IN THE

United States Court of Appeals for the Third Circuit

No. 21-1683

CHRISTA FISCHER, Individually and on Behalf of Other Similarly Situated Employees,

Appellants,

vs.

FEDERAL EXPRESS CORPORATION and FEDEX GROUND PACKAGE SYSTEM, INC.

On appeal by permission from the order dated December 23, 2020, of the United States District Court for the Eastern District of Pennsylvania in No. 5:19-cv-04924

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Daryl Joseffer
Jennifer B. Dickey
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

David R. Fine
K&L GATES LLP
Market Square Plaza
17 North Second St., 18th Fl.
Harrisburg, PA 17101
(717) 231-4500 (telephone)
(717) 231-4501 (facsimile)
david.fine@klgates.com

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

CORPORATE DISCLOSURE

The Chamber of Commerce of the United States of America (the "Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10 per cent or greater ownership in the Chamber.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community, including personal-jurisdiction issues.

The Chamber files this brief to address the important personal-jurisdiction issue in this case. Many of the Chamber's members employ individuals in states other than their place of incorporation or principal place of business, the two places where they would be subject to general personal jurisdiction. The Chamber's members have been sued in collective actions, including actions under the Fair Labor Standards Act ("FLSA"), in states where they are not subject to general personal jurisdiction. The Chamber's members have a strong interest in ensuring that all plaintiffs, not just the

original named plaintiffs, are required to establish the prerequisites for specific personal jurisdiction in FLSA collective actions. Otherwise, those companies will be forced to defend against claims that lack the requisite connection to the forum states, claims for which the companies could not reasonably have expected to be sued in those states. That would encourage abusive forum shopping and would impose substantial harm on businesses and on the judicial system.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has not yet addressed the precise question presented in this appeal: whether, in a collective action under the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. § 201, *et seq.*, a district court may exercise specific personal jurisdiction over a defendant with respect to claims by out-of-forum plaintiffs who lack sufficient connection to the forum.

But the Court is hardly without guidance. The Supreme Court has in recent years rejected an expansive view of specific personal jurisdiction in similar situations. In *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

1773 (2017), the Court held that a state court could not exercise specific personal jurisdiction in a mass-tort lawsuit over claims by plaintiffs that did not have sufficient connection to the forum state. *Id.* at 1781. In *BMS*, it was not sufficient that the non-forum plaintiffs raised claims similar to those raised by forum plaintiffs. *Id.* The non-forum plaintiffs' claims had to have their own connection with the forum, and they did not. *Id*.

The question at the heart of this case is whether the *BMS* reasoning applies to FLSA collective actions. Two courts of appeals have held that *BMS* applies to FLSA collective actions. *See Canaday v. Anthem Companies, Inc.*, No. 20-5947, 2021 WL 3629916 (6th Cir. Aug. 17, 2021); *Vallone v. CJS Solutions Group, LLC*, No. 20-2874, 2021 WL 3640222 (8th Cir. Aug. 18, 2021). The district court in this case joined a majority of other district courts that have likewise applied the *BMS* holding to FLSA collective actions, and the Chamber urges this Court to affirm that correct holding. As the Chamber demonstrates below, the Supreme Court's reasoning in *BMS*—rooted in Due Process—applies to collective FLSA actions just as it does to mass-tort actions, and it applies in federal courts just as it does in state courts.

Personal jurisdiction for FLSA actions in both state and federal court is analyzed according to state law and must meet Fourteenth-Amendment

requirements. As the Supreme Court explained in *BMS*, those requirements focus on the connection between the claim and the forum state: a claim by an out-of-state plaintiff arising from out-of-state conduct is insufficiently connected to the forum to ground personal jurisdiction. An FLSA collective action, the structure of which materially resembles the sort of mass-tort claim at issue in *BMS*, should be analyzed according to the holding in that case.

