No. 22-396

In The
Supreme Court of the United States

CHRISTA FISCHER, INDIVIDUALLY AND ON BEHALF OF OTHER SIMILARLY SITUATED EMPLOYEES,

Petitioners,

v.

FEDERAL EXPRESS CORP. AND FEDEX GROUND PACKAGE SYSTEM, INC.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit was correct to join the Sixth and Eighth Circuits in holding that this Court's decision in *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773 (2017), requires a claim-by-claim personal jurisdiction analysis of each opt-in plaintiff joining a collective action under the Fair Labor Standards Act.

CORPORATE DISCLOSURE STATEMENT

Respondents Federal Express Corporation and FedEx Ground Package System, Inc., state that they are nongovernmental corporate entities. Federal Express Corp. and FedEx Ground Package System, Inc., are wholly owned subsidiaries of FedEx Corporation, a publicly held corporation.

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INTRODUCTION

This Court in *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773 (2017), reiterated the longstanding Fourteenth Amendment personal jurisdiction rule that, absent general jurisdiction, *each* claim asserted against a defendant must arise from the defendant's contacts with the forum state for the court to consider it. In this case, Petitioners do not dispute that the out-of-state opt-in plaintiffs seeking to join the Fair Labor Standards Act ("FLSA") collective action cannot establish specific personal jurisdiction over their claims. So, the Third Circuit correctly affirmed the decision dismissing those out-of-state plaintiffs from this case.

Try as they might, Petitioners cannot evade *Bristol-Myers Squibb*'s logic and holding. They argue that the Fourteenth Amendment does not apply in federal courts (it does), that personal jurisdiction is not a claim-by-claim inquiry (it is), and that FLSA opt-in plaintiffs do not assert their own claims in a collective action (they do).

Petitioners also fail to provide any good reason for this Court to grant review.

First, just last Term, this Court denied two petitions for certiorari raising the same question and the same circuit conflict created by the First Circuit's outlier decision in *Waters* v. *Day & Zimmerman NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022), cert. denied, 142 S. Ct. 2777 (2022). No material fact has changed

since those denials, except that the number of circuits that disagree with the First Circuit's idiosyncratic view that the Fourteenth Amendment does not apply to claims in federal court added after service of summons has increased from two circuits to three.

Second, the Court should allow the shallow and lopsided split to percolate further. Nine circuits have yet to answer the question presented—and Respondents fully anticipate all will join the prevailing view. There is also reason to expect the outlier First Circuit may reverse itself, as the only presently active First Circuit judge from the panel dissented, agreeing with the Third, Sixth, and Eighth Circuits on the proper application of this Court's personal jurisdiction precedents.

Third, the decision below is undoubtedly correct. This Court has repeatedly clarified that the Fourteenth Amendment governs personal jurisdiction inquiries in federal cases, like this one, where Congress has not provided for nationwide service of process. See, e.g., *Omni Cap. Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 108 (1987). This Court likewise has reiterated that specific jurisdiction must be established claim by claim, so plaintiffs whose claims do not arise from the forum may not join a lawsuit just because other plaintiffs' claims do. *Bristol-Myers Squibb*, 137 S. Ct. at 1781. Because each plaintiff seeking to join an FLSA action is a real party in interest bringing her own claim, each of those claims

must independently relate to the forum. And Petitioners' policy arguments based on the history of the FLSA and legally distinct representative class actions do not support a contrary conclusion.

Finally, this case is a poor vehicle because the issue presented may become moot when the district court reaches the second step of the Third Circuit's FLSA collective certification process—at which point the court must consider (for the first time) whether the evidence supports certification. If not, then no opt-ins may remain in the case, making irrelevant the question of whether out-of-state opt-ins could join. There is also a budding circuit split on a threshold FLSA issue, whether the two-step certification process employed by the Third Circuit even comports with the FLSA, counseling against the Court's review of this case now.

The petition for a writ of certiorari should be denied.

STATEMENT

A. Background

1. *Bristol-Myers Squibb*

In 2017, this Court reiterated settled personal jurisdiction rules that plainly govern this case. In *Bristol-Myers Squibb*, this Court held that where a "connection between the forum and the specific claims at issue" is missing, a court may not exercise specific

personal jurisdiction over a plaintiff's claims under the Fourteenth Amendment, even if other plaintiffs' claims satisfy that requirement in the same lawsuit. 137 S. Ct. at 1781–82.

In *Bristol-Myers Squibb*, more than 600 plaintiffs—most of whom were not California residents—together filed civil actions in California state court against Bristol-Myers Squibb, claiming injuries allegedly caused by the drug Plavix. *Id.* at 1777. "The nonresident plaintiffs did not allege that they obtained" the drug from any California doctor or source; "nor did they claim that they were injured" by the drug or "treated for their injuries in California." *Id.* at 1778. In short, the out-of-state plaintiffs did not have specific jurisdiction on their own to sue in California (and there was no general jurisdiction over Bristol-Myers Squibb in California), so the out-of-state plaintiffs' argument for personal jurisdiction depended entirely on piggybacking on the jurisdiction asserted by the California-resident plaintiffs. See *id.* at 1781.

This Court rejected that strategy, reiterating that for specific jurisdiction to exist, each claim must arise out of or relate to the defendant's contacts with the forum. *Id.* at 1780–81. In other words, there must be an "affiliation between the forum and underlying controversy," such as the activity or occurrence complained of having taken place in the state. *Ibid.* (citing *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919 (2011)). And, while that

affiliation was present for the claims of the in-state plaintiffs, it was lacking with respect to the claims of the out-of-state plaintiffs. *Id.* at 1781–82.

Specifically, the Court held that "[t]he mere fact that *other* plaintiffs" had adequate connections to the forum "and allegedly sustained the same injuries as did the nonresidents" did not create specific jurisdiction over the nonresidents' claims. *Id.* at 1781. That was true even though the out-of-state plaintiffs joined the exact same lawsuit (with the same docket number and complaint in a mass action), and asserted the exact same claims against Bristol-Myers Squibb, as in-state plaintiffs. *Id.* at 1781–82 (citing *Walden* v. *Fiore*, 571 U.S. 277, 291 (2014)). Because none of the defendant's conduct giving rise to the out-of-state plaintiffs' claims occurred in the forum state, the Fourteenth Amendment forbade personal jurisdiction as to their claims. *Id.* at 1782.

