No. 21-1098

In The
Supreme Court of the United States

Laura Canaday, Individually and On Behalf of All Others Similarly Situated,
Petitioners,

v.

The Anthem Companies,
Respondent.

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

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REPLY BRIEF FOR PETITIONERS

Rachhana T. Srey
Caroline E. Bressman
NICHOLS KASTER, PLLP
80 South 8th Street
Suite 4700
Minneapolis, MN 55402

Adam W. Hansen
Counsel of Record
Eleanor E. Frisch
APOLLO LAW LLC
333 Washington Avenue North
Suite 300
Minneapolis, MN 55401
(612) 927-2969
adam@apollo-law.com

[*additional counsel listed on inside cover*]

William B. Ryan
DONATI LAW, PLLC
1545 Union Avenue
Memphis, TN 38104

Colin R. Reeves
APOLLO LAW LLC
1000 Dean Street
Suite 101
Brooklyn, NY 11238

Counsel for Petitioners

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Respondent The Anthem Companies opposes Supreme Court review. It argues that there is no circuit split, the question presented is unimportant, and the circuit court's unprecedented decision was correctly decided. One after the next, these claims do not withstand scrutiny.

Despite the headline, Anthem concedes immediately that the circuits are split. Instead, it claims that Petitioners failed to identify the issue that actually divides the circuits. That's wrong. But so is the premise of Anthem's argument. There is no threshold issue in this case antecedent to some other (imagined) main issue. The circuits have divided over whether federal courts have the authority to maintain an FLSA collective action that includes out-of-state opt-in plaintiffs. Divining the contours of that authority requires examining the interplay between and among the FLSA and principles of personal jurisdiction, service of process, and group litigation. The ultimate question in this case—can the court adjudicate the claims of out-of-state opt-in plaintiffs?—cannot be answered without reference to all of the relevant legal sources. The circuits are split over the question presented here. This Court should grant review to resolve it.

Anthem similarly downplays the importance of the question presented, but these arguments fall flat, too. The panel majority opinion marked a sea change to nearly 80 years of practice and precedent. If the panel's view prevails, nationwide collective actions will "be splintered into dozens, if not hundreds, of lawsuits all over the country." *Canaday v. Anthem Cos., Inc.*, 9 F.4th 392, 416 (6th Cir. 2021) (Donald, J., dissenting); App. 53a. Anthem responds

by shrugging at these changes, suggesting that employees should simply bear the costs of employers' proposed limitation. But for employees trying to collect their unpaid minimum wages and overtime, these novel constraints would be far-reaching and profound. Anthem also disputes whether the question presented here bears on other types of group litigation in federal court. But Anthem's own response concedes, as it must, that an overbroad and overzealous application of *Bristol-Myers* would curtail all manner of group litigation in federal court. The question presented is vitally important.

Anthem last litigates the merits. But Anthem merely repeats the same failed arguments and unsupported premises that were rejected by the First Circuit and Judge Donald's dissent in this case. These points fail to account for the critical differences between the state-court, state-law action in *Bristol-Myers* and FLSA collective actions. Anthem's view of the merits is also beside the point. The circuits are divided on a question of exceptional importance to employees, employers, and courts alike. For these reasons, this Court should grant the petition.

I. THE CIRCUITS ARE DIVIDED OVER *BRISTOL-MYERS*' APPLICATION TO FLSA COLLECTIVE ACTIONS.

Anthem first contends that "the circuits are not split on whether *Bristol-Myers Squibb* applies to FLSA collective actions." Response at 11. There's no merit to that claim. By any reasonable reading of the relevant circuit opinions, they are.

Bristol-Myers addressed *state-court* authority over defendants to adjudicate out-of-state *state-law*

claims. Determining "whether *Bristol-Myers*…applies to FLSA collective actions," Response at 11, necessarily involves deciding whether the holding and rationale of *Bristol-Myers* apply in a different context: to *federal courts* applying federal law in FLSA collective actions. The Sixth and Eighth Circuits answered that question "yes." The First Circuit said "no." That's a circuit split on whether *Bristol-Myers* applies to FLSA collective actions.

The centerpiece of Anthem's argument, though, is its contention that Petitioners whiffed on identifying the issue that actually divides the circuits. In Anthem's telling, the disagreement "is not over *Bristol-Myers*" but rather whether Rule "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." Response at 11, 13.

Day & Zimmermann NPS, Inc., the petitioner in 21-1192, makes a similar point. It claims that the circuits are split only over a "threshold question": "whether FLSA opt-in plaintiffs must show that a state court in the forum could exercise personal jurisdiction over their claims;" but not split over a downstream question: "whether FLSA collective actions may include opt-in plaintiffs who worked for the defendant outside the forum state." 21-1192 Petition at 36–38 (cleaned up).

These assertions are wrong: premise, conclusion, root and stem. Petitioners did propose a question that divides the circuits. And that question cannot be subdivided in the way Anthem and Day & Zimmermann suggest.

