No. 20-5947

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAURA CANADAY, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

THE ANTHEM COMPANIES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Tennessee, No. 19-cv-1084 (Hon. S. Thomas Anderson)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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

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

Deborah R. White
RETAIL LITIGATION CENTER, INC.
99 M Street, S.E., Suite 700
Washington, D.C. 20003
(202) 869-0200

Counsel for the Retail Litigation Center, Inc.

Nicole A. Saharsky
Daniel E. Jones
Minh Nguyen-Dang
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
nsaharsky@mayerbrown.com

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-5947 Case Name: Canaday v. The Anthem Cos., Inc.

Name of counsel: Nicole A. Saharsky

Pursuant to 6th Cir. R. 26.1, The Chamber of Commerce of the United States of America
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on February 8, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Nicole A. Saharsky

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-5947 Case Name: Canaday v. The Anthem Cos., Inc.

Name of counsel: Nicole A. Saharsky

Pursuant to 6th Cir. R. 26.1, The Retail Litigation Center, Inc.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on February 8, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Nicole A. Saharsky

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (continued)

Cases (continued) **Page(s)**

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page(s)**

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page(s)**

Constitutional Provisions, Statutes, and Rules

TABLE OF AUTHORITIES (continued)

Statutes and Rules (continued) **Page(s)**

Other Authorities

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents approximately 300,000 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. The Retail Litigation Center, Inc. is the only trade organization solely dedicated to representing the retail industry in court. Its members collectively employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. *Amici* regularly file *amicus* briefs in cases that raise issues of concern to the nation's business community, including personal-jurisdiction issues.[1]

Amici file this brief to address the important personal-jurisdiction issue in this case. Many of *amici*'s members employ individuals in States other than their place of incorporation and principal

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their 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.

place of business, the two places where they would be subject to general personal jurisdiction. *Amici*'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.

Amici'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.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises an important question of first impression in this Circuit: Whether, in a collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, a court may exercise specific personal jurisdiction over the defendant with respect to the claims of all plaintiffs who opt into the action, even though some plaintiffs' claims lack a sufficient connection to the forum.

The answer to that question is straightforward: When a defendant is not subject to general personal jurisdiction in the forum, the court may allow the collective action to proceed only if the defendant is subject to specific personal jurisdiction in the forum with respect to *all* plaintiffs' claims. If some plaintiffs cannot show the necessary connection between their claims and the defendant's activities in the forum – and therefore could not maintain their claims as individual actions in the forum – the collective action may not encompass those claims.

That rule follows from decades of Supreme Court precedent establishing that specific personal jurisdiction depends on a plaintiff-by-plaintiff assessment. To satisfy due process, a court faced with an action with multiple plaintiffs must find that the defendant has the necessary connection to the forum for *each plaintiff's* claim.

The Supreme Court applied that principle to reject an expansive exercise of specific jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) (*BMS*). The Court held that, for a mass-tort action to proceed in state court, the court must have personal jurisdiction over the defendant with respect to *all* plaintiffs' claims. *Id.* at 1778-81. The defendant lacked sufficient contacts to the forum to be

subject to general personal jurisdiction. *Id.* at 1778. Further, the non-resident plaintiffs' claims lacked the necessary connection to the forum to support specific personal jurisdiction, and the mere fact that the non-resident plaintiffs raised similar claims to the resident plaintiffs was not enough to satisfy due process. *Id.* at 1781.

That analysis resolves this case, as the district court correctly concluded. The only difference between this case and *BMS* is that *BMS* was a mass-tort action and this case is an FLSA collective action. But the same due-process principles apply. Like the nonresident plaintiffs in *BMS*, the nonresident plaintiffs in this case could not bring FLSA claims against the defendant in the forum by filing their own individual complaints, and they therefore may not bring them in the forum by instead opting in as party plaintiffs to a collective-action complaint.

The reasoning of *BMS* applies here, even though this is a case in federal court that involves a federal cause of action. Under Federal Rule of Civil Procedure 4(k), federal courts follow the personal-jurisdiction rules of the States in which they sit unless Congress has specified to the contrary. The FLSA does not specify to the contrary,

and so the Due Process Clause of the Fourteenth Amendment, and *BMS*, apply.

Some federal district courts have held that *BMS* does not apply to FLSA collective actions. But their analyses are unpersuasive.

First, some courts have concluded that in an FLSA collective action, only the original named plaintiffs are considered "parties" for personal-jurisdiction purposes. Those courts are mistaken. All plaintiffs in an FLSA collective action are on equal footing with the original named plaintiffs once they opt into the case.