Appellant Christa Fischer and her *amicus* rely on *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361 (3d Cir. 2002), to argue that, when a federal claim is brought in a federal court, the due-process analysis focuses on the Fifth rather than the Fourteenth Amendment and, so, the *BMS* limitations do not apply. But Ms. Fischer and her *amicus* largely ignore the fact that *Pinker* involved a claim under the Securities Exchange Act, which expressly provides for nationwide service of process and thus falls under different authority providing for application of the Fifth Amendment due process principles. The FLSA has no such nationwide service provision, and so *Pinker* is inapposite.

Most of the rest of Ms. Fischer's arguments amount to policy arguments that run counter to the text of the FLSA and existing jurisprudence such that they would be better directed to the Congress rather than to a court

charged with faithfully following the statutory text.

The Court's resolution of the issue in this case is important to the parties, and it is important more broadly to the businesses that the Chamber of Commerce represents. Many businesses employ persons in states other than where the businesses are incorporated or have their principal places of business—the places where those businesses know they are subject to general personal jurisdiction. The rule Ms. Fischer asks the Court to adopt—expanding the reach of specific personal jurisdiction far beyond what the Supreme Court and this Court have allowed—would subject businesses to uncertainty and potentially to forum shopping that imposes significant costs on the economy as a whole.

The Chamber urges the Court to affirm the district court's holding limiting the collective action to those Pennsylvania employees who can establish specific personal jurisdiction under the *BMS* analysis.

ARGUMENT

I. The Due Process Clause of the Fourteenth Amendment precludes courts from exercising specific personal jurisdiction over claims that lack a sufficient connection to the forum.

A. Federal courts generally follow state law with respect to personal jurisdiction, and specific personal jurisdiction relates to the connection between the claim and the forum state.

"Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Walden v. Fiore*, 571 U.S. 277, 283 (2014). That is "because 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.'" *Id.* (quoting Fed. R. Civ. P. 4(k)(1)(A)). And the Due Process Clause of the Fourteenth Amendment imposes limits on the exercise by state courts of both general jurisdiction and specific jurisdiction. The federal district court in this case was thus bound by those limits. *See infra* Section III(A).

The Supreme Court has described general personal jurisdiction as "all-purpose" personal jurisdiction in that it allows a corporation to be sued for essentially any claim where the corporation is "at home"—in its state(s) of incorporation and principal place of business. *BNSF Ry. v. Tyrell*, 137 S. Ct. 1549, 1558 (2017). All-purpose jurisdiction is not at issue here because no one contends that the FedEx defendants are "at home" in Pennsylvania.

Specific personal jurisdiction—the sort at issue in this case—is nar-

rower. Referred to by the Supreme Court as "conduct-linked" personal jurisdiction, specific jurisdiction allows a court to exercise personal jurisdiction over a defendant when the lawsuit arises out of or relates to the defendant's activities in the state. *Daimler AG v. Bauman*, 571 U.S. 117, 122, 127 (2014). The court must conclude that the defendant's "suit-related conduct" creates a substantial connection with the forum state, *Walden*, 571 U.S. at 284, so that it is "reasonable" to compel the defendant into court in the forum state to answer the particular plaintiff's claim. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

These limitations on personal jurisdiction arise in large measure from the fairness considerations underlying due process. They provide a "degree of predictability" to defendants so that they may "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id*. at 297.

B. BMS *highlights that specific personal jurisdiction must exist for each plaintiff's claim.*

BMS is the most instructive Supreme Court precedent for the personal jurisdiction problem with this suit. In *BMS*, the Supreme Court reaffirmed a core principle of specific personal jurisdiction: that in a multiple-plaintiff case, the court must have specific jurisdiction over each plaintiff's claim.[2]

[2] While Ms. Fischer cites the Supreme Court's most recent decision on specific personal jurisdiction, *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S.Ct. 1017 (2021), she does so only for general principles of per-

BMS involved a mass action by 86 California residents and 592 plaintiffs from other states in California, each alleging injuries from taking the medication Plavix. 137 S.Ct. at 1778. The non-resident plaintiffs claimed no connection to California. Nevertheless, the California Supreme Court held that the trial court had specific jurisdiction with respect to the non-residents' claims because they were "similar in several ways" to those of the California residents, who could claim specific personal jurisdiction. *Id.* at 1778-79.