Start with the first point. Petitioners asked this Court to decide "[w]hether a federal court has the authority, absent general personal jurisdiction over the defendant or the defendant's consent, to maintain a Fair Labor Standards Act collective action that includes opt-in plaintiffs who worked for the defendant outside the state where the court is located." Petition at i. There is a circuit split on that question. The Sixth and Eighth Circuits have said "no." The First Circuit said "yes." Anthem's claim that Petitioners failed to identify a circuit split is meritless.

More fundamentally, the question presented cannot be subdivided in the way Anthem and Day & Zimmermann propose, for a number of reasons.

For starters, the First Circuit did not simply decide the abstract question of whether Rule 4(k) and the Fourteenth Amendment apply to federal-law claims after a summons has been served. Response at 13. The First Circuit interpreted Rule 4 in context with "the FLSA and its legislative history." *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 96 (1st Cir. 2022). The court also discussed and analyzed *Bristol-Myers* at length—including the "federalism interest" *Bristol-Myers* identified as a potentially decisive consideration. *Id.* at 92. These elements formed the essential ingredients in the First Circuit's resolution of the ultimate question: whether the FLSA opt-in plaintiffs could join the suit.

For much the same reasons, Anthem and Day & Zimmermann's attempt to split the question presented into subsidiary issues simply doesn't make sense. The ultimate question is whether a federal court has the constitutional and statutory

authority to maintain an FLSA collective action that includes out-of-state opt-in plaintiffs. That is not a question anyone can answer—either in whole or in part—just by looking at the Federal Rules. It requires analysis of the FLSA, the Constitution, the Federal Rules, and this Court's precedent addressing personal jurisdiction, service of process, and group litigation. Logically, these sources of law are "interwoven" — "not … independent" considerations. *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917). In cases like this one, artificially constraining the inquiry by attempting to divide an indivisible issue would only frustrate the "intelligent resolution of the question." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996).[1]

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[1] The indivisible nature of the question presented is neatly illustrated by the alternative question proposed by Day & Zimmermann: "Whether out-of-state plaintiffs seeking to opt into an FLSA collective action pending in federal court must demonstrate that the forum state's courts would have personal jurisdiction over their claims." 21-1192 Petition at i. Day & Zimmermann seems to assume that its proposed reading of Rule 4(k) would compel a court to answer "yes" to that question. But even that assumption is wrong. A state court, fully bound by the Fourteenth Amendment, can maintain an FLSA collective action as long as the representative plaintiff serves process and establishes the court's personal jurisdiction over the defendant. The plaintiff-by-plaintiff, claim-by-claim mode of analysis used in *Bristol-Myers* would not be required given the different federalism interests at stake, the primacy of federal law, the representative nature of the action, and the relationship between the claims of the opt-in and named plaintiffs, among myriad other reasons. The upshot of these observations is this: the fact that Day & Zimmermann's own question presented fails to capture any cognizable preliminary question—at least not without making a number of unfounded and contested assumptions about the underlying merits—

For these reasons, the Court should reject Anthem's claim that the circuits are not split over the question presented. They are. And this Court should grant review.

Anthem's only other argument amounts to a plea to wait. Response at 14. But there is comparatively little to be gained from waiting. Additional percolation in the lower courts will not resolve the circuit split. And waiting probably won't yield a more diverse body of precedent. Petitioners know of only one other circuit court—the Third Circuit in *Fischer v. Federal Express Corp.*, No. 21-1683 (3rd Cir.)—that is considering the question presented. The Third Circuit heard argument in January 2022. It will very likely issue an opinion before this Court rules. And because the employees in *Fischer* are represented by the same counsel as Petitioners, the arguments before that court are largely the same as those presented here.

On the other hand, given the stakes for courts, employers, and workers, the benefits of immediate Supreme Court review far outstrip any diminishing benefit this Court would receive from additional lower court opinions. The question presented affects tens of thousands of employers and millions of employees. It implicates the bedrock jurisdictional limits on federal-court authority. And as set forth in the petition, the lower courts have been divided on the question presented from the word go. The time for this Court to intervene is now.

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illustrates the futility of trying to splinter the question presented in the first place.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

Anthem next seeks to diminish the importance of the question presented. But Anthem fails to do so. In places, Anthem's own arguments highlight the urgent need for Supreme Court review.

Anthem doesn't seriously contest the fact that its novel proposed rule would splinter FLSA collective actions into "dozens, if not hundreds, of lawsuits all over the country." *Canaday*, 9 F.4th at 416 (Donald, J., dissenting); App. 53a. Anthem suggests that employees could congregate in states exercising general personal jurisdiction over employers. Response at 16. But it ignores the reality that for many employees, no such option exists. Petition at 26. Mostly, Anthem thinks employees should just learn to live with the jurisdictional constraints it seeks to impose. But that would mean the death knell for many worthy FLSA claimants—especially low-wage workers pursuing small-dollar claims. It would also deliver a crippling body blow to Congress' goal of promoting "efficient resolution in one proceeding." *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

Anthem also seeks to minimize the importance of this case by pointing out that Congress could fix the problem Anthem seeks to make. Response at 16. But this point proves too much. Congress could theoretically "fix" any errant court interpretation of federal law (other than the U.S. Constitution). But Congress should not be made to correct problems it solved long ago. The fact that Congress could

theoretically do so hardly diminishes the importance of correctly interpreting critical elements of federal law.