Second, some courts have reasoned that excusing the plaintiffs not named in the complaint from establishing personal jurisdiction would make FLSA collective actions more efficient. But supposed efficiency gains cannot override defendants' due-process rights.

Third, a few courts have refused to apply *BMS* on the belief that it would preclude nationwide FLSA collective actions. But plaintiffs *can* file nationwide FLSA collective actions where defendants are subject to general jurisdiction.

Finally, the Seventh Circuit has declined to apply *BMS* in the class-action context. But FLSA collective actions are fundamentally dif-

ferent from class actions, in ways that make the application of *BMS* even more clear. (In any event, the Seventh Circuit is mistaken about class actions.)

The rule proposed by Canaday would cause substantial harm to businesses and to the judicial system. It would enable plaintiffs to make an end-run around the Due Process Clause by bringing nationwide collective actions anywhere they could find one plaintiff with the requisite connection to the forum. That maneuver, in turn, would eliminate the predictability that due process affords corporate defendants to allow them to structure their primary conduct. It also would allow the forum State to decide claims over which it has little legitimate interest, to the detriment of other States' interests. This Court therefore should affirm the decision of the district court.

ARGUMENT

I. The Due Process Clause Bars A Court From Exercising Specific Personal Jurisdiction Over Plaintiffs' Claims That Lack The Requisite Connection To The Forum

The Supreme Court's precedents, including *BMS*, establish that specific personal jurisdiction must be assessed on a plaintiff-by-plaintiff, claim-by-claim basis. That principle applies to FLSA collective actions just as it applied to the mass-tort action in *BMS*. The district court cor-

rectly granted Anthem's motion to dismiss the claims of the nonresident plaintiffs.

A. Specific Personal Jurisdiction Requires A Substantial Connection Between Each Plaintiff's Claim And The Defendant's Forum Contacts

Whether an exercise of personal jurisdiction comports with the "traditional notions of fair play and substantial justice" underlying the Due Process Clause generally depends on whether the defendant has certain minimum contacts with the forum State. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Those contacts can support two types of personal jurisdiction. First, a court may assert general, or "all-purpose," personal jurisdiction in States where a company is "essentially at home" – because the State is either the company's place of incorporation or its principal place of business. *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)). Second, a court may assert specific, or "conduct-linked," personal jurisdiction in a State where the lawsuit arises out of, or relates to, the defendant's activities in the State. *Daimler AG*, 571 U.S. at 122, 127.

This case concerns specific jurisdiction. To exercise specific jurisdiction over a defendant, a court must conclude that the defendant's "suit-related conduct" creates a substantial connection with the forum State. *Walden v. Fiore*, 571 U.S. 277, 284 (2014). That is, the court must find a substantial relationship between the forum, the defendant, and the particular plaintiff's claim, so that it is "reasonable" to call the defendant into that court to defend against that claim. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

That limitation on personal jurisdiction reflects the fairness concerns animating the Due Process Clause. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 472 (1985). It provides a "degree of predictability" to defendants, especially corporate defendants, so that they can "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. The Due Process Clause also protects important federalism interests, by preventing States from

reaching beyond their borders to adjudicate claims over which they "may have little legitimate interest." *BMS*, 137 S. Ct. at 1780-81.[2]

B. *BMS* Confirms That Specific Personal Jurisdiction Must Exist For Each Plaintiff's Claim

The Supreme Court applied those settled principles in a case involving multiple plaintiffs and reaffirmed that the court must find specific personal jurisdiction with respect to each plaintiff's claim.

In *BMS*, 86 California residents and 592 plaintiffs from other States sued BMS in California, alleging injuries from taking the drug Plavix. 137 S. Ct. at 1778. The nonresident plaintiffs did not claim any connections with California. *Id.* at 1781. Nonetheless, the California Supreme Court upheld the state court's assertion of specific jurisdiction over the nonresidents' claims, on the theory that the nonresidents' claims were "similar in several ways" to the claims of the California residents (for which there was specific jurisdiction). *Id.* at 1778-79.

---

[2] In *Ford Motor Company v. Montana Eighth Judicial District Court*, No. 19-368 (U.S. argued Oct. 7, 2020), and *Ford Motor Company v. Bandemer*, No. 19-369 (U.S. argued Oct. 7, 2020), the Supreme Court is considering what minimum contacts are necessary to support personal jurisdiction under the Fourteenth Amendment's Due Process Clause. This case presents a different issue – whether each plaintiff in an FLSA collective action must establish those minimum contacts with respect to his or her claims.