2. The FLSA

The FLSA allows employees who are "similarly situated" to join together to sue a common employer in so-called "collective actions." 29 U.S.C. 216(b). It does not, however, allow for representative litigation in any way resembling Rule 23 class actions.

To join, benefit from, or be bound by an FLSA collective action, each individual plaintiff must affirmatively opt into the case. *Ibid.* The FLSA makes clear that all members of the collective action are "party plaintiff[s]" who bring their own claims. *Ibid.* An

original plaintiff may not represent or control the litigation on behalf of other plaintiffs, who must "commence[]" their own "cause of action" in order to stop their statute of limitations from running—and can use their own lawyers, assert individual claims or defenses, and appeal in their own right—just like additional named plaintiffs joining a mass action. 29 U.S.C. 255(a), 256; see, e.g., *Campbell* v. *City of Los Angeles*, 903 F.3d 1090, 1105 (9th Cir. 2018) (describing FLSA collective action as "a kind of mass action" where later-joined plaintiffs have "the same status in relation to the claims of the lawsuit" as the original plaintiff (quotation omitted)); *Mickles* v. *Country Club Inc.*, 887 F.3d 1270, 1278 (11th Cir. 2018) (FLSA opt-in plaintiffs have full party status, and thus may separately "appeal adverse judgments against them"). The FLSA is, therefore, a permissive joinder statute, akin to the mass action rule addressed in *Bristol-Myers Squibb*.

The FLSA also does not contain a nationwide service of process provision—the statutory language used by Congress to indicate courts may exercise jurisdiction over a defendant in any state. *Omni Cap.*, 484 U.S. at 108 (explaining that under Rule 4(k)(1), the lack of nationwide service of process requires courts to look to state long-arm statutes and the Fourteenth Amendment for personal jurisdiction). Moreover, FLSA collective actions may be brought in either state or federal courts, and the statute makes

no indication that the jurisdictional rules should differ between the two. See 29 U.S.C. 216(b) (FLSA collective action "may be maintained against any employer * * * in any Federal or State court of competent jurisdiction").

B. Factual and Procedural History

Petitioner Christa Fischer filed an FLSA collective action seeking unpaid overtime from Respondents Federal Express and FedEx Ground Package System, Inc., alleging she was misclassified as exempt from premium overtime wages. App. 4a, 6a.[1] Fischer worked in Pennsylvania, so her claim arose there. App. 4a, 6a. She filed her lawsuit in the U.S. District Court for the Eastern District of Pennsylvania, and the court had specific jurisdiction over FedEx with respect to her claim. App. 4a; App. 74a.

Later, two other former FedEx security specialists opted into the lawsuit, filing consent forms with the district court. App. 7a. Neither of the opt-in plaintiffs worked for FedEx in Pennsylvania—and neither alleged any other connections with FedEx in Pennsylvania. App. 7a. One worked for FedEx in Maryland, the other in New York. App. 7a.

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[1] The district court held that only Federal Express Corp. ("FedEx") arguably employed Fischer, so her claims cannot proceed against FedEx Group Package System, Inc. on a joint employer theory. App. 6a n.1; App. 69a–73a. Fischer did not challenge that holding on appeal. Pet. 20 n.3. So, the only relevant Respondent for purposes of this petition is FedEx.

FedEx is a Delaware corporation with its principal place of business in Tennessee. App. 6a. Thus, courts in Pennsylvania cannot exercise general jurisdiction over FedEx. App. 36a.

Fischer filed a motion for conditional certification of a collective action. App. 7a. The district court granted the motion in part—tentatively certifying a collective action and authorizing notice for security specialists working for FedEx in Pennsylvania. App. 7a; App. 56a–60a (conditionally certifying collective); App. 60a–69a, 73a–75a (limiting collective to in-state plaintiffs). The district court held out-of-state plaintiffs, however, could not opt into the collective because it lacked personal jurisdiction over their claims. App. 7a; App. 74a. Because the FLSA does not authorize nationwide service of process, Federal Rule of Civil Procedure 4(k)(1)(A) requires federal courts to follow the Fourteenth Amendment's personal jurisdiction rules, including the rule reiterated in *Bristol-Myers Squibb* that each claim must arise out of or relate to the defendant's contacts with the forum state. App. 7a, 10a–11a; App. 61a–69a. Because the out-of-state opt-in plaintiffs' claims had no connection to Pennsylvania, the court lacked jurisdiction over them. App. 74a.

The Third Circuit granted an interlocutory appeal from this order and unanimously affirmed. App. 4a–5a.

The Third Circuit began with a summary of this Court's *Bristol-Myers Squibb* decision, which applied the Fourteenth Amendment to hold that plaintiffs with claims that did not arise out of the forum state could not join a case merely because other plaintiffs' claims did arise from the defendant's contacts with the forum. App. 8a–9a (each potential plaintiff "must still demonstrate personal jurisdiction over the defendant with respect to [her] own claims"). After summarizing the district court's opinion, App. 10a–11a, the Third Circuit turned to Petitioners' arguments—rejecting each one.

First, the court rejected the invitation to analogize FLSA actions and Rule 23 class actions. App. 12a. The court viewed Rule 23 class actions as representative, such that absent class members need not independently establish jurisdiction. App. 12a–16a. The court explained that Rule 23 class actions are "a sui generis type of suit, with different requirements and accompanying allowances from the 'ordinary' process of litigation." App. 12a (quoting *Taylor* v. *Sturgell*, 553 U.S. 880, 884 (2008)).

FLSA collective actions, by contrast, are not representative. Each plaintiff, opt-in or otherwise, raises her own claims—so each one must satisfy personal jurisdiction. App. 16a–28a (noting the FLSA's text, legislative history, and caselaw all demonstrate collective actions should be treated as ordinary joinder cases for jurisdictional purposes).

