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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY FOR PETITIONER

A. Petitioner And Respondent Agree The Court Should Grant Certiorari.

Respondent agrees with Petitioner that there is a clear circuit split on an important issue of federal jurisdiction that urgently needs this Court's resolution. Resp. Br. at 1 ("There is a split and this Court should resolve it."); *id.* at 8 ("The Circuit Courts disagree on an issue that is important and recurring in FLSA litigation," warranting certiorari.).

The circuit split is undeniable. See, e.g., App. 28 ("[T]he Sixth and Eighth Circuits * * * disagree with the decision that we [the First Circuit] reach today" based on an irreconcilable interpretation of Rule 4(k)'s jurisdictional limits on "amended complaints and opt-in notices."); App. 40 (The "majority's reading of Rule 4(k)(1)(A) * * * directly conflicts * * * with that of other circuits."). Only this Court can clarify which circuits' view of this fundamental jurisdictional question is correct.

The issue is also frequently recurring and exceptionally important. Not only will the First Circuit's holding affect the jurisdictional rules governing multi-state FLSA collective actions in that circuit, Resp. Br. at 8, it will control "a whole range of cases that also implicate Rule 4(k)(1)(A) but that have nothing to do with FLSA collective actions at all." App. 42; see also Pet. at 31-34. Nor does Respondent dispute that the First Circuit's holding encourages forum shopping in FLSA collective actions and other

multi-plaintiff litigations, as the jurisdictional rules are now significantly more permissive in that circuit than others. See Pet. at 34-36; see also Brief of The Chamber of Commerce of the United States of America and Business Roundtable as *Amici Curiae* in Support of Petitioner, at 16-21. The First Circuit's holding also conflicts with this Court's cases and Rule 4(k)'s text. Pet. at 21-31.

For all these reasons, this Court's immediate review is urgently needed. The petition for a writ of certiorari should be granted.

B. This Case Presents The Ideal Vehicle To Decide The Split.

1. This case presents an ideal vehicle for this Court's review. Only the question presented here invokes the explicit disagreement among the circuits. The circuits are not presently divided over what the Fourteenth Amendment and this Court's *Bristol-Myers Squibb* decision requires in the context of out-of-state opt-in plaintiffs under the FLSA. See, e.g., Resp. Br. at 2-3 (noting split involves whether to apply Fourteenth Amendment, not how it applies in this context). Every circuit court to decide that question has held that the reasoning of *Bristol-Myers Squibb* controls FLSA opt-in plaintiffs and requires dismissing those opt-ins whose claims are not related to the forum state. See Pet. at 12-13, 17-20.

Instead, the only issue that currently divides the circuits is whether the Fourteenth Amendment applies at all to FLSA opt-in plaintiffs pursuant to Rule

4(k) after an initial summons by a single in-state plaintiff has been served. Accordingly, the Petition properly asks whether, under Rule 4(k), subsequent out-of-state plaintiffs "must demonstrate that the forums state's courts would have personal jurisdiction over their claims." Pet. at i. Respondent's "restated" question uses slightly different semantics to ask the same substantive question: whether Rule 4(k) "independently limits a federal court's exercise of personal jurisdiction" (by imposing the forum state's jurisdictional rules, including the Fourteenth Amendment) over opt-in plaintiffs. Resp. Br. at i.

By contrast, the petition in *Canaday* v. *Anthem Cos.*, No. 21-1098 (Feb. 2, 2022), skips the question that has split the courts—what standard governs jurisdiction—and simply asks whether jurisdiction is present. *Canaday* Pet. at i, 21; see *Canaday* BIO at 12-13 (noting circuits are not yet split over that subsequent question). The question here is a better vehicle for resolving the existing split.

2. What constitutional standard governs out-of-state opt-ins' claims—the question presented here—is a distinct, threshold question that must be answered before resolving *how* a particular standard applies to FLSA opt-ins (the question presented in *Canaday*). Based on its erroneous holding that Rule 4(k)(1)(A) is inapplicable to later-added plaintiffs, the First Circuit held it need not even ask whether the opt-in plaintiffs could demonstrate that the forum state's courts would have jurisdiction over their claims, as Rule 4(k) and the Fourteenth Amendment

require. App. 19-20. The Sixth and Eighth Circuits, by contrast, held Rule 4(k)—consistent with its text—requires later-added plaintiffs to demonstrate compliance with the Fourteenth Amendment. Only then did the Sixth and Eighth Circuits hold that out-of-state opt-ins must be dismissed under *Bristol-Myers Squibb*. *Canaday* v. *Anthem Cos.*, 9 F.4th 392, 398-400 (6th Cir. 2021); *Vallone* v. *CJS Sols. Grp.*, 9 F.4th 861, 865 (8th Cir. 2021). The First Circuit never reached that second question given its answer to the first. That is the definition of a threshold jurisdictional question, and this Court is the only one that can resolve it.[1]

3. The jurisdictional question under Rule 4(k) presented here is itself of vital importance and warrants this Court's immediate review. The First Circuit's holding affects not only FLSA collective actions, but many other cases as well. While Respondent notes that the First Circuit interpreted Rule 4(k) in a case involving FLSA opt-ins, Resp. Br. at 7-8, he does not meaningfully dispute that the First Cir-