The U.S. Supreme Court reversed, finding no "adequate link between the State and the nonresidents' claims." *BMS*, 137 S. Ct. at 1781. The fact that "*other* plaintiffs" (the resident plaintiffs) "were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims." *Id.* The defendant must have a sufficient relationship to the forum with respect to *each* plaintiff's claim; the fact that the defendant has the necessary relationship with respect to *some* plaintiffs' claims is not sufficient. *Id.* That is true even when the claims raised by the resident and nonresident plaintiffs are similar. *Id.*

In rejecting the California Supreme Court's theory of tack-on jurisdiction, the Supreme Court relied on the fairness, predictability, and federalism interests underlying its specific-jurisdiction decisions. The Court's "primary concern" in assessing the California court's exercise of specific jurisdiction was "the burden on the defendant," which included both "the practical problems resulting from litigating in the forum" and "the more abstract matter of" requiring a defendant to "submit[] to the coercive power of a State" lacking any legitimate interest in the dispute.

BMS, 137 S. Ct. at 1780. Without the necessary link to the forum for each plaintiff's claim, the Court explained, it would be unfair to require the defendant to appear in the forum to answer that claim. *Id.* The Supreme Court summarized: "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).

C. The Supreme Court's Reasoning In *BMS* Applies Equally To FLSA Collective Actions

An FLSA collective action is "a kind of mass action," *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1105 (9th Cir. 2018), where named plaintiffs seek to bring claims under the FLSA on behalf of themselves and other "similarly situated" employees, 29 U.S.C. § 216(b). If the court conditionally certifies the action as a collective action, those other employees must affirmatively opt into the action, at which point they "become . . . party plaintiff[s]" to the action. *Id.* In other words, by opting in, the plaintiffs "assert[] claims in their own right." *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

The FLSA further provides that each opt-in plaintiff is an "individual claimant," whose lawsuit is considered to have been "filed" on the day that plaintiff opts into the collective action. 29 U.S.C. § 256; *see*

Campbell, 903 F.3d at 1105 (plaintiffs in an FLSA collective action "act as a collective of *individual* plaintiffs with *individual* cases"). That underscores that each opt-in plaintiff brings a separate claim against the defendant, just like each plaintiff in a mass action does. Accordingly, the FLSA's opt-in provision "is properly viewed as a rule of joinder." *Anjum v. J.C. Penney Co.*, No. 13-0460, 2014 WL 5090018, at *8 (E.D.N.Y. Oct. 9, 2014); *see Mineo v. Port Auth. of N.Y. & N.J.*, 779 F.2d 939, 941 n.5 (3d Cir. 1985) (FLSA's opt-in provision is a form of "permissive joinder").

To assert personal jurisdiction over all of the plaintiffs' claims, the court must find the requisite connection between the defendant and the forum for the claims of "each plaintiff." *Chavira v. OS Rest. Servs., LLC*, No. 18-CV-10029-ADB, 2019 WL 4769101, at *6 (D. Mass. Sept. 30, 2019); *see BMS*, 137 S. Ct. at 1781. The fact that *some* plaintiffs resident in the forum can establish specific personal jurisdiction over the defendant with respect to their claims does not allow them to bootstrap jurisdiction for the claims of *other* plaintiffs. *See BMS*, 137 S. Ct. at 1781; *Walden*, 571 U.S. at 286.

The Court's concern in *BMS* was that the defendant corporation could not reasonably expect, based on its activities within the forum, that it would be subject to suit there for claims by nonresident plaintiffs that are unconnected to the forum. *BMS*, 137 S. Ct. at 1780; *see World-Wide Volkswagen*, 444 U.S. at 297. That concern applies "with equal force to FLSA . . . actions that involve nonresident claims against non-forum defendants." *White v. Steak N Shake Inc.*, No. 4:20 CV 323 CDP, 2020 WL 1703938, at *4 (E.D. Mo. Apr. 8, 2020). Many businesses have employees in different States, and it makes no sense to say that because a business has a few employees in one State, *all* of its employees can bring claims against it in that State.

Further, that rule would disregard the interests of other States. Allowing a State to assert jurisdiction over the claims of a putative nationwide collective action, based on a single named plaintiff's connection to the forum, would permit the forum State to decide claims as to which it has insufficient legitimate interest, infringing on the authority of other States. *See BMS*, 137 S. Ct. at 1780.