The FLSA's text treats each opt-in plaintiff as a "party plaintiff" with the same status as the original plaintiff. 29 U.S.C. 216(b). None of the Rule 23 pre- or post-certification protections are present in the FLSA; nor do absent Rule 23 class members have any ability to control their claims, unlike FLSA opt-in plaintiffs. App. 17a–22a. And while FLSA actions are *dissimilar* to Rule 23 class actions, they are *similar* to the mass action at issue in *Bristol-Myers Squibb*, confirming the "gulf between FLSA collective actions and Rule 23 class actions." App. 22a. Just like mass actions, "the FLSA collective action device [i]s a species of joinder." App. 24a (citing, e.g., *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 70 n.1 (2013); *Campbell*, 903 F.3d at 1104–05).

The FLSA collective action device's history also confirms each plaintiff brings her own claim. App. 25a–26a. Congress enacted Section 216(b) explicitly to create a permissive joinder system (and to eschew the prior representative scheme), whereas the Rule 23 Advisory Committee in 1966 "took pains to explain their changes did not affect § 216." App. 25a. Since then, Congress has had myriad opportunities to bring Section 216(b) in line with Rule 23 and has declined them. App. 26a.

The "weight of prior decisions" also supports finding FLSA collective actions are distinct from Rule 23 class actions. App. 27a–28a (citing Supreme Court and circuit level cases holding the two types of ac-

tions are "fundamentally different" including because FLSA plaintiffs bring their own claims in a kind of mass action (quoting *Genesis Healthcare*, 569 U.S. at 74)). For all these reasons, traditional personal jurisdiction requirements apply to FLSA opt-in plaintiffs even if they do not apply to absent Rule 23 class members. App. 28a; see also App. 46a.

Second, after distinguishing FLSA actions from Rule 23 class actions, the Third Circuit engaged in a thorough, scholarly discussion of why the personal jurisdiction rules of the Fourteenth Amendment apply to bar out-of-state FLSA opt-in plaintiffs. App. 29a–46a. To start, the court observed that the personal jurisdiction requirements of the Fifth and Fourteenth Amendments are not self-executing, and this Court confirmed in *Omni Capital* that federal courts should look to Rule 4 to determine whether Congress has permitted the exercise of jurisdiction (and under what standard) no matter "what the outer limits of the Constitution might theoretically permit." App. 30a–33a. Rule 4(k)(1) provides situations when serving summons "establishes personal jurisdiction over a defendant." App. 34a (quoting Fed. R. Civ. P. 4(k)(1)(A)). The only one potentially applying here is when the defendant would be subject to jurisdiction in the forum state's courts under Rule 4(k)(1)(A). App. 34a–35a. "Because state courts are limited by the Fourteenth Amendment, so too are federal courts relying on Rule 4(k)(1)(A)." App. 46a.

Applying the Fourteenth Amendment, then, the Third Circuit explained there is no general personal jurisdiction over FedEx in Pennsylvania because it is incorporated in Delaware and its principal place of business is Tennessee. App. 36a. Out-of-state optins' claims "fare no better with specific personal jurisdiction" because "they do not contend they had any connection to, let alone injury arising from, FedEx's activities in Pennsylvania." App. 36a–39a.

The Third Circuit also observed that plaintiffs may be able to establish personal jurisdiction over a defendant in any state if federal law directly authorized it. App. 40a (citing Fed. R. Civ. P. 4(k)(1)(C)). Congress does that by providing for nationwide service of process in the federal statute. App. 40a–41a. But, indisputably, it did not include such a provision in the FLSA. App. 41a–42a.

Finally, the Third Circuit rightly rejected Petitioners' policy arguments. Its holding would not prevent nationwide collective actions in a court that can exercise general jurisdiction over the employer. App. 47a. Concerns about the practical ability to do so were similarly rejected by this Court in *Bristol-Myers Squibb*. App. 47a. The Third Circuit also rejected the argument that its holding would somehow undermine multidistrict litigations (MDLs), which implicate "a different statute, a different history, and a different body of caselaw." App. 48a (citation omitted).

Accordingly, the Third Circuit joined the Sixth and Eighth Circuits in holding that out-of-state opt-in plaintiffs cannot join FLSA collective actions in courts that do not have general jurisdiction over the defendant.

REASONS FOR DENYING CERTIORARI

I. The Question Presented Has Been Recently and Repeatedly Denied.

Just last year, this Court denied two petitions for certiorari that raised the same issue and disagreement among the circuits that Petitioners raise here. See *Canaday* v. *Anthem Cos.*, 142 S. Ct. 2777 (2022); *Day & Zimmerman NPS, Inc.* v. *Waters*, 142 S. Ct. 2777 (2022). Petitioners hope the third time's the charm. But little has changed since the recent denials to justify a different outcome here.

Petitioners raise nearly identical arguments to those raised in the *Canaday* and *Waters* petitions. *See Canaday* v. *Anthem Cos.*, Sup. Ct. Dkt. No. 21-1098, Pet. for a Writ of Certiorari (Feb. 2, 2022) (invoking the circuit split between the Eighth and Sixth Circuits on the one hand and the First Circuit on the other hand and raising similar merits arguments); *Day & Zimmerman NPS, Inc.* v. *Waters*, Sup. Ct. Dkt. No. 21-1192, Pet. for a Writ of Certiorari (Feb. 25, 2022) (relying on same circuit split). Because the Third Circuit decision agrees with the Eighth and Sixth Circuits, the only difference now is

that the split is three circuits to one, rather than two to one. That split is not materially different—it remains shallow and lopsided, as most circuits have not answered the question and the First Circuit is the only outlier.

Petitioners' only argument for why the Court should grant this petition despite denying two similar petitions last year is their claim that this case is likely "the last vehicle available for some time presenting the relevant question." Pet. 33. But Petitioners do not define "some time" and do not provide support for this naked assertion.

As Petitioners recognize, FLSA collective actions are "quite common." Pet. 26. Those cases have given rise to four recent circuit court decisions on this issue and two Supreme Court denials so far. Three of those circuit decisions came in the last year alone. Although there are no cases *currently* on appeal, there is nothing preventing other circuits from reviewing the issue just as the First, Third, Sixth, and Eighth Circuits have. Some of these circuits reviewed the question after granting interlocutory review of a district court's order, see App. 4a–5a; *Waters*, 23 F.4th at 86–87; *Canaday* v. *Anthem Cos.*, 9 F.4th 392, 395 (6th Cir. 2021), cert. denied, 142 S. Ct. 2777 (2022), and the Eighth Circuit analyzed the personal jurisdiction inquiry after the grant of summary judgment, *Vallone* v. *CJS Sols. Grp., LLC*, 9 F.4th 861, 864 (8th Cir. 2021). Appeals will continue to arise in either posture.

