. See Campbell v. City of Los Angeles, 903 F.3d 1090, 1104–06 (9th Cir. 2018); Mickles v. Country Club Inc., 887 F.3d 1270, 1278 (11th Cir. 2018). But, I do not see how those precedents are relevant to the question that is my concern, which pertains to whether we should be entertaining this interlocutory appeal when no motion for certification has even been filed, let alone denied. I do also note that even if the majority is right to endorse the precedents that it relies on about the party-plaintiff status of opt-ins, the wait-and-see approach that I favor avoids the oddity of resolving on appeal the merits of a motion to

dismiss claims that belong to individuals who are not even listed in the case's caption as parties to the appeal. My concern with our choosing to resolve such a motion in this odd posture is heightened by the fact that nothing in Day & Zimmermann' s briefing to this Court indicates that Day & Zimmermann is seeking to dismiss Waters's collective action claim itself (even in part), as the briefing by Day & Zimmermann advances arguments for dismissing only the claims of the individual opt-ins, none of which are Waters's claims alone. Cf. Molock, 952 F.3d at 300. In any event, insofar as Day & Zimmermann could be understood to be seeking to dismiss not those claims directly but only Waters's collective action claim insofar as it is brought on the opt-ins' behalf, the appeal remains interlocutory and thus still should be dismissed for all the reasons that I have given.

United States Court of Appeals
For the First Circuit

No. 20-1831

JOHN WATERS,
individually and for others similarly situated,

Plaintiff - Respondent,

v.

DAY & ZIMMERMANN NPS, INC.,

Defendant - Petitioner.

Before

Torruella, Lynch and Thompson,
Circuit Judges.

JUDGMENT

Entered: October 14, 2020

Pursuant to 28 U.S.C. § 1292(b), a district court may certify that an order is appropriate for interlocutory review when the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and when "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Here, the district court certified that its order denying defendant-petitioner's motion to dismiss on personal jurisdiction grounds was appropriate for interlocutory review

under § 1292(b). Following the district court's § 1292(b) certification, defendant-petitioner filed the current petition for permission to appeal in this court; plaintiff-respondent did not file a response. See generally Fed. R. App. P. 5.

Having considered the district court's ruling and the petition filed with this court, we conclude that § 1292(b) review would be appropriate. We express no view whatsoever at this time as to the merits of the personal jurisdiction dispute.

Defendant-petitioner's § 1292(b) petition is granted. The appeal shall proceed as 20-1997. All papers filed in Appeal No. 20-1831 will be treated as if filed in 20-1997. A briefing schedule will enter in the ordinary course.

By the Court:

Maria R. Hamilton, Clerk

cc:
Honorable Nathaniel M. Gorton
Robert M. Farrell, Clerk (D. Mass)
David B. Salmons
Keri L. Engelman
Michael J. Puma
James D. Nelson
Philip J. Gordon
Michael Josephson
Michael K. Burke
Richard J. Burch
Richard M. Schreiber

United States District Court
District of Massachusetts

John Waters,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 19-11585-NMG**
Day & Zimmermann NPS, Inc,	)	
Defendant.	)	

MEMORANDUM & ORDER

(Filed Aug. 14, 2020)

GORTON, J.

This is a putative collective action which arises under the Fair Labor Standards Act, 29 U.S.C. § 216(b) ("FLSA"). Plaintiff John Waters ("plaintiff" or "Waters") alleges for himself and others similarly situated that defendant Day & Zimmerman NPS, Inc. ("defendant" or "Day & Zimmerman") has failed to pay overtime wages in violation of the statute. On June 2, 2020, this Court entered an order denying the motion of Day & Zimmerman to dismiss the opt-in plaintiffs who are not residents of Massachusetts for lack of personal jurisdiction. Day & Zimmerman has moved for certification of an interlocutory appeal of that order. For the reasons that follow, that motion will be allowed.