If the rule were otherwise, plaintiffs could make an end-run around *BMS* by finding a single plaintiff from the forum State of their

choice. *BMS* involved 678 plaintiffs from 34 different States asserting similar tort claims against BMS in California. 137 S. Ct. at 1778. Here, Canaday seeks to certify a collective action for all employees in her job position (medical management nurses) in federal court in Tennessee against an Indiana defendant, even though fewer than 100 of the 2,575 nurses worked in Tennessee. *See* R.68, PageID.621-622.

In both cases, some plaintiffs are residents of the forum State who can establish personal jurisdiction over the defendant for their claims, and others are nonresidents who cannot establish the necessary connection. This Court should not let the nonresident plaintiffs in this case proceed with their claims when the Supreme Court prohibited the nonresident plaintiffs from doing so in *BMS*.

D. The Due Process Clause Of The Fourteenth Amendment Applies In This Case

Canaday attempts to distinguish *BMS* on the ground that the Court's Fourteenth Amendment due-process analysis does not apply in federal court. Appellant Br. 21-26; *see, e.g.*, *Chavez v. Stellar Mgmt. Grp. VII, LLC*, No. 19-cv-01353-JCS, 2020 WL 4505482, at *7-8 (N.D. Cal. Aug. 5, 2020). But unless Congress provides for nationwide service

of process – which it has not done for the FLSA – the Fourteenth Amendment's Due Process Clause applies.

1. The Due Process Clause of the Fourteenth Amendment limits the exercise of personal jurisdiction in this case because Federal Rule of Civil Procedure 4(k) incorporates state personal-jurisdiction rules and the Fourteenth Amendment limitations on them. As the Supreme Court has explained, "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Walden*, 571 U.S. at 283 (quoting *Daimler AG*, 571 U.S. at 125).

That is because Rule 4(k) directs federal courts to follow the personal-jurisdiction rules of the States in which they sit unless Congress separately has authorized service of process for a particular federal claim or defendant. Specifically, Rule 4(k)(1)(A) provides that service of process "establishes personal jurisdiction over [the] defendant" if the defendant "is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). Rule 4(k) voluntarily incorporates state personal-jurisdiction rules, which include the limitations imposed by the Due Process Clause of the

Fourteenth Amendment. *See CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996).

The Supreme Court has recognized that Rule 4(k) incorporates the Fourteenth Amendment due-process limitations on personal jurisdiction. In *Walden*, the Court considered a Fourth Amendment claim that individuals brought against a state police officer in federal court in Nevada. 571 U.S. at 281. Even though the case involved a federal claim brought in federal court, the Court applied the Due Process Clause of the Fourteenth Amendment to evaluate personal jurisdiction. The Court explained that, under Rule 4(k), "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 where the federal court sits. *Id.* at 283 (citing Fed. R. Civ. P. 4(k)(1)(A)).

2. In this case, Canaday raises a claim under the FLSA. That federal statute does not provide its own service-of-process rule. *See* 29 U.S.C. § 201 *et seq*. Rule 4(k)(1)(A) therefore directs application of Tennessee personal-jurisdiction rules, which are evaluated under the Due Process Clause of the Fourteenth Amendment. And under the Four-

teenth Amendment, a plaintiff asserting a violation of the FLSA must show that defendant's "suit-related conduct" creates a substantial connection with the forum State. *Walden*, 571 U.S. at 284. Here, only Canaday, and any opt-in plaintiff who similarly worked for Anthem in Tennessee, could make that showing.

Canaday argues that the Fourteenth Amendment's limitations apply only to the original named plaintiff, because opt-in plaintiffs do not need to serve process under Rule 4(k). Appellant Br. 39-43. This argument incorrectly "equates the method of service that Rule 4(k)(1) provides for initiating suits," which applies "only when the suit is initiated," with the rule's "territorial limitations on amenability to service," which "remain operative throughout the proceedings." *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 309 (D.C. Cir. 2020) (Silberman, J., dissenting) (citing *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 103 n.6 (1987)).

The fairness and federalism concerns embodied in the Court's Fourteenth Amendment due-process decisions (including *BMS*) fully apply here. That is true even though the FLSA is a federal statute; each State has an interest in enforcing labor standards within its terri-

tory. *See* 29 U.S.C. § 216(b) (FLSA claims may be brought in state court). If the district court adjudicates the claims of all of the plaintiffs, it will be "reach[ing] out beyond [its] limits," *World-Wide Volkswagen*, 444 U.S. at 292, to resolve matters over which many other States have legitimate interests. That could be permissible if Tennessee has its own interest in resolving the claims because the claims arose out of the defendant's activities in the forum. But it does not.