Petitioners fail to explain why this case deserves the Court's attention more than *Canaday* or *Waters* did or why their petition is more "urgent" than the ones this Court already denied. Pet. 35. This petition should be denied for the same reasons the Court denied review in *Canaday* and *Waters*.

II. The Circuit Split Is Shallow and Lopsided, With Only One Outlier Circuit.

Far from "robust" and "intractable," Pet. 24, the circuit split is shallow and lopsided. Only four of the thirteen circuits have considered whether *Bristol-Myers Squibb*'s personal jurisdiction analysis applies to FLSA collective actions. App. 1a–48a; *Waters*, 23 F.4th 84; *Canaday*, 9 F.4th 392; *Vallone*, 9 F.4th 861. And only one supports Petitioners' contention that the Fourteenth Amendment does not apply to opt-in plaintiffs. See *Waters*, 23 F.4th 84.[2]

This Court should allow further percolation, which FedEx expects to result in more circuits joining the prevailing view. For reasons explained by the Third Circuit decision below, the prevailing view faithfully applies this Court's cases and is right on the merits. See *infra*, Section III. By contrast, the First Circuit's majority decision is flawed and not

[2] Petitioners also discuss a division among federal district court decisions, Pet. 24, but a conflict among district courts is irrelevant to certiorari. See S. Ct. R. 10.

likely to be followed by others. It stands alone in taking the incorrect position that the Fourteenth Amendment does not govern personal jurisdiction respecting the claims of FLSA opt-in plaintiffs based on an idiosyncratic interpretation of Federal Rule of Civil Procedure 4(k) that is unlikely to be followed by other circuits.

Petitioners spend little time discussing the First Circuit's opinion in *Waters*, the only majority opinion written in their favor. See Pet. 23–24. They appear to prefer Judge Donald's dissent in *Canaday*, which they claim the First Circuit "buil[t] on." See Pet. 22–23, 25. However, Judge Donald's opinion does not extend nearly as far as Petitioners suggest. Unlike Petitioners, who erroneously believe that "[i]n *federal court*—in contrast to state court—personal jurisdiction is governed by the Fifth Amendment Due Process Clause," Pet. 12, Judge Donald recognized that federal courts' application of "Rule 4 requires us to conduct our personal jurisdiction analysis under the Fourteenth Amendment," *Canaday*, 9 F.4th at 407 (Donald, J., dissenting). While Judge Donald's flawed Fourteenth Amendment analysis led her to the wrong result, her opinion does not support the First Circuit's or Petitioners' preferred methodology.

The longevity of the First Circuit's outlier opinion is also uncertain, especially as other circuits continue to weigh in. Only one of the judges from the *Waters* panel is currently an active First Circuit judge. That panelist, Judge Barron, dissented. See

23 F.4th at 100–05 (Barron, J., dissenting).[3] Another panelist—the majority author, Judge Dyk—is not a First Circuit judge. The final panelist, Judge Thompson, assumed senior status after *Waters* was published. Were the First Circuit to take up this issue en banc in a later case, Judge Dyk would not have a vote and Judge Thompson likely wouldn't either. Because Judge Barron's view aligns with the other circuits to have addressed this issue, that majority circuit view would likely prevail in the en banc First Circuit without this Court's intervention.

Given that nine circuits have yet to address this issue, and only one disagrees with the prevailing

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[3] Petitioners contend that because Judge Barron "would have dismissed the interlocutory appeal as improvidently granted," his "conclusion has no relevance to the circuit split." Pet. 24 n.4. Not so. Although Judge Barron would have dismissed the interlocutory appeal, see *Waters*, 23 F.4th at 100, 105 (Barron, J., dissenting), the majority chose not to do so, which gave Judge Barron occasion to address its flawed reasoning. He identified several problems with the majority's holding, including that it "read[s] Rule 4(k)(1)(A) in [a] narrow, time-of-service-limited way" that no other court has ever employed, *id.* at 103, requires federal courts to "change how they have been doing things in many cases" by employing different personal jurisdiction standards to different plaintiffs, *ibid.*, and disregards commentators' calls for Congress to amend Rule 4(k) to provide wider personal jurisdiction in ways that become senseless under the majority's reading of the Rule, *id.* at 100–02. Judge Barron's preference to address the issue after a final judgment does not undermine his well-reasoned disagreements with the majority's merits analysis.

view, the Court should allow further percolation and time for the outlier First Circuit to correct itself. See, e.g., *Arizona* v. *Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, * * * federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

III. The Third Circuit Decision Below Is Correct and Faithfully Applies This Court's Precedent.

The Third Circuit held that out-of-state plaintiffs seeking to opt into an FLSA collective action in federal court must demonstrate that the forum state's courts would have personal jurisdiction over their claims under the Fourteenth Amendment. This conclusion accords with this Court's decision in *Bristol-Myers Squibb* and is correct.

In *Bristol-Myers Squibb*, this Court addressed whether, under the Fourteenth Amendment, a court's specific personal jurisdiction over an in-state mass action plaintiff allowed that court to resolve claims by out-of-state plaintiffs. Applying the "settled principles regarding specific jurisdiction," the Court said no. 137 S. Ct. at 1781. The Court explained that specific personal jurisdiction is a claim-

by-claim analysis: "The mere fact that *other* plaintiffs" had claims arising from the forum state did not allow the exercise of specific jurisdiction "over the nonresidents' claims." *Ibid.* There must be a connection between the forum and each specific claim at issue. *Ibid.* Because the "conduct giving rise to the nonresidents' claims occurred elsewhere," their claims had to be dismissed. *Id.* at 1781–82 (applying *Walden*, 571 U.S. 277).

The same settled principles apply here and support the Third Circuit's unanimous holding. Each plaintiff's claims—including the claims of opt-in plaintiffs—must arise from the forum state, or else the court cannot exercise specific personal jurisdiction over them.