The U.S. Supreme Court reversed, explaining that there was no "adequate link" between California and the non-residents' claims. *Id.* at 1781. The fact that the *California* plaintiffs were prescribed, obtained and ingested Plavix in California and allegedly sustained the same injuries as did the non-residents was insufficient to confer specific personal jurisdiction over the *non-residents*' claims. *Id.* Rather, plaintiffs must show that the defendant has a sufficient relationship to the forum with respect to *each* plaintiff's claim. *Id.* Importantly, the Court summarized its holding by noting that "What is needed—and what is missing here—is a connection between the forum *and the specific claims at issue*." *Id*. at 1781 (emphasis added).

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sonal jurisdiction. *See* Appellant's Opening Br. at 23-24 and 48. That makes sense, as *Ford Motor Co.* does not alter the *BMS* analysis and, indeed, it cites it approvingly. *See* 141 S.Ct. at 1025. *Ford Motor Co.* dealt with a different specific-jurisdiction issue since the plaintiffs there were citizens of the fora and claimed injuries from their use of Ford products in the fora in which they lived. *Id.* at 1023.

II. The Supreme Court's reasoning in *BMS* applies to FLSA collective actions.

An FLSA collective action is "a form of group litigation in which a named employee plaintiff or plaintiffs file a complaint 'in behalf of' a group of other, initially unnamed employees who purport to be 'similarly situated' to the named plaintiff." *Halle v. West Penn Allegheny Health System Inc.*, 842 F.3d 215, 223 (3d Cir. 2016). But a collective action is not like a class action. "Rather, the existence of a collective action depends upon the affirmative participation of opt-in plaintiffs." *Id.* at 224. The requirement that a plaintiff affirmatively opt in to an FLSA collective action is "the most conspicuous difference between the FLSA collective action and a class action under Rule 23" because "every plaintiff who opts into a collective action has party status, whereas unnamed class members in Rule 23 class actions do not." *Id.* at 225 (quotation omitted). Congress indicated that opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as the named plaintiffs. *Id.* (quotation omitted). Thus, by opting in, FLSA collective-action plaintiffs "assert[] claims in their own right." *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989). This Court has treated FLSA collective actions as a sort of permissive joinder. *Mineo v. Port Auth. of N.Y. & N.J.*, 779 F.2d 939, 941 n.5 (3d Cir. 1985).

In these regards, an FLSA collective action materially resembles the mass action in *BMS*. In *BMS* and in an FLSA case like this one, a group of plaintiffs seeks to assert individual claims *en masse* with each plaintiff having

his or her own party capacity. As the Sixth Circuit held in *Canaday*,

> [t]he principles animating *Bristol-Myer*'s application to mass actions under California law apply with equal force to FLSA collective actions under federal law. As other circuits have acknowledged, an FLSA "collective action is more accurately described as a kind of mass action, in which aggrieved workers act as a collective of individual plaintiffs with individual cases."

2021 WL 3629916 at *4 (quoting *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1105 (9th Cir. 2018)). Indeed, this Court has compared FLSA collective actions to mass actions like the one in *BMS*. *Abraham v. St. Croix Renaissance Group, L.L.L.P.*, 719 F.3d 270, 272 n.1 (3d Cir. 2013).

Accordingly, just as there had to be specific personal jurisdiction over each plaintiff's claim in *BMS*, there must be specific personal jurisdiction over the claims of each plaintiff that opts in to an FLSA collective action.

III. Ms. Fischer's attempts to distinguish *BMS* are unavailing.

Ms. Fischer and her *amicus* offer a number of arguments against application of the *BMS* analysis to this case. None withstands scrutiny.

A. The Fourteenth Amendment's due-process analysis applies to FLSA collective actions.

Ms. Fischer first attempts to avoid the Fourteenth Amendment's due process limits altogether, claiming that cases raising federal claims in federal court necessarily implicate the Fifth Amendment's potentially different due-process analysis, rather than the Fourteenth Amendment's.