E. The Arguments Against Applying *BMS* To FLSA Collective Actions Are Unpersuasive

No court of appeals has addressed the question whether *BMS* applies to FLSA collective actions.[3] All but one of the district courts in this Circuit that have addressed the issue have held that *BMS* applies to FLSA collective actions.[4] Other district courts disagree on the an-

[3] In addition to this case, the issue is presented in *Waters v. Day & Zimmermann NPS, Inc.*, No. 20-1997 (1st Cir. docketed Oct. 28, 2020).

[4] *See* R.68, PageID.631; *Turner v. UtiliQuest, LLC*, No. 3:18-cv-00294, 2019 WL 7461197, at *3 (M.D. Tenn. July 16, 2019); *Rafferty v. Denny's, Inc.*, No. 5:18-cv-2409, 2019 WL 2924998, at *7 (N.D. Ohio July 8, 2019); *Maclin v. Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845, 850-51 (N.D. Ohio 2018). *But see Hammond v. Floor & Decor Outlets of Am., Inc.*, No. 3:19-cv-01099, 2020 WL 2473717, at *15 (M.D. Tenn. May 13, 2020).

swer.[5] Further, the federal appellate judges that have addressed whether *BMS* applies in the context of federal class actions have disagreed.[6]

The courts that have declined to apply *BMS* to FLSA collective actions have offered a number of justifications for their approach. None is persuasive.

1. First, some courts determined that opt-in plaintiffs need not establish specific personal jurisdiction with respect to their claims because they are differently situated from the original named plaintiffs.

---

[5] Some courts have correctly held that all plaintiffs in an FLSA collective action must establish the prerequisites for specific personal jurisdiction. *See, e.g.*, *White*, 2020 WL 1703938, at *2; *Vallone v. CJS Sols. Grp., LLC*, 437 F. Supp. 3d 687, 691 (D. Minn. 2020), *appeal docketed*, No. 28-2874 (8th Cir. Sept. 9, 2020); *Camp v. Bimbo Food Bakeries USA, Inc.*, No. 18-CV-378-SM, 2020 WL 1692532, at *7 (D.N.H. Apr. 7, 2020); *Pettenato v. Beacon Health Options, Inc.*, 425 F. Supp. 3d 264, 280 (S.D.N.Y. 2019); *Roy v. FedEx Ground Package Sys., Inc.*, 353 F. Supp. 3d 43, 52-53 (D. Mass. 2018).

Other courts have held that only the original named plaintiffs in an FLSA collective action must establish personal jurisdiction over the defendant. *See, e.g.*, *Aiuto v. Publix Super Mkts., Inc.*, No. 1:19-CV-04803-LMM, 2020 WL 2039946, at *5 (N.D. Ga. Apr. 9, 2020); *Turner v. Concentrix Servs., Inc.*, No. 1:18-CV-1072, 2020 WL 544705, at *3 (W.D. Ark. Feb. 3, 2020); *Meo v. Lane Bryant, Inc.*, No. CV-18-6360JMAAKT, 2019 WL 5157024, at *12 (E.D.N.Y. Sept. 30, 2019).

[6] *Compare Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445, 447 (7th Cir. 2020), *cert. denied*, No. 20-510, 2021 WL 78484 (U.S. Jan. 11, 2021), *with Molock*, 952 F.3d at 305-10 (Silberman, J., dissenting).

Those courts took the view that *BMS* "framed the specific jurisdiction analysis at the level of the suit," which the courts understood to mean for the claims of the plaintiffs named in the caption of the lawsuit. *Aiuto v. Publix Super Mkts., Inc.*, No. 1:19-CV-04803-LMM, 2020 WL 2039946, at *5 (N.D. Ga. Apr. 9, 2020) (internal quotation marks omitted). Those courts therefore only required the original named plaintiffs in an FLSA collective action to establish personal jurisdiction over the defendant. *See, e.g.*, *id.*

That is wrong. An FLSA collective action is not merely a lawsuit between the original named plaintiff and the defendant. *All* of the plaintiffs are on the same footing – as "party plaintiff[s]," 29 U.S.C. § 216(b) – once they opt into an FLSA collective action. *See Campbell*, 903 F.3d at 1105 (the "result" of joining an FLSA collective action is that the opt-in plaintiffs gain "the same status in relation to the claims of the lawsuit as that held by the original named plaintiffs"). That surely includes for purposes the constitutional defense of personal jurisdiction, because without personal jurisdiction, any purported judgment is necessarily "void" and nonbinding on the defendant. *Pennoyer*

v. Neff, 95 U.S. 714, 732 (1877); *see World-Wide Volkswagen*, 444 U.S. at 291.

