No. 21-1192

In the Supreme Court of the United States

DAY & ZIMMERMANN NPS, INC.,
Petitioner,

v.

JOHN WATERS,
Individually and on Behalf of All
Others Similarly Situated,
Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (Chamber) 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. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Business Roundtable is an association of chief executive officers of over 225 leading U.S. companies that together have more than $9 trillion in annual revenues and more than 20 million employees. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy. Business Roundtable participates in litigation as *amicus curiae* where important business interests are at stake, such as this case.[1]

Many of *amici*'s members conduct business in States other than the State in which they are incorporated or have their principal place of business, where they are subject to general personal jurisdiction. And many of *amici*'s members have been sued in multi-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of *amici*'s intention to file this brief more than 10 days before the due date and all parties consented to its filing.

plaintiff cases in States where they are not subject to general personal jurisdiction – including in collective actions under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq*.

Amici's members have a strong interest in ensuring that defendants only are subject to specific personal jurisdiction in forums that have a significant connection to the lawsuit. Otherwise, those companies will be forced to defend against claims in States where the companies could not reasonably have expected to be sued. The decision below, if uncorrected, would allow plaintiffs to bring a nationwide collective action in federal court even if only one plaintiff has the requisite connection to the forum State. 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 concerns the due-process limits on specific personal jurisdiction in collective actions under the FLSA. That issue is immensely important to businesses. Every business engaged in interstate commerce is covered by the FLSA. And the number of FLSA collective actions has increased dramatically in the past two decades. In fact, FLSA collective actions are the most common type of employment-related, multi-plaintiff lawsuit that businesses face.

The First Circuit's decision greatly expands specific personal jurisdiction in FLSA collective actions. This Court has recognized that the Fourteenth Amendment places strict limits on the exercise of personal jurisdiction by States to ensure fair notice to defendants about where they may be sued. In particular, in *Bristol-Myers Squibb Co.* v. *Superior Court*, 137

S. Ct. 1773 (2017) (*BMS*), the Court made clear that every plaintiff in a mass action must show a sufficient connection between his or her claim and a forum State. The Court accordingly rejected the idea that one plaintiff could establish personal jurisdiction in the forum State, and then add many more plaintiffs who cannot establish the necessary connection to the forum State.

Yet the First Circuit's decision permits exactly that. It provides a roadmap for plaintiffs to make an end-run around *BMS* and this Court's due-process teachings, even though there is no indication that this Court or Congress intended that outcome. Through an imaginative reading of Federal Rule of Civil Procedure 4(k)(1), the First Circuit held that *only* the original named plaintiff in an FLSA collective action must establish a sufficient connection between his or her claim and the forum State. As a result, any district court can hear a nationwide collective action against any employer, so long as *one* plaintiff could show the necessary connection to the forum State. Worse, because the First Circuit's holding is premised on Rule 4(k)(1), it is not limited to FLSA collective actions, but applies to *any* multi-plaintiff case in federal court.

The First Circuit's decision is wrong. Rule 4(k)(1) provides that a district court can exercise personal jurisdiction over a defendant who would be amenable to jurisdiction in a state court in the same district. That rule has long been understood to incorporate the Fourteenth Amendment's due-process limitations on personal jurisdiction in federal court. But the First Circuit believed that the rule applies only to the initial service, so claims added after the original complaint would not be governed by Rule 4(k)(1)'s limits on personal jurisdiction. That is incorrect. The rule's limits

on personal jurisdiction do not disappear after the initial service, but apply to every claim in the case no matter when it is added. Not surprisingly, the First Circuit's decision creates multiple circuit splits: It conflicts with decisions of the Sixth and Eighth Circuits holding that Rule 4(k)(1) requires every plaintiff who opts into an FLSA collective action to establish a sufficient connection between his or her claim and the forum State, and it conflicts with decisions from other courts of appeals that applied Rule 4(k)(1) to claims added after the original complaint in non-FLSA cases.

If left uncorrected, the First Circuit's rule would impose enormous costs on courts, businesses, and consumers. Businesses would not be able to predict where they could be sued. They would find themselves defending high-stakes, multi-plaintiff claims in inconvenient jurisdictions picked specifically because they are plaintiff-friendly. That would drive up the costs of litigation, which would undoubtedly be passed on to consumers and employees. And that gamesmanship would place additional burdens on the district courts and threaten the public's confidence in the integrity of the judicial system. This Court's review is urgently needed.

ARGUMENT

A. The Petition Presents A Question Of Enormous Importance For Courts And Businesses

This case concerns the requirements for specific personal jurisdiction in FLSA collective actions. That question is critically important to businesses, because the FLSA applies to the vast majority of employers in the United States, and the number of FLSA collective actions is large and growing.