Ms. Fischer's articulation of the law is incorrect. In *Max Daetwyler*

Corp. v. R. Meyer, 762 F.2d 290 (3d Cir. 1985), this Court explained that, "[i]n the absence of a federal statute authorizing nationwide service of process, federal courts are referred to the statutes or rules of the state in which they sit. ... When a federal question case arises under a federal statute that is silent as to service of process, [Fed. R. Civ. P.] 4(e) adopts an incorporative approach requiring that both the assertion of jurisdiction and the service of process be gauged by state amenability standards." *Id.* at 295.

The Supreme Court followed the same approach in *Walden*, when considering a federal claim brought against a police officer in federal court in Nevada, the Court explained that, under Federal Rule of Civil Procedure 4(k)—which had been labeled Rule 4(e) when this Court decided *Max Daetwyler*—the Fourteenth Amendment applies and "a federal district court's authority to assert personal jurisdiction in most cases" is linked to service of process" on a defendant that is subject to personal jurisdiction in the state in which the court sits. *Id.* at 283.

Both Ms. Fischer and her *amicus* rely on *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361 (3d Cir. 2002), to assert broadly that the Fifth Amendment necessarily provides the due-process analysis when a federal claim is brought in federal court. *See* Appellant's Opening Br. at 24; *Amicus* Public Citizen's Br. at 8. But their characterization of *Pinker* amounts to what this Court's late Chief Judge William H. Hastie referred to as "trampling on graves"—citation to a case for a principle it does not support. *Pinker* involved a claim

under the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.*, which includes a provision for nationwide service of process. *Pinker*, 292 F.3d at 369. The Court held that, "[w]here Congress has spoken by authorizing nationwide service of process, therefore, as it has in the Securities Act, the jurisdiction of a federal court need not be confined by the defendant's contacts with the state in which the federal court sits." *Id.* The holding in *Pinker*, then, is not that the Fifth Amendment always provides the relevant personal-jurisdiction analysis when a federal claim is raised in a federal court, but that the Fifth Amendment applies when the statute at issue expressly allows nationwide service of process.

The Court's holding in *Pinker* is, of course, entirely consistent with *Max Daetwyler* and *Walden*, and it offers no help to Ms. Fischer because she does not and could not argue that the FLSA includes a provision for nationwide service of process. FLSA collective actions thus fall within the general rule announced in *Max Daetwyler* and *Walden*. Such actions must comply with state service rules and the attendant Fourteenth-Amendment limitations described in *BMS* and other cases.

The plaintiff in *Canaday* made the same argument Ms. Fischer makes here. The Sixth Circuit responded that Congress could have empowered federal courts to exercise personal jurisdiction "to the full reach of the federal government's sovereign authority" rather than only to the limits of the forum state's authority, but it did not do so by including in the FLSA a provi-

sion for nationwide service of process. *Canady*, 2021 WL 3629916 at *4-5.

Ms. Fischer also claims that *BMS* is inapplicable because, in her view, the FLSA collective action at issue here does not implicate the federalism concerns identified in *BMS*. *See* Appellant's Opening Br. at 48. But federalism concerns can apply in FLSA cases just as they can in mass state-law cases. After all, each state has an interest in enforcing labor standards within its territory, as is underscored by the fact that state courts also have jurisdiction to hear FLSA claims. *See* 29 U.S.C. § 216(b). And in any event, lower courts are bound by the holding in *BMS* regardless of whether they think any particular case implicates all of the policy considerations identified by the Supreme Court.

B. Ms. Fischer's argument about physical service of process misses the mark.

Perhaps recognizing that her reliance on the Fifth Amendment is unsustainable, Ms. Fischer seeks to distinguish this case from *BMS* in another way: she asserts that opt-in plaintiffs in FLSA collective actions need not themselves effect service of process and, so, Rule 4 is satisfied when just the named plaintiff effects service. *See* Appellant's Opening Br. at 39. Ms. Fischer devotes considerable attention to demonstrating that there are circumstances in which those with status as plaintiffs need not physically serve a summons on the defendant. That may be true, but it is also irrelevant.