The Supreme Court in *BMS* made clear that each plaintiff must establish personal jurisdiction over the defendant with respect to his or her particular claim. *See* 137 S. Ct. at 1781 (court must have personal jurisdiction for the "specific claims at issue"). The Court therefore separately assessed whether the state court had personal jurisdiction over the claims of the nonresident plaintiffs as opposed to the plaintiffs from California. *Id.* at 1781-82.

2. Some district courts have declined to follow *BMS* in FLSA collective actions because they believed it would be more efficient if only the original named plaintiffs had to establish personal jurisdiction over the defendant. *See, e.g.*, *Chavez*, 2020 WL 4505482, at *10. But the desire for efficiency cannot override constitutional rights. *See*, *e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010); *Ring v. Arizona*, 536 U.S. 584, 607 (2002). The Due Process Clause "is not intended to promote efficiency or accommodate all possible interests"; "it is intended to protect the particular interests of the person" whose rights are at stake. *Fuentes v. Shevin*, 407 U.S. 67, 90

n.22 (1972). The due-process limitations on personal jurisdiction, in particular, "protect the liberty of the nonresident defendant – not the convenience of plaintiffs." *Walden*, 571 U.S. at 284.

Moreover, that view fails to take into account defendants' countervailing interests in defending the claims against them on the merits. Expanding a collective action requires the defendant to evaluate and defend against additional claims and significantly raises the potential damages exposure. That reduces the likelihood that those claims will be adjudicated on the merits, no matter how dubious their merits. Defendants in collective actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). That settlement pressure is substantially greater in a nationwide collective action.

3. Some courts have refused to apply *BMS* under the belief that Congress enacted the FLSA "specifically to address employment practices *nationwide*." *Swamy v. Title Source, Inc.*, No. C 17-01175 WHA, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017) (emphasis added); *see, e.g.*, *Turner v. Concentrix Servs., Inc.*, No. 1:18-CV-1072, 2020 WL

544705, at *3 (W.D. Ark. Feb. 3, 2020); *Mason v. Lumber Liquidators, Inc.*, No. 17-CV-4780 (MKB), 2019 WL 2088609, at *6 (E.D.N.Y. May 13, 2019). The courts took the position that applying *BMS* "would splinter most nationwide collective actions," thereby "trespass[ing] on the expressed intent of Congress." *Swamy*, 2017 WL 5196780, at *2.

The FLSA sets nationwide labor standards, but does not say anything about nationwide collective actions to enforce those standards. *See* 29 U.S.C. § 216(b). Congress certainly did not provide that all plaintiffs may bring their FLSA claims in nationwide collective actions, without regard to other jurisdictional limitations. Congress did not provide a nationwide-service-of-process rule, which would displace Rule 4(k) and the incorporated Fourteenth Amendment limits on personal jurisdiction.[7] Nothing in the FLSA evidences an intent to permit nationwide collective actions at all costs. *See Freeman v. Quicken Loans, Inc.*,

[7] 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); *id.* § 2334(a) (Anti-Terrorism Act); 29 U.S.C. § 1132(e)(2) (ERISA). The Supreme Court has repeatedly declined to address, in cases where federal personal-jurisdiction rules apply, whether the Fifth Amendment imposes the same restrictions as the Fourteenth Amendment. *E.g.*, *BMS*, 137 S. Ct. at 1784.

566 U.S. 624, 637 (2012) ("No legislation pursues its purposes at all costs." (brackets and internal quotation marks omitted)).

Anyway, plaintiffs *can* file a nationwide FLSA collective action "in the States that have general jurisdiction over" the defendant. *BMS*, 137 S. Ct. at 1783; *see, e.g.*, *Pettenato v. Beacon Health Options, Inc.*, 425 F. Supp. 3d 264, 280 (S.D.N.Y. 2019) ("Applying [*BMS*] to FLSA collective actions will *not* prevent a nationwide FLSA collective of plaintiffs from joining together in a consolidated action in a state that has general jurisdiction over [the defendant]." (internal quotation marks omitted)). That outcome is sensible, because a defendant would expect to face suit in its home State by plaintiffs from any State for any type of claim. That is the essence of general personal jurisdiction. *See BNSF Ry.*, 137 S. Ct. at 1558-59. And as a practical matter, where employees across multiple States seek to sue their employer for a single common practice that allegedly violated the FLSA, it makes the most sense to hear those claims in the employer's home State, the likely location of the relevant witnesses and documents.