I. Background

Day & Zimmerman is a Delaware corporation with its principal place of business in Pennsylvania engaged primarily in the business of providing power plant services. Waters is a former Mechanical Supervisor who was employed by Day & Zimmerman in Plymouth, Massachusetts from January, 2018, until May, 2018. He alleges that defendant failed to pay him, and other similarly situated workers, 1.5 times his regular hourly compensation for work in excess of 40 hours per week in violation of the FLSA (so-called "straight time for overtime"). In this action in which the putative class has not been conditionally certified, Waters seeks to represent all individuals who were employed by defendant, performed substantially similar job duties and did not receive proper overtime compensation.

The FLSA authorizes collective actions against employers alleged to have violated the statute. Unlike a Fed. R. Civ. P. 23 class action, the FLSA requires plaintiffs to opt-in affirmatively. A large number of plaintiffs have filed written consents to join the putative collective action, many of whom reside outside of Massachusetts.

In September, 2019, the defendants moved to dismiss the non-Massachusetts, opt-in plaintiffs pursuant to Fed. R. Civ. P. 12(b)(2). I n that motion, Defendants argued that as a result of the decision of the United States Supreme Court in Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty., 137

S. Ct. 1773 (2017) ("BMS"), the Court lacked personal jurisdiction over those out of state plaintiffs.

This Court declined to extend application of the holding in BMS to the instant FLSA collective action, denied defendant's motion and found that it had personal jurisdiction over the the non-Massachusetts, opt-in plaintiffs. The Court concluded that it has personal jurisdiction over claims brought by the named plaintiff, Waters, which is all that is needed to confer personal jurisdiction over defendant in the instant putative FLSA collective action.

II. Motion to Certify Appeal

A. Legal Standard

District courts may certify an otherwise non-appealable order for interlocutory review by the Court of Appeals if the order (1) involves a controlling question of law (2) as to which there are grounds for a substantial difference of opinion and (3) an immediate appeal would materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); Carabello-Seda v. Municipality of Hormigueros, 395 F.3d 7, 9 (1st Cir. 2005).

Generally, interlocutory appeals from a denial of a motion to dismiss are disfavored and the First Circuit has emphasized that certification of an interlocutory appeal should be used

> sparingly and only in exceptional circumstances, and where the proposed intermediate

> appeal presents one or more difficult and pivotal questions of law not settled by controlling authority.

Id.

B. Analysis

1. Controlling Question of Law

A question of law is "controlling" if reversal would terminate the action. Phillip Morris Inc. v. Harshbarger, 957 F. Supp. 327, 330 (D. Mass. 1997). Even if reversal does not lead to total resolution, however, a question may be controlling if reversal would dramatically alter the scope of the case. Id. (noting that even in the event that a reversal would "leave something of the case * * * the scope of the case would be so significantly altered that it would still be appropriate to call the [relevant] question controlling").

Furthermore, a controlling question typically implicates a pure legal principle that can be resolved without extensive consultation to the record and commonly involves "a question of the meaning of a statutory or constitutional provision." S. Orange Chiropractic Ctr., LLC v. Cayan LLC, No. 15-c-13069PBS, 2016 WL 3064054, at *2 (D. Mass. May 31, 2016). Such a question generally promotes the possibility of "curtailing and simplifying pretrial or trial". Id. (quoting 16 Charles Alan Wright et al., Federal Practice and Procedure § 3930 (3d ed.).

Although reversal would not terminate the entire action because the named plaintiff (and any putative Massachusetts class members) would be unaffected, it would eliminate at least 109 non-Massachusetts plaintiffs (out of a total of 112 current plaintiffs) and would preclude any other such potential plaintiffs from joining the litigation. As such it would drastically alter and simplify all aspects of litigation, including both the FLSA class certification and the merits. See 16 Charles Alan Wright et al., Federal Practice and Procedure § 3930 (3d ed.)

Moreover, as the defendants note, a reversal of this Court's decision would necessarily conclude the litigation as to the 109 non-Massachusetts opt-in plaintiffs for lack of personal jurisdiction.