The issue is not whether a particular plaintiff must effect service un-

der Rule 4 but whether that plaintiff *could* do so consistent with the due process limits of the Fourteenth Amendment. Rule 4(k) recognizes a default rule that personal jurisdiction is appropriate over a defendant only if the defendant is subject to personal jurisdiction in "a court of general jurisdiction in the state where the district court is located," is joined under Rules 14 or 19 and served within certain geographical limits or is authorized by federal statute. *See* Fed. R. Civ. P. 4(k). And, although the rule is phrased in terms of when service may be effective, this Court has applied it to the separate question of whether an exercise of personal jurisdiction is appropriate. *See Max Daetwyler*, 762 F.2d at 295. ("When a federal question case arises under a federal statute that is silent as to service of process, Rule 4[(k)] adopts an incorporative approach requiring that *both* the assertion of jurisdiction and the service of process be gauged by state amenability standards.") (emphasis added); *see also, Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 103 n.6 (1987) (recognizing that personal jurisdiction under Rule 4 rests not simply on the method of service but on the defendant's amenability to service). Thus, while it may be true that opt-in plaintiffs in a FLSA collective action need not themselves physically serve process on the defendant, it is incorrect to conclude that their claims are not subject to the territorial limits of the Fourteenth Amendment per Rule 4(k). They are.

In *Canaday*, the Sixth Circuit considered and rejected the same argument Ms. Fischer makes here about Rule 4.

> After Anthem appeared in the case in response to Canaday's service of the complaint, it is true, the nonresident plaintiffs served their "written notices" under Civil Rule 5(a)(l)(E) on Anthem to opt into the collective action, and they had no additional service obligation under Civil Rule 4(k). ... But that reality does not eliminate Civil Rule 4(k)'s requirement that the defendant be amenable to the territorial reach of that district court for that claim. The federal court's authority to assert personal jurisdiction over the defendant with respect to the nonresident plaintiffs' claims remains constrained by Civil Rule 4(k)(1)(A)'s territorial limitations.

2021 WL 3629916 at *6.

And, in the case of FLSA collective actions like the one at issue here, the only basis for personal jurisdiction under Rule 4(k) is pursuant to the ordinary rules governing a state's exercise of personal jurisdiction. *See Vallone*, 2021 WL 3640222 at *2. That is because, as mentioned above, nothing in the FLSA purports to authorize personal jurisdiction over a defendant outside of those bounds. Setting aside any potential constitutional limits on Congress's ability to prescribe nationwide personal jurisdiction, the simple fact of the matter is that Congress has not even tried to do so in the case of the FLSA. Instead, it has left FLSA collective actions to the default rule.

C. Ms. Fischer's argument about the statutory text is without merit.

Ms. Fischer argues that nothing in the language of the FLSA supports the limitations FedEx and other employers have asserted. *See* Appellant's Opening Br. at 31-32. However, the limitations arise not from the FLSA but from the Constitution. If Ms. Fischer's myopic focus on the cause of action

had merit, the Court in *BMS* would have reached a different conclusion since, of course, the California common law at issue in that case suggests no geographic limitation. And, in any event, a focus on the FLSA would only reveal that Congress has left FLSA claims to the due-process limitations of the Fourteenth Amendment. Courts have for decades held that, if a statute provides for nationwide service of process, the Fifth Amendment's analysis would apply. *See Max Daetwyler, supra.* Congress has amended the FLSA several times since courts first reached that holding, yet never added a provision for nationwide service of process. If Congress intended personal jurisdiction for FLSA collective actions to apply in that fashion, it would have amended the statute to say so. *See Norwest Bank Worthington, et al v. Ahlers et ux*, 485 U.S. 197, 210 (1988) (Congress is presumed to act with knowledge of extant judicial decisions).[3] To the extent the text of the statute speaks to the issue in this case, it supports FedEx's position.

IV. Permitting courts to exercise specific personal jurisdiction over plaintiffs' claims with no connection to the forum would harm businesses and the judicial system.