4. In the federal class-action context, the Seventh Circuit has held that only the named plaintiffs must establish personal jurisdiction

over the defendant. *See Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447-48 (7th Cir. 2010), *cert. denied*, No. 20-510, 2021 WL 78484 (U.S. Jan. 11, 2021). In contrast, when the D.C. Circuit faced the issue, the one judge who reached it disagreed with the Seventh Circuit's view. *Molock*, 952 F.3d at 305-10 (Silberman, J., dissenting).[8]

This Court need not decide any issue related to class actions, because "Rule 23 actions are fundamentally different from collective actions under the FLSA" in several key respects. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013). Importantly, in an FLSA collective action, all plaintiffs must affirmatively choose to "become parties to [the] collective action." *Id.* at 75; *see Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 224 (3d Cir. 2016) ("[T]he existence of a collective action depends upon the affirmative participation of [the] plaintiffs."). When they do, they "become . . . party plaintiff[s]," 29 U.S.C. § 216(b), and "have the same status in relation to the claims of the lawsuit as do the named plaintiffs," *Prickett v. DeKalb Cty.*, 349 F.3d 1294, 1297 (11th Cir. 2003).

---

[8] The D.C. Circuit majority determined that it should wait to decide the issue until the class-certification stage, rather than decide it at the motion-to-dismiss stage. *See Molock*, 952 F.3d at 298-99.

The Seventh Circuit's main reason for not applying *BMS* to class actions was that the absent class members "are not full parties to the case for many purposes." *Mussat*, 953 F.3d at 447. That reason is flawed because absent class members are undoubtedly full parties for the most important purpose of a class action, producing a binding, preclusive judgment. *Devlin v. Scardelletti*, 536 U.S. 1, 10-11 (2002). If absent class members are considered parties for protecting their own interests that are affected by a binding judgment, surely they should be considered parties for purposes of personal jurisdiction, a constitutional prerequisite to a binding judgment protecting a defendant's interests in not being haled into an unfair forum. But in any event, that reasoning plainly does not apply to collective actions under the FLSA, where the statute deems all plaintiffs who have opted in "party plaintiff[s]," 29 U.S.C. § 216(b), with the "same status" as the original named plaintiffs, *Prickett*, 349 F.3d at 1297.

The Seventh Circuit also refused to apply *BMS* because it reasoned that Federal Rule of Civil Procedure 23 somehow protects defendants' due-process rights. *See Mussat*, 953 F.3d at 447. That is incorrect. Rule 23 ensures that the class members' claims are sufficiently

similar for class adjudication; it does nothing to ensure that there is a sufficient relationship between the defendant, the forum, and the particular claim. *See Molock*, 952 F.3d at 307-08 (Silberman, J., dissenting). But it does not matter here, because Rule 23 does not govern FLSA collective actions. Instead, in an FLSA collective action, the original named plaintiff must show only that other employees are "similarly situated." 29 U.S.C. § 216(b). The FLSA does not include all of the procedural protections of Rule 23. *See, e.g.*, *Swales v. KLLM Transp. Servs., LLC*, No. 19-60847, 2021 WL 98229, at *6 (5th Cir. Jan. 12, 2021).

Analogies to class actions therefore provide no basis for excusing FLSA collective-action plaintiffs from complying with the due-process limitations set out in *BMS*.

II. Permitting A Court To Exercise Specific Personal Jurisdiction Over Plaintiffs' Claims With No Connection To The Forum Would Harm Businesses And The Judicial System

If only the original named plaintiffs in an FLSA collective action were required to establish specific personal jurisdiction, that would impose serious, unjustified burdens on the business community and the courts. These burdens provide an additional, compelling reason to affirm the decision below.

A. Requiring Only The Named Plaintiffs To Establish Specific Jurisdiction Would Encourage Abusive Forum Shopping

Not long ago, the plaintiffs' bar relied heavily on expansive theories of general jurisdiction to bring nationwide or multi-state suits in plaintiff-friendly "magnet jurisdictions." U.S. Chamber Inst. for Legal Reform, BMS *Battlegrounds: Practical Advice for Litigating Personal Jurisdiction After* Bristol-Myers 3-5 (June 2018), https://perma.cc/8QYZ-C48M.

The Supreme Court responded to that abuse by limiting general personal jurisdiction to the places the defendant corporation can fairly be considered "at home." *BNSF Ry.*, 137 S. Ct. at 1558. Even a "substantial, continuous, and systematic course of business" by the defendant in the forum State, the Court explained, is not enough to support general jurisdiction. *Daimler AG*, 571 U.S. at 138.