Petitioners' merits arguments seek to undermine the Third Circuit's faithful application of *Bristol-Myers Squibb*. That makes sense, as their personal-jurisdiction arguments all fail if the Fourteenth Amendment applies to the opt-in plaintiffs' claims. Because the Third Circuit was correct that *Bristol-Myers Squibb* governs all the claims here, the court was right to affirm the district court's dismissal of the out-of-state opt-in plaintiffs' claims for lack of specific personal jurisdiction. Petitioners' arguments to the contrary all fail.

A. The Fourteenth Amendment governs the claims in this case.

Petitioners attempt to limit *Bristol-Myers Squibb* to state court cases, but their effort is thwarted by this Court's longstanding personal jurisdiction precedents. Contrary to Petitioners' claim that "[i]n *federal court*—in contrast to state court—personal jurisdiction is governed by the Fifth Amendment Due Process Clause," Pet. 12, this Court has repeatedly indicated that the Fourteenth Amendment applies to most federal court cases, which are governed by Rule 4(k)(1)(A). The fact that *Bristol-Myers Squibb* interpreted the Fourteenth Amendment in a state court case does not change how it applies elsewhere.

This Court long ago settled that Rule 4(k)(1) introduced a simple default rule: The Fourteenth Amendment applies to federal question claims *unless* Congress expressly indicates otherwise by providing for nationwide service of process. *Omni Cap.*, 484 U.S. at 108 (holding that where a federal statute "does not authorize [nationwide] service of summons," federal courts must look only to the "long-arm statute of the [forum] State" and the Fourteenth Amendment). Because "Congress knows how to authorize nationwide service of process when it wants to," the omission of express language doing so makes clear Congress did not intend for that result to follow. *Id.* at 106 (noting other federal statutes in which Congress has provided for nationwide service); see also 4 Federal Practice and Procedure

§ 1068.1 (4th ed. 2021) ("[T]he Court in *Omni Capital* determined that the jurisdiction of a federal court, even in federal question cases, in the absence of a statutory provision for service, was limited by the forum state's long-arm statute as a result of the incorporation of that methodology by former Rule 4(e).").[4]

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[4] Rule 4's legislative history reinforces that the Fourteenth Amendment applies to "all actions" against domestic defendants where Congress has not "provided for nationwide service." Amendments to Fed. R. Civ. P. 4, 146 F.R.D. 401, 559, 571 (1993). The Fifth Amendment, in contrast, applies *only* when the defendant is not subject to jurisdiction in any state or where nationwide service is authorized. *Id.* at 571; see also 16 Moore's Federal Practice § 108.123 (3d ed. 2021).

Petitioners attack a strawman when asserting that "[n]othing in Rule 4 remotely suggests that opt-in plaintiffs—as opposed to named plaintiffs—in an FLSA collective action need to separately satisfy service-of-process requirements." Pet. 30 (emphasis omitted). It is undisputed that Rule 4 does not require each opt-in plaintiff to serve process. *See* App. 38a ("[I]f an additional plaintiff seeks to join the suit bringing her own claims, or if the original plaintiff seeks to add or amend claims, there is no need to serve the defendant again as long as the new claims arise out of or relate to the defendant's minimum contacts with the forum state, because the defendant would already be subject to the jurisdiction of the court with respect to those claims."). But Rule 4(k)(1)(A) does require that personal jurisdiction be established over a defendant in line with what the Fourteenth Amendment requires—i.e., over each plaintiff's claim. *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

This Court has repeatedly recognized that the Fourteenth Amendment—not the Fifth Amendment—governs most federal cases (whenever nationwide service of process is not authorized). See *Daimler AG* v. *Bauman*, 571 U.S. 117, 125 (2014) ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons."); *Walden*, 571 U.S. at 283 (noting in federal-question case that under Rule 4(k), federal courts typically must "ask whether the exercise of jurisdiction 'comports with'" the Fourteenth Amendment).

Congress's intent to have the Fourteenth Amendment apply to personal jurisdiction in FLSA cases is crystal clear for two reasons. First, Congress did not provide for nationwide service of process in the FLSA despite doing so in several contemporaneous statutes.[5] Second, in the FLSA, Congress permitted collective actions in both state and federal courts, with no indication that the rules governing jurisdiction should differ between them. 29 U.S.C. 216(b) (permitting cases in "any Federal or State court of competent jurisdiction"). Through both actions, Congress indicated its "intention" not to allow FLSA

[5] See, e.g., 15 U.S.C. 22, 28 U.S.C. 1391 (Clayton Act); 15 U.S.C. 78aa (1934 Securities Exchange Act); 29 U.S.C. 1132(e)(2) (Employment Retirement Income Security Act).

suits outside the bounds of the Fourteenth Amendment. *Omni Cap.*, 484 U.S. at 106.[6]

Thus, Petitioners' argument that the Fourteenth Amendment (and *Bristol-Myers Squibb*'s application of it) applies only in state courts, see, e.g., Pet. 12, 32, is plainly wrong. And the Third Circuit's application of the Fourteenth Amendment in this case followed this Court's precedent.

B. Specific jurisdiction must be established over a defendant regarding each claim.

The Third Circuit also faithfully applied *Bristol-Myers Squibb*'s holding that personal jurisdiction is a claim-by-claim analysis that every plaintiff must satisfy. 137 S. Ct. at 1780–81. Personal jurisdiction over a defendant must be established equally for each plaintiff's claims, even if plaintiffs whose claims do not relate to the forum join a case with plaintiffs whose claims do relate to the forum. *Id.* at 1781 ("What is needed—and what is missing here—

[6] See also *Canaday*, 9 F.4th at 401 ("In the face of [Congress's] choice [to allow FLSA actions in state or federal court] and in the face of Congress's decision not to add a nationwide service of process provision to the FLSA, it would be odd to attribute to the National Legislature a desire to confine state court FLSA actions to the conventional Fourteenth Amendment rules and sotto voce to permit nationwide service for the same FLSA action in federal court."). More than odd, it would directly conflict with this Court's cases, as discussed herein.

is a connection between the forum and the specific claims at issue.").