Finally, there can be no debate that the applicability of BMS to FLSA collective action and the determination of whether this Court has personal jurisdiction over the non-Massachusetts opt-in plaintiffs is a purely legal question. It is an unqualified constitutional issue which requires no extensive consultation to the record or questions of fact. Meijer, 245 F. Supp. 3d at 315.

2. Materially Advance the Termination of Litigation

The requirement that an immediate appeal materially advance the ultimate termination of the litigation is "closely tied" to the controlling-question-of-law element. Philip Morris, 957 F. Supp. at 330. This

condition is satisfied if reversal of the Court's decision advances the termination of the litigation. Meijer, 245 F. Supp. 3d at 315 (citing United Air Lines, Inc. v. Gregory, 716 F. Supp. 2d 79, 92 (D. Mass. 2010).

For reasons stated above, a reversal would materially impact litigation because it would resolve the case as to 109 current plaintiffs and drastically curtail and simplify pretrial and trial proceedings. See Simmons v. Galvin, No. CV 01-11040-MLW, 2008 WL 11456109, at *3 (D. Mass. Jan. 16, 2008) (noting that a question is controlling and would materially advance the termination of litigation if "interlocutory reversal might save time for the district court, and time and expense for the litigants." (quoting Wright et al., Federal Practice and Procedure § 3930 (3d ed.)

3. Substantial Difference of Opinion

A substantial ground for a difference of opinion arises where an issue involves "one or more difficult and pivotal questions of law not settled by controlling authority." Meijer, 245 F. Supp. at 314-15. The issue must involve a legal principle rather than an application of a legal principle to a unique set of facts. Id.

There is no question that the relevant question of law presents a substantial ground for difference of opinion. As of this writing, 13 other district judges have reached the same conclusion as this session of this Court and held that BMS does not apply to FLSA collective actions, while 11 district judges have taken the contrary position. See David Chavez et al. v. Stellar

Management Group VII, LLC et, No. 19-CV-01353-JCS, 2020 WL 4505482, at *6 (N.D. Cal. Aug. 5, 2020) (collecting cases). Indeed, the instant decision differs from that of two other judges in the District of Massachusetts and one in the District of New Hampshire, thereby creating a conflict within the trial courts of the First Circuit. Such a split clearly constitutes a substantial difference of opinion. Moreover, as this Court has previously noted, neither the First Circuit nor any other Circuit Court of Appeals has yet addressed this question.

Finally, the Court notes that personal jurisdiction is among those categories of rulings "obviously suited for interlocutory appeal." See Wright et al., Federal Practice and Procedure § 3931 (3d ed.)

In summary, the circumstances here are "sufficiently novel and important, and * * * sufficiently out of the ordinary" to warrant interlocutory appeal. In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1010 n.1 (1st Cir. 1988). Whether the Supreme Court's decision in BMS extends beyond mass tort actions to FLSA collective actions is a unique and significant legal question subject to reasoned differences of opinion of judges of this and other districts across the country. Because resolution of this question further involves a controlling question of law and an immediate appeal would materially advance the ultimate termination of the litigation, the Court finds that interlocutory appeal is justified in this particular case.

ORDER

For the foregoing reasons the motion of defendants for certification of an interlocutory appeal (Docket No. 85) is **ALLOWED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated August 14, 2020

United States District Court
District of Massachusetts

John Waters,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 19-11585-NMG**
Day & Zimmermann NPS, Inc,	)	
Defendant.	)	

MEMORANDUM & ORDER

(Filed Jun. 2, 2020)

GORTON, J.

This is a putative class action which arises under the Fair Labor Standards Act, 29 U.S.C. § 216(b) ("FLSA"). Plaintiff John Waters ("plaintiff" or "Waters") alleges that defendant Day & Zimmerman NPS, Inc. ("defendant" or "Day & Zimmerman") has failed to pay him and other similarly situated employees overtime wages in violation of the statute. Day & Zimmerman has moved to dismiss the opt-in plaintiffs who are not residents of Massachusetts, contending that this Court lacks personal jurisdiction over those purported class members.

