No. 21-1192

In The
Supreme Court of the United States

DAY & ZIMMERMANN NPS, INC.,
Petitioner,

v.

JOHN WATERS, individually and for others similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONSE TO PETITION

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QUESTION PRESENTED (RESTATED)

Congress granted "any one or more employees" the right to "maintain" an action "for and in behalf of himself or themselves and other employees similarly situated" against an employer who violates the Fair Labor Standards Act. 29 U.S.C. § 216(b). It also authorized other employees to join that action by simply filing a "consent in writing to become such a party … in the court in which such action is brought." *Id.*

The question presented is whether Fed. R. Civ. P. 4(k)(1) "independently limits a federal court's exercise of personal jurisdiction with respect to out-of-state opt-in [Fair Labor Standards Act] claimants added after service of process has been effectuated." *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 87 (1st Cir. 2022).

PARTIES

Petitioner is Day & Zimmermann NPS, Inc.

Respondent is John Waters.

RELATED PROCEEDINGS

This case is directly related to:

Waters v. Day & Zimmermann NPS, Inc., No. 19-cv-11585 (D. Mass. June 2, 2020) (order denying motion to dismiss)

Waters v. Day & Zimmermann NPS, Inc., No. 19-cv-11585 (D. Mass. Aug. 14, 2020) (order certifying interlocutory appeal)

Waters v. Day & Zimmermann NPS, Inc., No. 20-1977 (1st Cir. Jan. 13, 2022) (opinion affirming denial of motion to dismiss)

While not directly related, a similar petition for a writ of certiorari is pending:

Canaday v. Anthem Cos., No. 21-1098 (U.S.)

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INTRODUCTION

The bottom line is this: There is a circuit split and this Court should resolve it.

"The FLSA establishes federal minimum wage, maximum-hour, and overtime guarantees that cannot be modified by contract." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013). The FLSA "gives employees the right to bring a private cause of action on their own behalf and on behalf of 'other employees similarly situated' for specified violations of the FLSA." *Id.* In particular, the FLSA states:

> "An action to recover [wages owed] may be *maintained* against *any* employer … 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."

29 U.S.C. § 216(b) (emphasis added). "A suit brought on behalf of other employees is known as a 'collective action.'" *Genesis Healthcare Corp.*, 569 U.S. at 69 (citing *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169–170 (1989)).

Under the plain terms of the FLSA, the "action" is "maintained" by the employee(s) who filed it. 29 U.S.C. § 216(b). The FLSA's special collective action procedure gives other employees the right to join the "action" by filing a "consent in writing" in "the court in which such action is brought." *Id.* No amended complaint, much less service of summons, is required. *Id.* So it would seem clear that once service "establishes personal jurisdiction over a defendant[,]" Fed. R. Civ. P. 4(k), who may "opt-in" should be governed by the FLSA.

But a Sixth Circuit panel held (2-to-1) the Fourteenth Amendment limits on prevents a *federal* court from awarding unpaid wages to similarly situated, "out-of-state" employees who opt-in to an FLSA collective action. *Canaday v. Anthem Companies, Inc.*, 9 F.4th 392 (6th Cir. 2021). So did the Eight Circuit (sort of). *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861 (8th Cir. 2021).[1] In this case, the First Circuit correctly held the Fourteenth Amendment does not limit the jurisdiction of federal courts to apply the FLSA to "out-of-state" opt-in plaintiffs. *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022).

This split may seem odd since everyone appears to agree that, as a Constitutional matter, limits on a federal court's authority "arise from the Fifth Amendment's Due Process Clause and its requirements of minimum contacts with the United States, not the Fourteenth Amendment's Due Process Clause and its requirement of minimum contacts with the host State." *Canaday*, 9 F.4th at 398 (citing *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 137 S. Ct. 1773,

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[1] In fairness to the Eighth Circuit, the plaintiff-appellants' only jurisdictional arguments were: (1) the defendant-appellee waived personal jurisdiction by failing to raise it; and (2) that non-Minnesota residents of the collective action could recover compensation for their non-Minnesota travel time if they worked some time in Minnesota. Since the parties apparently did "not dispute" that 14th Amendment limits applied to opt-in plaintiffs, the Eighth Circuit took "that proposition as a given[.]" *Vallone*, 9 F.4th at 865.