Not long ago, the plaintiffs' bar relied heavily on expansive theories of general personal jurisdiction to bring nationwide or multi-state suits in plain-

[3] Congress has provided for nationwide service of process in other federal statutes. *See, e.g.*, 15 U.S.C. § 22 (Sherman Act); 18 U.S.C. § 1965(a) (RICO Act); 18 U.S.C. § 2334(a) (Anti-Terrorism Act); 29 U.S.C. § 1132(e)(2) (ERISA).

tiff-friendly "magnet jurisdictions." U.S. Chamber Inst. for Legal Reform, BMS *Battlegrounds: Practical Advice for Litigating Personal Jurisdiction after* Bristol-Myers at 3-5 (June 2018) (https://perma.cc/8QYZ-C48M).[4]

The Supreme Court responded to that abuse by limiting general personal jurisdiction to those places where a corporation is "at home," meaning usually only where it is incorporated and where it has its principal place of business. *BNSF Ry.*, 137 S.Ct. at 1558. Even a "substantial, continuous, and systematic course of business" by the defendant in the forum state is not enough to render a defendant "at home" there. *Daimler*, 571 U.S. at 138.

Ms. Fischer's suggested approach would allow an end run around those limits. A collective action could be filed anywhere that a single, forum-based plaintiff agreed to sign on as the named plaintiff, even when the forum state has no "legitimate interest" in the claims of the remaining plaintiffs. *See BMS*, 137 S.Ct. at 1780. Permitting specific personal jurisdiction over all the claims in such a case would, in effect, "reintroduce general jurisdiction by another name" and do so on a massive scale. *See* Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675, 687 (2015).

Just as with the expansive theories of general personal jurisdiction the Supreme Court has now eschewed, the exercise of specific personal jurisdiction under the theory espoused by Ms. Fischer and her *amicus* would be

[4] Last visited August 30, 2021.

"unacceptably grasping." *Daimler*, 571 U.S. at 138-39. Among other things, that tail-wagging-the-dog approach has no limiting principle. Out-of-state plaintiffs could outnumber in-state named plaintiffs by 500:1 or even 5,000:1 and still rely on the specific personal jurisdiction claimed by a named plaintiff. In *BMS*, the nonresident plaintiffs outnumbered the California plaintiffs 592:86. 137 S.Ct. at 1778. In FLSA collective actions, the ratio of out-of-state to in-state plaintiffs is often as great or greater. For example, in *Waters v. Day & Zimmermann NPS, Inc.*, No. 19-11585-NMG, 2020 WL 4754984 (D. Mass. Aug. 14, 2020), only three of 112 plaintiffs worked in the forum state. *Id.* at *2. In *Maclin v. Reliable Reports of Tex., Inc.*, 314 F. Supp.3d 845 (N.D. Ohio 2018), just 14 of 438 employees worked in the forum state. *Id.* at 847. In *Canaday*, fewer than 100 of 2,575 potential plaintiffs were employed in the forum state. *Canaday v. The Anthem Cos., Inc.*, 441 F. Supp.3d 644, 646-47 (W.D. Tenn. 2020).[5]

It takes little imagination to see the likelihood of abusive forum shopping were courts to accept Ms. Fischer's approach. And that sort of forum shopping violates basic principles of federalism by allowing courts in states with little or no legitimate interest to decide claims—including claims based on conduct that occurred wholly in other states. That substantially infringes

[5] As noted, the Sixth Circuit has decided *Canaday* in a way consistent with FedEx's position. The First Circuit has held oral argument in *Waters*, and it has not yet announced its decision.

on the authority of those other states to control conduct that occurs within their borders.