Petitioners' argument that opt-in plaintiffs need not establish personal jurisdiction over FedEx regarding their claims is irreconcilable with that holding. Instead, they rely on Judge Donald's dissent in *Canaday* (and one district court case) for the idea that the personal jurisdiction inquiry focuses not on the relationship of each claim to the forum state, but on the "suit" as a whole. Pet. 22–24 (claiming that only "the suit must arise out of or relate to the defendant's contacts" and the "only lawsuit" relevant to personal jurisdiction is between the named plaintiff and defendant, quoting *Canaday*, 9 F.4th at 408 (Donald, J., dissenting) (emphasis omitted)); Pet. 31–32 (repeating claim that personal jurisdiction analysis occurs "at the level of the suit" and the "suit" is the entire FLSA action, citing *Morgan* v. *U.S. Xpress, Inc.*, No. 17-85, 2018 WL 3580775, at *5 (W.D. Va. July 25, 2018)). By this, Petitioners mean personal jurisdiction is only required for one plaintiff, and all others joining the same suit need not establish it.

Bristol-Myers Squibb held the opposite. It used the term "suit" only once—in explaining the differences between general and specific jurisdiction (the former does not require any connection between the claim in that suit and the forum; the latter does). 137 S. Ct. at 1780. It then went on to explain, repeatedly,

that each plaintiff's "claim" must satisfy specific jurisdiction requirements—even if they join a case already brought by plaintiffs whose claims do satisfy them. *Id.* at 1780–81 ("The mere fact that *other* plaintiffs" can establish personal jurisdiction does not change that each plaintiff must prove "a connection between the forum and the[ir] specific claim[.]"). In other words, a district court must have jurisdiction over the defendant for each claim filed; it does not matter if others file first.

Under Petitioners' approach, however, a single in-state plaintiff whose claims relate to the forum could file a case and thereby permit any number of unrelated out-of-state claims to follow. That logic would do away with the Court's holding that out-of-state plaintiffs may not escape the same personal-jurisdiction inquiry that they would have had to endure if they had brought the case themselves. The Third Circuit was right to reject Petitioners' argument in favor of this Court's holding. See App. 11a; App. 17a ("[O]pt-in plaintiffs are required to demonstrate the court has personal jurisdiction with respect to each of their claims."); see also *Vallone*, 9 F.4th at 865 ("Personal jurisdiction must be determined on a claim-by-claim basis."); *Canaday*, 9 F.4th at 400 (rejecting argument that personal jurisdiction should be analyzed "at the level of the suit rather than at the level of each claim" and explaining that this Court's caselaw confirms that personal jurisdiction is a "claim-specific inquiry" (citations omitted)).

C. Petitioners' attempt to analogize FLSA collective actions to "representative" Rule 23 class actions fails.

Petitioners seek to avoid application of these settled rules by analogizing FLSA opt-in plaintiffs to absent class members in Rule 23 class actions—repeatedly asserting that both types of cases are "representative" actions brought solely by a "named plaintiff." Pet. 23, 27, 31–32. Some courts have held that only the named plaintiff in Rule 23 class actions must establish personal jurisdiction over his claims because the absent class members are truly absent and do not assert independent claims. So, Petitioners' reasoning goes, FLSA opt-in plaintiffs should not have to establish personal jurisdiction either.

The Third Circuit rightly held that this conclusion does not follow. See App. 16a–28a. As this Court has explained, "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Genesis Healthcare*, 569 U.S. at 74. And those fundamental differences confirm each FLSA opt-in plaintiff is a real party in interest with her own claim, even if the same is not true for absent Rule 23 class members.[7]

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[7] For purposes of this brief in opposition, FedEx takes no position on whether a court must have personal jurisdiction over absent Rule 23 class members' claims. That question is irrelevant to whether FLSA opt-in plaintiffs must establish personal jurisdiction given the key differences with Rule 23 actions.

First, and most importantly, Rule 23 class actions are representative, whereas each plaintiff in an FLSA collective action is a real party in interest.

Under the FLSA, each plaintiff—whether the initial filer or a later opt-in plaintiff—brings her own claims. An FLSA "named plaintiff" has no representative authority to bring a case on behalf of absent parties; rather, the statute makes clear: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing [and filed in the court] to become such a party * * *." 29 U.S.C. 216(b). Even after the original plaintiff files a putative FLSA collective action, no additional employees may join or be bound by the action unless they affirmatively opt to "become parties to [the] collective action." *Genesis Healthcare*, 569 U.S. at 75; see *LaChapelle* v. *Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (under Section 216(b), "no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively 'opted into' the class").

Once an FLSA opt-in plaintiff files a consent to join, she has full party status. A separate FLSA claim is "commenced in the case of any individual claimant" on the "date on which [her] written consent is filed in the court." 29 U.S.C. 256.[8] All FLSA

[8] This Section of the FLSA could not be clearer that opt-in plaintiffs' status is the same as the original named plaintiff's status. Just like an original plaintiff is an "individual claimant"

plaintiffs are "party plaintiff[s]" that bring their own "individual" claims. *Ibid.*; 29 U.S.C. 216(b); see *Prickett* v. *DeKalb County*, 349 F.3d 1294, 1297 (11th Cir. 2003) ("by referring to them as 'party plaintiff[s],' Congress indicated that opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as do the named plaintiffs").

In sum, FLSA actions are *not* "representative actions." *Hoffmann-LaRoche, Inc.* v. *Sperling*, 493 U.S. 165, 173 (1989) (noting Congress shaped the current Section 216(b) opt-in requirement to forbid representative FLSA actions). Each opt-in plaintiff brings her own individual claim.

Rule 23 class actions are the opposite. The Rule 23 class mechanism produces "a class with an independent legal status" that is represented by the named plaintiffs. *Genesis Healthcare*, 569 U.S. at 75. Named plaintiffs have inherent representative power over absent class members, who are then bound by the action unless they affirmatively opt out. See Fed. R. Civ. P. 23(c)(2); see *Mickles*, 887

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whose claim is "commenced" when he files the complaint and "his written consent to become a party plaintiff," 29 U.S.C. 256(a), opt-in plaintiffs become "individual claimant[s]" with independent claims commencing when they file their consent to become a party plaintiff, *id.* 256(b). See also McLaughlin on Class Actions § 2:16 (2021) ("Unlike absent members of a certified class action, any plaintiff who opts into a collective action has full party status and obligations.").