1784 (2017)).[2] However, the Sixth Circuit held Fed. R. Civ. P. 4—which on its face governs service of process alone—imposes Fourteenth Amendment limits on state courts on *federal* courts even after the party maintaining the action properly served the defendant. *Id.* In contrast, and consistent with its plain terms, the First Circuit held "Rule 4 is concerned with initial service, not jurisdictional limitations after service." *Waters*, 23 F.4th at 98–99.

That is, Rule 4 governs the "procedure" by which a plaintiff brings a defendant before a federal district court. Fed. R. Civ. P. 4 ("Summons."). Once the defendant is before a federal court, the Fifth Amendment governs a federal court's exercise of its jurisdiction with respect to FLSA plaintiffs who exercise their right to opt-in pursuant to 29 U.S.C. § 216(b).

Petitioner says the First Circuit created a "clear roadmap for evading any meaningful limits on a federal court's exercise of personal jurisdiction" in "FLSA cases *and* many others involving joinder or amendments." Petition at 3 & 37 (emphasis original). Not so. As the First Circuit noted: "In both the case of added parties and claims, the court's jurisdiction is still subject to constitutional limitations[,]" but with respect *federal* claims "the Fifth Amendment"—not the Fourteenth Amendment—governs a federal court's authority. *Waters*, 23 F.4th at 99.

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[2] Indeed, nationwide service of process—the propriety of which Petitioner does not challenge— would not be possible unless federal courts had "nationwide" jurisdiction as a constitutional matter.

The *Canaday* court worried limiting Rule 4 to its terms would permit "California" to "evade" *Bristol-Myers* "by the mere expedient of adding an out-of-state opt-in provision to its mass action statute." *Canaday*, 9 F.4th at 400. Respectfully, that's also incorrect. *Bristol-Myers* was a state court proceeding addressing state law claims. Therefore, the Fourteenth Amendment applied by its own force. Even if California "merely" added an opt-in provision to its mass action statute, the Fourteenth Amendment would still preclude California state courts from asserting jurisdiction over the nonresidents' claims. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1779.

In the context of opt-in plaintiffs seeking to join a FLSA collective action proceeding in federal court, the United States is the relevant "sovereign" and "forum." Rule 4(k) does not, by its terms or otherwise, limit a federal court's authority beyond the service of process. Rather, federal courts only look to the Fourteenth Amendment standards because, under Rule 4, "a federal district court's authority to assert personal jurisdiction in most cases is linked to service of process on a defendant 'who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.'" *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (quoting Fed. R. Civ. P. 4(k)(1)(A)). Once the initial hurdle of obtaining valid service is passed, the federal rules do not impose the limits on state court personal jurisdiction on federal courts. This is particularly true where, as here, Congress authorized "similarly situated" employees to join a singular "action" without the need for service of process. 29 U.S.C. § 216(b).

STATEMENT OF THE CASE

Petitioner is a Delaware corporation with a principal place of business in Lancaster, Pennsylvania. Petitioner engages in a range of business, including providing power plant services.

In 2018, Respondent worked for Petitioner as a Mechanical Supervisor in Plymouth, Massachusetts. Petitioner paid Waters by the hour. Although he regularly worked overtime hours, Petitioner failed to pay him overtime.

In 2019, Respondent sued Petitioner in the federal court covering where he worked (and lived): the District of Massachusetts. As permitted by Congress, he brought his action on "behalf of himself … and other employees similarly situated." 29 U.S.C. § 216(b). Respondent properly served Petitioner with summons. Everyone agrees this "establishe[d] personal jurisdiction over" Petitioner (at least with respect to Respondent's FLSA claim). Fed. R. Civ. P. 4(k)(1).