[1] In an attempt to defend her question, Canaday argues that there is no "genuine threshold issue," *Canaday* Reply at 10; *id.* at 1, 5-6, and that the only real question is what "*Bristol-Myers* * * * require[s]" in state courts, *id.* at 5 n.1. That is incorrect. The threshold question that has split the circuits and is presented here is whether, under Rule 4(k), the Fourteenth Amendment (which was interpreted in *Bristol-Myers Squibb*) applies at all to later-added claims or plaintiffs. If it does not (as the First Circuit improperly held), then what *Bristol-Myers Squibb* requires is not relevant.

cuit's holding will impact jurisdictional issues beyond FLSA cases. If its interpretation of Rule 4(k) as imposing jurisdictional limits only at the time of service stands, that will affect all later-added plaintiffs and claims in all state law and federal question cases (in absence of nationwide service of process provisions) in federal court. That includes, but is not limited to, the FLSA. See App. 33 (Judge Barron explaining in dissent that the First Circuit's holding "will have seemingly wide-ranging effects on a slew of cases" far beyond "the specific dispute at hand"); App. 40-41 & n.16 (the majority's holding will require courts to alter their jurisdictional analysis in all cases involving Rule 4(k)(1)(A) and "later-added claims and plaintiffs").[2] Ensuring the uniform administration of jurisdictional requirements under the federal rules is both a matter of great importance and an essential function of this Court.

4. Finally, there are no vehicle problems with this case. Respondent agrees, Resp. Br. at 8, and has identified no hurdle to this Court's review of the pressing legal question presented.

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[2] Respondent's implication that Judge Barron's dissent took no position on the majority's holding is wrong. Resp. Br. at 7 n.3. True enough, he stated he would not have granted interlocutory review. But he also explained that the majority's reasoning (i) has no precedential support, App. 40, (ii) conflicts with the uniform understanding of Rule 4(k) in both courts and academia, App. 39-40, and (iii) would have far reaching consequences beyond the FLSA, requiring a sea change for how courts handle jurisdictional questions, App. 41-42.

The *Canaday* petitioner argues this case is a "comparatively poor vehicle" because Judge Barron in dissent noted he would not have granted interlocutory review. *Canaday* Reply at 10. But whatever Judge Barron's preference, interlocutory review was granted and the majority's holding is now the law of the First Circuit. It is binding on all courts in that circuit—and only this Court's review can correct it.

Nor does the interlocutory nature of this appeal from a motion to dismiss present any hurdle. This Court regularly reviews jurisdictional and other questions decided on an interlocutory basis.[3] Interlocutory appeals are especially apt for this Court's review, since they involve important questions of law about which there is substantial disagreement. 28 U.S.C. 1292(b). No factual issue stands in the way of the legal question here.

By contrast, if review is *not* granted in this case, it will be difficult to raise this issue ever again in the First Circuit. There's no reason to believe the First Circuit, having now resolved the issue (incorrectly),

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[3] See, e.g., *Ford Motor Co.* v. *Mo. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1023-24 (2021) (reviewing personal jurisdiction question that arose from discretionary interlocutory appeal in state court); *Finley* v. *United States*, 490 U.S. 545, 547 (1989) (resolving appeal from interlocutory order on motion to dismiss to resolve statutory jurisdictional requirements that were subject of circuit split); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 192-93 (1974) (same); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 717-18 (2005) (deciding constitutional issue arising from interlocutory appeal from denial of motion to dismiss).

would continue to view it as proper grounds for interlocutory review. And as several courts have noted, most collective action cases will settle after certification due to overwhelming pressure to limit potentially enormous liability regardless of the merits. Pet. at 37 n.7. A First Circuit panel could not overturn the holding challenged here anyways.

Petitioner also did not "jump[] the gun" by moving to dismiss before the collective action was certified. *Canaday* Reply at 10. Over one-hundred plaintiffs have opted into this case, and an order dismissing parties that have already joined a case clearly would not have been "advisory." *Id.* at 11. The opt-in plaintiffs are real parties to the action, App. 7-13, and their dismissal would reduce Petitioner's potential liability and litigation costs.[4] The fact that there may be other issues in the case on which Petitioner might prevail does not mean that challenging personal jurisdiction is premature. A motion to dismiss is a natural time to raise personal jurisdiction issues—and this Court has repeatedly granted certiorari to resolve jurisdictional issues raised in motions to dismiss.[5]

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[4] Canaday's suggestion that Respondent may choose not to pursue a collective action (Reply at 11) is implausible given that Respondent filed a collective action complaint and his lawyers have solicited (and gained) over one hundred new clients to join the case. Indeed, Respondent never denies that he will pursue a collective and identifies no vehicle problems here.

[5] See, e.g., *Ford Motor*, 141 S. Ct. 1017; *Walden* v. *Fiore*, 571 U.S. 277 (2014); *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014).

There is no reason for this Court to delay resolving the circuit split on the crucial jurisdictional issue presented here.

CONCLUSION

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

Respectfully submitted,

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