Ms. Fischer's approach would as well be unfair to businesses named as defendants. As the Supreme Court has acknowledged, defendants should not have to submit to the "coercive power of a State" with "little legitimate interest in the claims in question." *BMS*, 137 S.Ct. at 1780. Among other things, the due-process limitations on specific personal jurisdiction "give[] a degree of predictability to the legal system" so that potential defendants are able to "structure their primary conduct" by knowing where their conduct "will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297; *see also, J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion). Such "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

Under existing and properly applied standards for specific personal jurisdiction, a company "knows that ... its potential for suit [in a given state] will be limited to suits concerning the activities that it initiates in the state." Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. Rev. 1313, 1346 (2005). Were the jurisprudence to shift in the way Ms. Fischer and her *amicus* urge such that a court need not have specific personal jurisdiction over the claims of all plaintiffs, a company could be forced into a state's courts to

answer for claims entirely unrelated to that state. Businesses that employ individuals in more than one state would have no way of avoiding nationwide collective actions in the courts of any of those states, no matter how far flung from the business's home. And they could be forced to litigate hundreds, thousands or even millions of claims in one state even though most or even virtually all of the claims arose from out-of-state conduct. *See World-Wide Volkswagen*, 444 U.S. at 292. Such an approach would damage the predictability and fairness guaranteed by the Due Process Clause.

Finally, those harmful consequences would not be limited to the businesses sued in states with no legitimate interest in the claims at issue. Businesses forced to litigate high-stakes collective actions in unexpected fora would surely incur higher litigation expenses, and at least some of those costs would be borne by consumers in the form of higher prices.

The Supreme Court's recent personal-jurisdiction jurisprudence, faithfully applied, avoids these harmful consequences. In *BMS*, the Court established a rule for specific personal jurisdiction that adheres to the Court's precedents and provides predictability and fairness to defendants. As demonstrated above and in FedEx's brief, the law compels the application of the *BMS* holding to FLSA collective actions. So, too, do considerations of public policy.

V. Ms. Fischer's public-policy arguments do not withstand scrutiny.

Ms. Fischer contends that the rule FedEx urges here is counter to FLSA's purposes. But application of *BMS* to FLSA collective actions is fully consistent with the purposes of the FLSA. Statewide FLSA collective actions are available anywhere specific personal jurisdiction allows, and nationwide FLSA collective actions are available in any state in which a company is subject to general personal jurisdiction. Thus, a plaintiff seeking to pursue a collective action can choose whether to file within the state in which the plaintiff's claim arises, in the state where the employer is incorporated or in the state where the employer has its principal place of business. These options provide the plaintiff with several different avenues for relief, while ensuring that any FLSA action that is brought has a sufficient connection to the forum in which it is to be litigated. The latter, of course, protects both the judicial resources of the court and the rights of the defendant.

These different avenues for relief are not somehow illusory because plaintiffs sometimes wish to pursue a nationwide FLSA collective action against multiple defendants sued as joint employers. *See* Appellant's Opening Br. at 33-34. As an initial matter, despite Ms. Fischer's assertion that joint employer actions are "more common," she offers no evidence to actually help quantify that point. And in any event, nothing in the text of the FLSA suggests that a single nationwide collective action must be available. Congress recognized that there might be benefits to allowing employees to assert FLSA claims collectively; it did not indicate that the only means to

recognize those benefits would be through a single, nationwide collective action. Certainly, many of those asserted benefits would occur even with just a statewide collective action.

With respect to joint employers, statewide FLSA collective actions would continue to be available in the jurisdiction within which the plaintiff's claim arises—if the plaintiff is correct that the entities are joint employers within a state, they would presumably both be subject to FLSA suit there. That would serve the named plaintiff equally well as a nationwide collective action. And, as a practical matter, it would also serve similarly situated out of state employees, for a successful statewide collective action in one state against joint employers will have spillover effects in other states. Thus, the statewide collective action serves the purposes of FLSA without subjecting defendants to asymmetrical burdens of being forced to litigate a nationwide FLSA collective action far from home.

Most of Ms. Fischer's policy arguments are thus better directed to the legislative branch. The text of the FLSA and the Supreme Court's personal-jurisdiction precedents are straightforward, and the Court should not ignore them in the interests of advancing some presumed but unstated congressional interest.[6] Congress knows how to provide for nationwide service of pro-

[6] Ms. Fischer discusses at some length the legislative history of the FLSA. The text of the statute suggests no ambiguity and, so, there is no need to look to the legislative history. *See United States v. Gonzales*, 520 U.S. 1, 6 (1997) (resort to legislative history is only appropriate when the text of the statute is ambiguous). Even if there were an ambiguity, the legislative history suggests

cess, and it is presumed to act with knowledge of how courts have interpreted the law. If it intended for specific personal jurisdiction over FLSA collective actions to be analyzed by a rule other than the *BMS* holding, Congress could have amended the statute to provide for nationwide service of process, which governing precedent has treated differently for personal jurisdiction purposes. But the now-controlling version of the statute does not do that.