But if Canaday's approach were accepted, the plaintiffs' bar would be able to make an end-run around those limits on general personal jurisdiction in any FLSA collective action. A collective action could be filed anywhere that even a single individual with the requisite forum connection is willing to sign up as a named plaintiff, even though the

State has no "legitimate interest" in the vast majority of the plaintiffs' claims. *BMS*, 137 S. Ct. at 1780.

Permitting such a suit to be brought on a specific jurisdiction theory – especially when nearly all of the plaintiffs are nonresidents and have claims based on out-of-state conduct – would in effect "reintroduce general jurisdiction by another name" and on a massive scale. 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 expansive theories of general personal jurisdiction, the forum State's assertion of authority in those circumstances would be "unacceptably grasping." *Daimler AG*, 571 U.S. at 138-39.

And there is no logical stopping point. Out-of-state plaintiffs could outnumber the in-state named plaintiffs by 500:1, or even 5000:1, and still invoke specific jurisdiction. In *BMS*, the nonresident plaintiffs outnumbered the California plaintiffs 592 to 86. 137 S. Ct. at 1778. In the FLSA collective-action context, the ratio of out-of-state plaintiffs to in-state plaintiffs often is the same or larger.

This case illustrates the point: Here, of the 2,575 medical management nurses Anthem employed, fewer than 100 worked in Tennessee – an even more lopsided proportion than in *BMS*. R.68, PageID.621-622. And that ratio is not unusual in FLSA collective-action cases. For example, in *Waters v. Day & Zimmermann NPS, Inc.*, No. 19-11585-NMG, 2020 WL 4754984 (D. Mass. Aug. 14, 2020), *appeal docketed*, No. 20-1997 (1st Cir. Oct. 28, 2020), only 3 of the 112 plaintiffs (3 percent) worked in the forum State. *Id.* at *2. Similarly, in *Maclin v. Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845 (N.D. Ohio 2018), only 14 of the 438 employees (3 percent) worked in the forum State. *Id.* at 847.

This abusive forum shopping violates basic principles of federalism. Courts in the forum State can decide claims over which they have little legitimate interest, including claims based on conduct that occurred exclusively in other States. That substantially infringes on the authority of those other States to control conduct within their borders. As the Supreme Court has recognized, 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.

In sum, permitting nationwide collective actions to proceed even though most of the plaintiffs' claims lack the requisite connection to the forum would create a new way for plaintiffs' lawyers to forum shop, allowing them to file a limitless number of claims in a desired forum so long as one named plaintiff can establish specific personal jurisdiction over the defendant.

B. Requiring Only The Named Plaintiffs To Establish Specific Jurisdiction Would Make It Exceedingly Difficult For Businesses To Predict Where They Could Be Sued

Relatedly, Canaday's proposed approach would make it nearly impossible for corporate defendants to predict where plaintiffs could bring high-stakes, multi-state FLSA collective actions based on a theory of specific personal jurisdiction. That in turn would inflict significant economic harm.

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 J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion). That

"[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

Under existing standards for specific personal jurisdiction, a company "knows that . . . its potential for suit [in a 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). But if a court need not have specific jurisdiction over the claims of all plaintiffs, a company could be forced into a State's court to answer for claims entirely unrelated to that State.

Businesses that employ individuals in several States across the country would have no way of avoiding nationwide collective actions in any of those States. And they could be forced to litigate a massive number 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. 292. That result would eviscerate the predictability and fairness guaranteed by the Due Process Clause.

The harmful consequences of this unpredictability would not be limited to businesses. The costs of litigation surely would increase if

businesses were forced to litigate high-stakes collective actions in unexpected forums. And some of that cost increase would invariably be borne by consumers in the form of higher prices.

Fortunately, there is an easy way to avoid these harmful consequences. The Supreme Court set out the governing rule in *BMS*. This Court should follow that guidance and hold that, in an FLSA collective action, the court may adjudicate only those claims that could have been brought in the forum as individual actions.

CONCLUSION

The Court should affirm the decision of the district court.

Dated: February 8, 2021

Respectfully submitted,

/s/ *Nicole A. Saharsky*

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

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

Deborah R. White
RETAIL LITIGATION CENTER, INC.
99 M Street, S.E., Suite 700
Washington, D.C. 20003
(202) 869-0200

Counsel for the Retail Litigation Center, Inc.

Nicole A. Saharsky
Daniel E. Jones
Minh Nguyen-Dang
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
nsaharsky@mayerbrown.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 6,481 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: February 8, 2021

/s/ *Nicole A. Saharsky*
Nicole A. Saharsky

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on February 8, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Nicole A. Saharsky*
Nicole A. Saharsky