F.3d at 1275–76 (in Rule 23 class actions, "each person who falls within the class definition is considered to be a class member and bound by the judgment unless she has opted out," whereas "a plaintiff must affirmatively opt into a § 216(b) action" (citations omitted)).

Second, Rule 23 class actions require procedural protections and due process safeguards for absent class members, which do not protect FLSA plaintiffs. See App. 13a–14a, 18a; *Canaday*, 9 F.4th at 403. "This gap between the requirements of collective and class proceedings is to be expected, as many of the rules specific to class actions have evolved to protect the due process rights of absent class members, a consideration not pertinent under the post-1947 FLSA." *Campbell*, 903 F.3d at 1112; see *Swales* v. *KLLM Transp. Servs., LLC*, 985 F.3d 430, 433 (5th Cir. 2021).

Third, every opt-in plaintiff in an FLSA collective action has "the right to select counsel of [her] own choosing." *Fenley* v. *Wood Grp. Mustang, Inc.*, 170 F. Supp. 3d 1063, 1073 (S.D. Ohio 2016); see, e.g., *Gui Zhen Zhu* v. *Matsu Corp.*, 424 F. Supp. 3d 253, 271–72 (D. Conn. 2020). The original plaintiff's counsel has no right to represent opt-in plaintiffs unless they consent or hire them, permitting individualized claims and individualized defenses. *Campbell*, 903 F.3d at 1105; *Thiessen* v. *Gen. Elec. Cap. Corp.*, 267 F.3d 1095, 1107 (10th Cir. 2001). By contrast, absent Rule 23 class members are represented by "class

counsel," Fed. R. Civ. P. 23(g), who represent the "unitary, coherent claim" as to all class members. *Lyngaas* v. *Ag*, 992 F.3d 412, 435 (6th Cir. 2021).

Fourth, the statutes of limitations "also operate differently in the two settings." *Canaday*, 9 F.4th at 403. In the FLSA context, the statute of limitations continues to run until a particular plaintiff chooses to affirmatively opt into the case. It is the given opt-in plaintiff's actions—and not the original plaintiff's—that "commence" that opt-in plaintiff's claim and stop that opt-in plaintiff's statute of limitations from running. 29 U.S.C. 255(a) (setting statute of limitations from when the "cause of action" is "commenced"); *id.* 256 ("determining when an action is commenced for purposes of section 255 [statute of limitation]," and explaining that an opt-in plaintiff's cause of action is not "commenced" until she opts into the case). By contrast, the statute of limitations may stop running on individual federal claims of all members of a putative class when a Rule 23 class action is filed by a named plaintiff. See *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 353–54 (1983) ("the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the [putative] class" (citation omitted)).

Fifth, while absent Rule 23 class members cannot appeal adverse decisions on their own, courts have held that FLSA opt-in plaintiffs can—because they have "properly become parties." *Campbell*, 903 F.3d at 1105 (citation omitted); see also *Mickles*, 887 F.3d

at 1278 (holding that opt-in plaintiffs have full party status in FLSA cases, and thus may separately "appeal adverse judgments against them").

At bottom, all these distinctions show that while a Rule 23 class action is a representative action "directed by the named plaintiff and class counsel, representing the absent class members, under the supervision of the court," an FLSA collective action is nothing of the sort. App. 28a. Rule 23 class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700–01 (1979). FLSA actions are *not* such an exception. They proceed "as a kind of mass action, in which aggrieved workers act as a collective of *individual* plaintiffs with *individual* cases." App. 28a (quoting *Campbell*, 903 F.3d at 1105). Thus, nothing in the FLSA obviates the principle that personal jurisdiction must be satisfied on a claim-by-claim basis, and FLSA actions are bound by this Court's mass action holding from *Bristol-Myers Squibb*.[9]

[9] Even the First Circuit in *Waters* recognized that there are "myriad" dissimilarities between "FLSA collective actions and Rule 23 class actions." 23 F.4th at 99; *id.* at 91 (noting "collective actions are distinct from FRCP 23 class actions" and apparently agreeing that if the Fourteenth Amendment applies to FLSA opt-in plaintiffs, they are properly characterized as real parties in interest subject to *Bristol-Myers Squibb*'s requirements). So, there is no split on the key issue of whether

Because they are real parties in interest bringing their own claims, FLSA opt-in plaintiffs must shoulder their jurisdictional burden just like any other claimant. *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

D. Petitioners' appeals to history and policy fail.

Petitioners attempt to distinguish mass actions from collective actions by invoking the history of FLSA cases and Petitioners' preferred policies. First, Petitioners argue that Congress intended FLSA claims to be tried together. See Pet. 3, 29. Second, they argue that, since Congress enacted the FLSA, courts have permitted nationwide FLSA collective actions without discussing personal jurisdiction. See Pet. 4. Third, Petitioners argue historic MDLs may be undermined by the Third Circuit's decision. See Pet. 26–27. All these arguments fail.

Through Section 216 of the FLSA, Congress created a mechanism for plaintiffs to consolidate their distinct claims where similarly situated. Petitioners suggest that the only way to effectuate Section 216 is for district courts to exercise jurisdiction over the claims of out-of-state opt-in plaintiffs who undeniably could not file their own suit in that district. See Pet. 3 (claiming that "[l]imiting federal court authority in the way employers propose 'would splinter

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FLSA collective actions are "representative" and thus are exempt from *Bristol-Myers Squibb*'s mass action holding. All circuits to address the issue agree they are not.

most nationwide collective actions, trespass on the expressed intent of Congress, and greatly diminish the efficacy of FLSA collective actions as a means to vindicate employees' rights'" (quoting unpublished district court opinion)). Not so.

In *Bristol-Myers Squibb*, this Court encountered and resolved a similar argument, clarifying that the "decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction." 137 S. Ct. at 1783. Here, courts in Tennessee (FedEx's headquarters and principal place of business) and Delaware (its place of incorporation) would have general jurisdiction over FedEx.[10] There is nothing stopping FLSA plaintiffs from filing a nationwide collective action against FedEx in a federal court in either state, both of which could adjudicate all claims without employing any specific jurisdiction analysis involving where each claim arose.