I. Background

Day & Zimmerman is a Delaware corporation with a principal place of business in Pennsylvania engaged

in a range of businesses, including the provision of power plant services. Waters is a former Mechanical Supervisor who was employed by Day & Zimmerman in Plymouth, Massachusetts from January, 2018, until May, 2018. He alleges that defendant failed to pay him, and other similar situated workers, overtime at 1.5 times his regular hourly compensation for over 40 hours per week in violation of the FLSA (so-called "straight time for overtime"). In this action in which the putative class has not been conditionally certified, Waters seeks to represent all individuals who were employed by defendant, performed substantially similar job duties and did not receive proper overtime compensation.

The FLSA authorizes collective actions against employers alleged to have violated the statute. Unlike a Fed. R. Civ. P. 23 class action, the FLSA requires plaintiffs to opt-in affirmatively. A number of plaintiffs have filed written consents to join the putative collective action, many of whom reside outside of Massachusetts. Defendants contend, primarily based on the United States Supreme Court decision in Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty., 137 S. Ct. 1773 (2017) ("BMS"), that the Court lacks personal jurisdiction over the non-resident, opt-in plaintiffs and have moved to dismiss those plaintiffs pursuant to Fed. R. Civ. P. 12(b)(2). Plaintiffs rejoin that jurisdiction is proper in Massachusetts because this Court maintains personal jurisdiction over the named plaintiff Waters and the BMS decision does not apply to FLSA collective actions.

II. Motion to Dismiss For Lack of Personal Jurisdiction

a. Legal Standard

On a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), plaintiff bears the burden of showing that the Court has authority to exercise jurisdiction over defendants. Cossart v. United Excel Corp., 804 F.3d 13, 18 (1st Cir. 2015). Where, as here, the Court is confronted with a motion to dismiss for lack of personal jurisdiction without first holding an evidentiary hearing, it applies the "prima facie" standard of review and takes the plaintiff's

> properly documented evidentiary proffers as true and construe[s] them in the light most favorable to [plaintiff's] jurisdictional claim.

A Corp. v. All Am. Plumbing, Inc., 812 F.3d 54, 58 (1st Cir. 2016). A plaintiff cannot, however, rely on "unsupported allegations" and "must put forward evidence of specific facts to demonstrate jurisdiction exists." Id. (internal citations omitted).

Plaintiff's claims invoke the Court's federal question jurisdiction. 28 U.S.C. § 1331.

1. Personal Jurisdiction in Federal Question Cases

In federal question cases, the Due Process Clause of the Fifth Amendment of the United States Constitution requires only that a defendant maintain "adequate contacts" with the United States as a whole

rather than with the forum state. United States v. Swiss Am. Bank, 274 F.3d 610, 618 (1st Cir. 2001). Plaintiff must, however, "ground its service of process in a federal statute or civil rule." Id.

An out-of-state defendant in federal-question cases may be properly served if the federal statute pursuant to which the claim is brought provides for nationwide service of process. Fed. R. Civ. P. 4(k)(1)(C). Where, as here, the federal statute is silent on the availability of nationwide service of process, such service is governed by the forum state's long-arm statute. Fed. R. Civ. P. 4(k)(1)(A). Accordingly, this Court must conduct the same personal jurisdiction inquiry as in a diversity case under the Massachusetts long-arm statute. See Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947, 950 (1st Cir. 1984).

2. Personal Jurisdiction in Diversity Cases

In a diversity suit, this Court acts as "the functional equivalent of a state court sitting in the forum state." See Astro–Med, Inc. v. Nihon Kohden Am., Inc., 591 F.3d 1, 8 (1st Cir. 2009). As such, to make a prima facie showing of personal jurisdiction in diversity cases, the plaintiff must demonstrate that the exercise of jurisdiction 1) is permitted by the Massachusetts long-arm statute, M.G.L. c. 223A § 3, and 2) coheres with the Due Process Clause of the Fourteenth Amendment of the United States Constitution by showing that each defendant has "minimum contacts" with

Massachusetts. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 52 (1st Cir. 2002).