Ms. Fischer asserts that, "[f]or 79 years following the FLSA's enactment, *no one* questioned the constitutional authority of federal courts to entertain collective actions under the FLSA—including, of course collective actions that include opt-in plaintiffs who worked for their employer outside the state where the action is maintained." Appellant's Opening Br. at 3 (emphasis original). But it seems unlikely that "no one" questioned the constitutional reach of FLSA collective actions in these circumstances, and in any event the point is irrelevant. The law develops incrementally, and it is not at all uncommon for new decisions to put issues in play that had not been before.

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only that Congress saw benefits to collective actions, not that those collective actions had to be national in scope.

CONCLUSION

The district court correctly and faithfully applied precedents from this Court and the Supreme Court to a situation materially similar to *BMS*. In doing so, the district court did not stretch the jurisprudence. The Fourteenth Amendment's due-process analysis applies to federal claims in federal court at least when the relevant statutes do not provide for nationwide service of process. Courts, including this one, recognized that rule decades ago. The FLSA includes no provision for nationwide service of process and, since Congress has amended the FLSA a number of times since courts first reached the holding about nationwide service, it should be presumed that Congress does not intend there to be nationwide service or a Fifth Amendment analysis of personal jurisdiction. Thus, all plaintiffs in a FLSA collective action must be able to establish personal jurisdiction over the defendant. The Sixth and Eighth Circuits have concluded likewise, and there is no need for this Court to create a circuit split on the point.

Amicus Curiae Chamber of Commerce of the United States of America respectfully requests that the Court affirm the district court's personal-jurisdiction order.

Respectfully submitted,

/s/ David R. Fine

Daryl Joseffer
Jennifer B. Dickey
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

David R. Fine
K&L GATES LLP
Market Square Plaza
17 North Second St., 18th Fl.
Harrisburg, PA 17101
(717) 231-5820
david.fine@klgates.com

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Counsel for Amicus Curiae
the Chamber of Commerce of the United States of America

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

/s/ David R. Fine

ELECTRONIC FILING CERTIFICATION

I hereby certify that the attached brief as provided to the Court in electronic form includes the same text as the "hard copies" of the brief filed by overnight courier with the Court. I also certify that this electronic file has been scanned with Symantec Anti-Virus software.

/s/ David R. Fine

CERTIFICATION OF WORD COUNT

I certify that this brief includes 5,732 words as calculated with the word-counting feature of Microsoft Word and including the parts of the brief specified in Federal Rule of Appellate Procedure 32.

/s/ David R. Fine

CERTIFICATE OF SERVICE

I certify that, on August 30, 2021, I filed the attached brief with the Court's CM/ECF system such that all counsel will receive service automatically and that I served two copies on the following by U.S. Mail, postage-prepaid:

Adam W. Hansen, Esq.
Colin R. Reeves, Esq.
Apollo Law LLC
333 Washington Ave. North
Suite 300
Minneapolis, MN 55401

Benjamin L. Davis, III, Esq.
Kelly A. Burgy, Esq.
The Law Offices of Peter T. Nicholl
36 South Charles St.
Suite 1700
Baltimore, MD 21201

Scott M. Pollins, Esq.
Pollins Law Firm, LLC
50 Monument Rd.
Suite 101
Bala Cynwyd, PA 19004

Counsel for Appellants

Frederick L. Douglas, Esq.
Brandon D. Pettes, Esq.
Federal Express, Legal Department
3620 Hacks Cross Rd.
Building B Third Floor
Memphis, TN 38125

Counsel for Appellees

/s/ David R. Fine