Over time, more than 100 similarly situated employees joined Waters' FLSA collective action as opt-in plaintiffs by filing their written consent with the court. Though most worked outside of Massachusetts, all the opt-in plaintiffs worked for Respondent in the United States,

On September 12, 2019, Petitioner moved to dismiss what it calls "out-of-state" opt-in plaintiffs for lack of personal jurisdiction. Petitioner said this Court's *Bristol-Myers* decision strips federal courts of jurisdiction over the federal claims of "out-of-state" opt-in plaintiffs in FLSA collective actions.

Respondent opposed Petitioner's motion to dismiss. He argued the district court acquired personal jurisdiction over Petitioner it was served with valid process and that *Bristol-Myers*'s holding was confined to *state*—not federal—courts' authority to exercise personal jurisdiction under the Fourteenth Amendment. Once Respondent properly served Petitioner under Rule 4 and the Massachusetts' long-arm statute—something Petitioner does not dispute—the district court could exercise its jurisdiction over Petitioner.

On October 11, 2019, Petitioner filed its reply in support of its motion to dismiss focusing on recent District of Massachusetts rulings that incorrectly found *Bristol-Myers* divests district courts of personal jurisdiction over non-resident defendants with respect to out-of-state opt-in plaintiffs in FLSA collective actions.

On March 11, 2020, the Seventh Circuit rejected Petitioner's Rule 4 argument as applied to Rule 23 class actions. *See Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447–48 (7th Cir. 2020), *cert. denied,* 141 S. Ct. 1126 (2021). The parties submitted supplemental filings with the district court.

On June 2, 2020, the district court denied Petitioner's motion to dismiss, correctly finding *Bristol-Myers* did not divest it of personal jurisdiction over Petitioner with respect to out-of-state opt-in plaintiffs. Petitioner moved for a certificate of appealability under 28 U.S.C. § 1292(b). The district court certified its order for an interlocutory appeal on August 14, 2020.

On appeal, the First Circuit determined that "the Fifth Amendment's constitutional limitations limit the authority of the court after service has been effectuated at least in federal-law actions" like the FLSA. *Waters*, 23 F.4th at 96. And 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." *Id.* at 92 (cleaned up). The Court flatly rejected Petitioner's argument that Fed. R. Civ. P. 4(k) continues to impose—on a *federal* court acting after valid service of process—the limits that the Fourteenth Amendment imposes on state court. *Id.* at 93–96.[3]

ARGUMENT

Having considered the briefs (including amicus briefs) in this case and the *Canaday* petition (No. 21-1098), Respondent agrees there is a circuit split that warrants this Court's attention. Therefore, while Respondent disagrees with many of Petitioner's statements regarding the merits, this is not the place for those fights.

Respondent is concerned certain misstatements in the petition could bear on what issues would be before the Court if certiorari were granted. Most importantly, the First Circuit did not decide the

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[3] Petitioner pretends Judge Barron dissented in *Waters* because he thought Petitioner was right. But Judge Barron explained why he felt compelled to "write separately[.]" *Waters*, 23 F.4th at 100. For "reasons independent of the merits of the majority's ruling," he felt there was "no reason … to decide this question at this time, given the interlocutory posture of this appeal." *Id.*

application of Fed. R. Civ. P. 4(k) (and the Fourteenth Amendment) to federal law claims in the abstract. To the contrary, it specifically addressed Rule 4 in the context of "opt-in" plaintiffs to a validly served FLSA collective action. *Waters*, 23 F.4th at 96. It explained why *Bristol-Myers* does not limit federal court authority *in these circumstances*. *Id.* at 92.

Similarly, Petitioner's invitation to consider Rule 4's subpart (k) in isolation should be rejected. Petition at 28 (arguing the "other parts of Rule 4 [are] irrelevant"). Just as the case must be placed in context of forum (federal), claim (federal), and the FLSA's specific method of participation, so must the applicable rules be considered in context. Therefore, should this Court grant certiorari, it should be to consider whether Rule 4(k)(1) "independently limits a federal court's exercise of personal jurisdiction with respect to out-of-state opt-in [Fair Labor Standards Act] claimants added after service of process has been effectuated." *Waters*, 23 F.4th at 87.

CONCLUSION

The Circuit Courts disagree on an issue that is important and recurring in FLSA litigation. The Court should grant certiorari in this case, or *Canaday*, or both.

Respectfully submitted,

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