The Court's jurisdiction may be either "specific" or "general." Swiss Am. Bank, 274 F.3d at 618. Specific jurisdiction requires a "demonstrable nexus" between the claims of the plaintiff and the defendant's contacts in the forum state. Id. Such contacts must demonstrate that the defendant "purposeful[ly] avail[ed] [itself] of the privilege of conducting activities in the forum state." Noonan v. Winston Co., 135 F.3d 85, 90 (1st Cir. 1998). General jurisdiction, on the other hand, exists when the defendant has engaged in "continuous and systematic activity, unrelated to the suit, in the forum state." Swiss Am. Bank, 274 F.3d at 618.

3. Massachusetts Long-Arm Statute

The Massachusetts long-arm statute provides, in relevant part, that a court may exercise personal jurisdiction

> over a person, who acts * * * as to a cause of action in law or equity arising from the person's (a) transacting any business in this commonwealth [or] (b) contracting to supply services or things in this commonwealth * * * .

M.G.L. c. 223A, § 3.

The requirements of the Massachusetts long-arm statute are substantially similar to (although potentially more restrictive than) those imposed by the Due

Process Clause of the Fourteenth Amendment. See Copia Commc'ns, LLC v. AMResorts, L.P., 812 F.3d 1, 4 (1st Cir. 2016) (noting that "[r]ecently, however, we have suggested that Massachusetts's long-arm statute might impose more restrictive limits on the exercise of personal jurisdiction than does the Constitution"). See also Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc., 825 F.3d 28, 34 (1st Cir. 2016).

4. Due Process Clause

The plaintiff must also demonstrate that the Court's exercise of personal jurisdiction over the defendant comports with the United States Constitution. See Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement, 326 U.S. 310, 316 (1945).

To support the Court's exercise of specific personal jurisdiction over the Corporate Defendants, plaintiff must make an "affirmative showing" that 1) the litigation relates to or arises out of the defendant's contacts with the forum state; 2) the defendant purposefully availed itself of the privilege of conducting business in the forum state; and 3) jurisdiction over the defendant is reasonable under the circumstances. Sawtelle v. Farrell, 70 F.3d 1381, 1388 (1st Cir. 1995); Phillips Exeter Academy v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999).

B. Application and Applicability of BMS to FLSA Collective Actions

At the outset, the Court notes (and plaintiff does not contend otherwise) that it does not have general jurisdiction over Day & Zimmerman, a corporation that is neither incorporated nor "essentially at home" in the Commonwealth. Daimler AG v. Bauman, 571 U.S. 117, 139 (2014). Further, defendant does not contest that this Court has specific personal jurisdiction over plaintiff Waters given that he was employed by Day & Zimmerman in Massachusetts and the alleged failure to pay overtime occurred in Massachusetts.

Defendant's principal contention is that the Supreme Court's decision in BMS extends beyond mass tort actions to FLSA collective actions and divests this Court of specific jurisdiction over the non-Massachusetts, opt-in plaintiffs. This Court disagrees.

In BMS, approximately 600 plaintiffs, including both California residents and residents of other states, filed eight separate personal injury lawsuits in California state court against Bristol-Myers Squibb for damages caused by its blood thinner, Plavix. 137 S. Ct. at 1777. The plaintiffs structured their lawsuit as a coordinated, mass tort action pursuant to Cal. Civ. Proc. Code § 404. Id. Defendant argued that the California state court lacked personal jurisdiction over it with respect to the claims of the non-California plaintiffs who had not purchased, used or been injured by Plavix in California because those plaintiffs could not demonstrate that their claims arose out of defendant's

contacts with California. Id. at 1783-84. Applying "settled principles of personal jurisdiction," the Supreme Court agreed. Id. at 1783. The Court found that there was no connection between the forum and the claims of the nonresidents and, therefore, the exercise of personal jurisdiction over defendants with respect to those claims violated the Due Process Clause of the Fourteenth Amendment. Id. at 1781. The Court did not, however,

> confront the question whether its opinion * * * would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.