Anthem also questions whether this case could affect other types of group litigation in federal court. In one breath, Anthem assures the reader that MDL proceedings and Rule 23 class actions are safe from defendants' campaign to extend *Bristol-Myers* to all types of group litigation in federal court. Response at 18. But in the next breath, Anthem argues that "*Bristol-Myers Squibb*, properly understood, applies to class actions as well." Response at 19. This candid concession reveals the key point: Anthem and its amici propose a categorical rule that would, if accepted, seriously disrupt a wide range of representative and aggregate litigation in federal court.

Anthem remains notably silent on all the other compelling reasons that this case presents questions of great importance. It does not dispute the importance of correctly interpreting a statute—the FLSA—that covers most businesses and workers in the United States. It does not question the significance of a proposed rule that would seriously constrain the authority of federal courts. And it does not diminish the consequences of imposing wide-ranging limitations on innumerable congressionally created rights. Petition 26–29.

The question presented is vitally important. This Court should grant the petition to decide it.

III. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT.

Anthem disputes that the Sixth Circuit majority's interpretation stands at odds with this Court's precedent. Response at 21. But these arguments do not diminish the urgency of granting review.

Petitioners have already previewed the flaws in the Sixth and Eighth Circuit's decisions—flaws that Anthem parrots here. In short, Anthem misinterprets Rule 4 as imposing state-court personal-jurisdiction limits in every federal case unless Congress authorizes nationwide service of process. And it fails to account for the critical differences between the state-court, state-law mass-tort action in *Bristol-Myers* and FLSA collective actions—including the federalism concerns that drove the outcome in *Bristol-Myers*.

But in the main, Anthem's view of the merits is not relevant. Lower courts have divided over a question of exceptional importance to employees, employers, and federal courts. That alone is all the reason this Court needs to grant review.

IV. THIS CASE PRESENTS THE IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED.

This case presents the ideal vehicle to address the question presented.

Although a section heading in Anthem's response alludes to vehicle problems with this case, Response at 15, the response itself identifies no genuine vehicle problems at all.

Anthem's only argument: the "differences [between Rule 23 class actions and FLSA collective actions] make this case a poor vehicle to resolve the class-action question." Response at 19–20. But this case is not a Rule 23 class action. Petitioners do not ask this Court to decide whether *Bristol-Myers*' applies to Rule 23 class actions. It does not help Anthem to point out that this case is a poor vehicle to address issues the case does not raise. That's true of all cases.

Day & Zimmerman claims this case makes a poor vehicle because the "petition [in this case] limits itself to" a question that "has not yet divided the courts of appeals." 21-1192 Petition at 38. But for the reasons already discussed, that's false. The courts of appeals have divided over the question presented in this case. And Day & Zimmerman has not identified a genuine threshold issue distinct from the question presented here—just an artificially constrained mode of analysis that would forbid consideration of the FLSA in a case about the jurisdictional limits applicable to FLSA collective actions.

Day & Zimmerman also resists the conclusion that the First Circuit's decision in *Waters* makes a comparatively poor vehicle to address the question presented. 21-1192 Petition at 38. But as Judge Barron pointed out in his dissent, Day & Zimmerman jumped the gun. It asked the district court to opine on the jurisdictional limits of the FLSA's collective-action mechanism before the court determined whether the case could proceed as a collective action in the first place. *Waters*, 23 F.4th

at 104–05 (Barron, J., dissenting). Judge Barron would have dismissed the appeal in *Waters* as improvidently granted because the court could not "know for certain at this juncture—as [the court] would if [it] 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." *Id.* It was not prudent, in Judge Barron's view, to decide a "major question" "in a case in which it may turn out not to be necessary for [the court] to decide that question at all." *Id.* at 105. These observations should give this Court pause. *Waters* comes to this Court in a preliminary and contingent posture. Any opinion by this Court would be rendered completely advisory if the representative plaintiff chooses not to pursue a collective action or if the district court refuses to permit one.

This case, by contrast, presents no barriers to addressing *Bristol-Myers*' application to FLSA collective actions. The district court addressed the jurisdictional question in the context of Petitioners' motion seeking conditional certification and court-authorized notice. App. 69a. The district court agreed that Canaday, as the representative plaintiff, had met her burden to show that "she is similarly situated to the other Anthem employees she seeks to represent." App. 67a. In this case, then, the district court had no choice but to address the question presented. This Court can and should do the same.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Rachhana T. Srey
Caroline E. Bressman
NICHOLS KASTER, PLLP
80 South 8th Street
Suite 4700
Minneapolis, MN 55402

William B. Ryan
DONATI LAW, PLLC
1545 Union Avenue
Memphis, TN 38104

Adam W. Hansen
Counsel of Record
Eleanor E. Frisch
APOLLO LAW LLC
333 Washington Avenue North
Suite 300
Minneapolis, MN 55401
(612) 927-2969
adam@apollo-law.com

Colin R. Reeves
APOLLO LAW LLC
1000 Dean Street
Suite 101
Brooklyn, NY 11238

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