For decades—indeed, for "79 years following the FLSA's enactment," Pet. 4—courts routinely did just

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[10] Petitioners assert that because "[e]mployers, including FedEx, frequently balkanize their operations through a web of corporate affiliates, subsidiaries, and subcontractors," plaintiffs can "rarely" file collective actions in an employer's home state. Pet. 25 n.5. Yet, other than a couple of law review articles, Petitioners don't offer any support for FedEx's alleged balkanization. *Ibid.* Instead, it is undisputed that, had Fischer filed her suit in a district court in Tennessee or Delaware, the opt-in plaintiffs would be litigating in that court—not this one.

that. "In collective actions filed by individual employees, the named plaintiff traditionally has filed the action in a jurisdiction that possessed general jurisdiction over the defendant or in the jurisdiction from which the allegations arose." *Canaday*, 9 F.4th at 397 (collecting Supreme Court cases going back to 1945). "[N]o one questioned the authority of federal courts to entertain collective actions under the FLSA," Pet. 4, because no one had to. Where courts have general jurisdiction over a defendant, there is no argument that out-of-state opt-in plaintiffs should be dismissed. Given courts can continue to adjudicate nationwide FLSA collective actions when they have general personal jurisdiction over the defendant, "[a]dherence to this approach * * * does not seem likely to disrupt the way FLSA collective actions traditionally have been filed, at least as measured by the fact patterns" in this Court's decisions. *Canaday*, 9 F.4th at 397.[11]

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[11] Nor does the Third Circuit's holding remove the ability to bring FLSA collective actions in other states that do not have general jurisdiction over the defendant. Similarly situated employees still may join the same FLSA action there, so long as all their claims relate to the forum state. Petitioners identify no reason to think Congress would disapprove of state-specific FLSA actions—indeed, Congress expressly contemplated such actions being filed in state court. 29 U.S.C. 216(b); see *Canaday*, 9 F.4th at 401 ("It is not obvious, at any rate, that state-based collective actions are necessarily inefficient. Congress apparently did not think so. It gave the federal and state courts authority to hear FLSA claims * * *.").

Finally, Petitioners worry that the Third Circuit's holding will upend other historic multidistrict litigation practices. Pet. 26–27. But there are material differences between MDLs and FLSA collective actions. "Multidistrict litigation implicates a different statute, a different history, and a different body of caselaw." *Canaday*, 9 F.4th at 403–04 (citations omitted); *accord* App. 48a (quoting same). Because MDLs' statute, history, and caselaw bear little resemblance to the FLSA's, the Third Circuit and the Sixth Circuit correctly concluded there are reasons courts may take "different approach[es]" to each. *Canaday*, 9 F.4th at 404; see App. 43a. Just as courts have treated Rule 23 class actions differently from FLSA collective actions regarding personal jurisdiction, the same will result for MDLs. Indeed, the Third and Sixth Circuits cabined their opinions to the FLSA collective action context, and expressly excluded MDLs. There is no reason to believe their holdings would impact established MDL precedent.

Not only are Petitioners' arguments from history or policy wrong, but in no event can they justify ignoring the clear application of this Court's opinion in *Bristol-Myers Squibb* to FLSA opt-in plaintiffs.

And, again, a state-specific action would be the *plaintiff's choice*, as she could bring a nationwide collective wherever there is general jurisdiction. Petitioners' policy preference to allow nationwide collective actions in any state where one plaintiff has a connection was not shared by Congress, and it should not be adopted by this Court.

When this Court applied the Fourteenth Amendment analysis in *Bristol-Myers Squibb*, it gave lower courts everything they need to determine district courts' personal jurisdiction over out-of-state opt-in plaintiffs in FLSA collective actions. The Court should not grant this petition to do so again.

IV. This Case Is a Poor Vehicle for Review of the Question Presented.

Petitioners contend that this case cleanly presents the question presented because the "district court addressed the jurisdictional question in the context of Fischer's motion seeking *conditional* certification and court-authorized notice." Pet. 33 (emphasis added). Petitioners ignore, however, that the certification of the collective was merely conditional—and the district court's ultimate certification decision may moot any need to decide the personal jurisdiction question.

Under the Third Circuit's two-step process for certifying FLSA collective actions, the conditional certification stage involves a preliminary decision that requires only a "modest factual showing" that the collective members are similarly situated. See *Karlo* v. *Pittsburgh Glass Works, LLC*, 849 F.3d 61, 85 (3d Cir. 2017) (citation omitted); App. 55a (describing first step as involving a "lenient standard" resulting only in court-approved notice). As a result,

"'conditional certification' is not really a certification. It is actually 'the district court's exercise of [its] discretionary power * * * to facilitate the sending of notice to potential class members.'" *Zavala* v. *Wal Mart Stores Inc.*, 691 F.3d 527, 536 (3d Cir. 2012) (citation omitted). At the second step, the "parties move to final certification," at which point the court engages "in a more exacting inquiry and the plaintiffs must satisfy a higher burden to show that the employees are in fact similarly situated." App. 56a (citing *Karlo*, 849 F.3d at 85).

If at the second stage (which has not yet been reached in this case) the district court decides the plaintiffs cannot satisfy their burden of proving they are similarly situated, the court will decertify the collective. At that point, it will not matter whether the Fourteenth Amendment allows out-of-state opt-in plaintiffs to join, as the named plaintiff will be the only one left in the case. The fact that the question presented here may not ultimately matter to the case counsels against certiorari.

Moreover, the Fifth Circuit recently held that courts should not engage in this two-step process because the FLSA "says nothing about 'conditional certification.'" *Swales*, 985 F.3d at 440. Rather, courts should review all available evidence and ensure collectives are similarly situated rather than engage in a lenient "conditional" first step. See *id.* at 440–43. That decision opened a split with other circuits, including the Third Circuit. App. 55a (applying Third

Circuit's "two-step process in certifying collective actions"). Whether the two-step FLSA certification process is valid or should be only one step itself presents a threshold issue that this Court should decide before the question raised here. If a one-step process were employed in this case, there may be no certification at all, making the question presented moot.

The potential that the personal jurisdiction inquiry will become moot in this case, and the need to resolve the circuit split created by *Swales* before resolving the FLSA-specific personal jurisdiction questions presented here, are additional reasons this Court should deny the petition and allow further percolation in the circuit courts.

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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