Id. at 1789 n.4 (Sotomayor, J., dissenting).

Joining with the majority of district courts to have considered the issue, this Court has determined that BMS does not apply to Rule 23 class actions. See Munsell v. Colgate-Palmolive Co., No. CV 19-12512-NMG, 2020 WL 2561012, at *7 (D. Mass. May 20, 2020); Rosenberg v. LoanDepot.com LLC, No. CV 19-10661-NMG, 2020 WL 409634, at *12 (D. Mass. Jan. 24, 2020). Defendants maintain, however, that an FLSA collective action is different than a Rule 23 class action and that BMS divests this Court of specific personal jurisdiction over the non-Massachusetts, opt-in plaintiffs. No United States Circuit Court of Appeals has addressed application of BMS to FLSA collective actions and district courts are squarely split on the question. See Pettenato v. Beacon Health Options, Inc., 425 F. Supp. 3d 264, 276 (S.D.N.Y. 2019) (collecting cases).

The FLSA permits plaintiffs to bring suits on behalf of "themselves and other employees similarly situated." 29 U.S.C. § 216(b). Courts which have declined to extend BMS often follow the reasoning first articulated by the Court in Swamy v. Title Source, Inc., No. C 17-01175 WHA, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017). See Aiuto v. Publix Super Markets, Inc., No. 1:19-CV-04803-LMM, 2020 WL 2039946, at *5 (N.D. Ga. Apr. 9, 2020) (noting that the "court finds the Swamy court's reasoning * * * persuasive"); Warren v. MBI Energy Servs., Inc., No. 19-CV-00800-RM-STV, 2020 WL 937420, at *6 (D. Colo. Feb. 25, 2020) (same); Seiffert v. Qwest Corp., No. CV-18-70-GF-BBM, 2018 WL 6590836, at *2–3 (D. Mont. Dec. 14, 2018) ("This Court agrees with the reasoning in Swamy * * * . Nothing in the plain language of the FLSA limits its application to in-state plaintiffs' claims.").

Concluding that the circumstances of an FLSA collective action are "far different from those contemplated by the Supreme Court in Bristol-Myers" the Swamy Court held that BMS did "not apply to divest courts of personal jurisdiction in FLSA collective actions." Swamy, 2017 WL 5196780, at *2. Specifically, the Swamy court found that an FLSA claim is a

> federal claim created by Congress specifically to address employment practices nationwide [that] Congress created [as] a mechanism for employees to bring their claims on behalf of other employees who are "similarly situated," and [Congress] in no way limited those claims to in-state plaintiffs.

Id. (citing 29 U.S.C. §§ 202, 207(a), 216(b)).

Further, the Swamy Court, and others that have endorsed its reasoning, found that if BMS were applied to collective actions it would contravene the express intent of Congress and serve

> [to] splinter most nationwide collective actions * * * and greatly diminish the efficacy of FLSA collective actions as a means to vindicate employees' rights.

Id.

Other sessions, including two in this district, disagree with the Swamy analysis. Those Courts have held that BMS applies to FLSA collective actions and "divests courts of specific jurisdiction over the FLSA claims of [out of state] plaintiffs." Chavira v. OS Rest. Servs., LLC, No. 18-cv-10029-ADB, 2019 WL 4769101, at *5 (D. Mass. Sept. 30, 2019) (quoting Maclin v. Reliable Reports of Tex., Inc., 314 F. Supp. 3d 845, 850-51 (N.D. Ohio 2018)); see also Roy v. FedEx Ground Package Sys., Inc., 353 F. Supp. 3d 43 (D. Mass. 2018);

In brief, those Courts have concluded that the opt-in plaintiffs in an FLSA collective action are "more similar to plaintiffs in a mass tort action than plaintiffs in a class action" and therefore the application of BMS divests courts of personal jurisdiction over out of state opt-in plaintiffs in FLSA actions. Chavira, 2019 WL 4769101, at *5 (quoting Roy, 353 F. Supp. 3d at 60).

This Court finds synergy with those Courts that have held BMS to be inapplicable in the FLSA context. In evaluating specific jurisdiction, the BMS decision

focused the analysis at the level of the suit. The Supreme Court held that in order for jurisdiction to be proper, "the suit must aris[e] out of or relat[e] to the defendant's contacts with the forum." BMS, 137 S. Ct. at 1780 (quoting Daimler, 134 S. Ct. at 760). In the mass tort context, each individual plaintiff is a real party in interest and therefore a Court must have jurisdiction over each plaintiff. In contrast, in an FLSA collective action the suit is between the named plaintiff and the defendant. That other members of a putative class in the FLSA action must opt-in does not change the dynamics of the suit which remains between the plaintiff and defendant. See Aiuto, 2020 WL 2039946, at *5 (noting that "[u]nlike in a mass tort action, in an FLSA collective action there is only one suit: the suit between Plaintiff and the Defendant[s]") (internal citations and quotations omitted); Hammond v. Floor & Decor Outlets of Am., Inc., No. 3:19-cv-01099, 2020 WL 2473717, at *14 (M.D. Tenn. May 13, 2020) (noting that the relevant question is "whether the named plaintiff * * * in the suit can exercise personal jurisdiction over the defendant"); see also Hunt v. Interactive Med. Specialists, Inc., No. 1:19CV13, 2019 WL 6528594, at *3 (N.D. W. Va. Dec. 4, 2019).

In this putative FLSA collective action, the suit is between Waters and Day & Zimmerman. The appropriate jurisdictional analysis, therefore, is at the level of Waters' claim. There is no dispute that as to Waters the requirements of the long-arm statute and the Due Process Clause are satisfied.

Courts which have extended BMS have concluded that, because an FLSA claim is more analogous to mass tort than a Rule 23 class action, the BMS reasoning is applicable. This Court respectfully disagrees. That a FLSA action may be, in some ways, similar to a mass-tort claim does not necessarily lead to the conclusion that BMS is applicable. The BMS decision was specifically limited to "the due process limits on the exercise of specific jurisdiction by a State." BMS, 137 S. Ct. at 1777. It did not address "whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." Id. Moreover, the concerns with respect to forum-shopping that "animated Bristol-Meyers are not present in an FLSA collective action." Aiuto, 2020 WL 2039946, at *5. The decision itself and the meaningful distinctions between mass torts and FLSA collective actions support the conclusion that BMS does not apply to the instant case.

Congress enacted the FLSA 1) as a remedial statute specifically to address employment practices nationwide, Swamy, 2017 WL 5196780, at *2, and 2) specifically to limit duplicative lawsuits where numerous employees have been harmed by the same employers. See Cunha v. Avis Budget Car Rental, LLC, 221 F. Supp. 3d 178, 181 (D. Mass. 2016) (noting that "FLSA collective actions were created to promote the efficient adjudication of similar claims, so similarly situated employees, whose claims are often small and not likely to be brought on an individual basis, may join together * * * to prosecute claims.") (internal

citations and quotations omitted). Extending BMS to the FLSA context would contravene the explicit intent of Congress in enacting the FLSA. See Sierra Club v. Sec'y of Army, 820 F.2d 513, 522 (1st Cir. 1987) (noting that "[u]nless the language of a statute itself points in a contrary direction, courts are bound to interpret it consistent with the legislative intent, if discernible.")

Accordingly, this Court declines to extend BMS to the instant FLSA collective action. The Court has personal jurisdiction over claims brought by the named plaintiff, Waters, which is all that is needed to confer personal jurisdiction over defendant in the instant putative FLSA collective action.

ORDER

For the foregoing reasons the motion of defendants to dismiss (Docket No. 16) is **DENIED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated June 2, 2020