The FLSA has a massive reach. It covers all employees of every business in the United States with $500,000 or more in annual sales, as well as of all hospitals, schools, universities, and public agencies. 29 U.S.C. 203(s)(2). It also covers all employees engaged in interstate commerce. *E.g.*, 29 U.S.C. 206(a). In all, the Department of Labor estimates that the FLSA covers over 143 million American workers in over 9.8 million workplaces. Dep't of Lab., Wage & Hour Div., *FY 2021 Congressional Budget Justification* 10 (2021), perma.cc/S8G6-CRBS. That is about 90% of the total U.S. workforce. See Dep't of Lab., Bureau of Lab. Stats., *Employment Status of the Civilian Population by Age and Sex* (Mar. 4, 2022), perma.cc/L6WC-AFLA.

The Act permits employees to sue for alleged violations on an individual or collective basis, and "virtually all" FLSA cases are brought as collective actions. Gerald L. Maatman, Jr. et al., *18th Annual Workplace Class Action Litigation Report* 25 (2022), perma.cc/UN7X-HF7Y (Maatman, *Annual Report*). In a collective action, plaintiffs who are "similarly situated" to the original named plaintiff can opt into the action. See 29 U.S.C. 216(b). Notably, the opt-in plaintiffs become "party plaintiff[s]," *ibid.*, with the same rights to participate as the original named plaintiff, see *Campbell* v. *City of Los Angeles*, 903 F.3d 1090, 1104-05 (9th Cir. 2018); *Prickett* v. *DeKalb Cnty.*, 349 F.3d 1294, 1297 (11th Cir. 2003).

The number of FLSA collective actions is significant and growing. In 2021, plaintiffs filed 5,200 FLSA lawsuits in federal court, Maatman, *Annual Report* 25 – nearly three times more than in 2000, William B. Gould IV, *A Primer on American Labor Law* 33 (2013). That number is expected to grow, driven by increased focus on employee classification and new rulemaking from the Department of Labor that expands eligibility

for minimum wage and overtime compensation. Maatman, *Annual Report* 26; see Carlton Fields, *2022 Class Action Survey* 11 (2022), perma.cc/6F3L-Q3KC (reporting that companies expect wage-and-hour claims to "top the next wave of claims").

Employers face more FLSA collective actions than any other type of employment-related multi-plaintiff lawsuit. In 2021, plaintiffs filed 19% more FLSA collective actions than ERISA class-action lawsuits. See Maatman, *Annual Report* 25. While plaintiffs filed more employment-discrimination lawsuits than FLSA collective actions, most of the employment-discrimination cases were brought on an individual basis. See *id.* at 9, 25. FLSA collective actions thus "represent the most significant exposure to employers in terms of any workplace laws." *Id.* at 26.

The potential financial exposure for businesses is enormous. One study found that the ten largest FLSA settlements in 2021 totaled $640 million, more than double the ten largest settlements in the previous year. Maatman, *Annual Report* 5-6. Another study reported that employers spent $5.3 billion between 2009 and 2019 to settle FLSA and related state-law claims. Stephanie Plancich & Janeen McIntosh, *Trends in Wage and Hour Settlements: 2019 Update* 1 (June 4, 2020), perma.cc/7DK7-MXJJ. Both the average number of plaintiffs per case and the average settlement size per plaintiff have increased over the past decade, and both are expected to keep increasing. *Id.* at 9-10.

In sum, FLSA collective actions are a significant and growing form of multi-plaintiff litigation. Questions involving the scope of those actions and where they can be brought thus are of enormous importance to businesses.

B. The First Circuit's Decision Dramatically Expands Personal Jurisdiction In FLSA Cases And In Mass Actions Generally

1. In recent years, this Court has reined in abusive forum shopping by bringing rigor to both general and specific personal jurisdiction. The Court has held that a corporate defendant is subject to general jurisdiction only in the State or States in which it is "fairly regarded as at home," generally the corporation's State of incorporation and the State where it has its principal place of business. *Daimler AG* v. *Bauman*, 571 U.S. 117, 137 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 924 (2011)); see *BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1558-59 (2017). And the Court also has clarified the due-process limits on courts' exercise of specific personal jurisdiction.

In particular, in *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773 (2017) (*BMS*), the Court established that every plaintiff in a mass action must establish specific jurisdiction over the defendant. *Id.* at 1781. In that case, 86 California residents and 592 plaintiffs from other States sued Bristol-Myers Squibb in California, alleging injuries from taking the drug Plavix. *Id.* 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. *Id*. at 1778-79.

This Court reversed, finding no "adequate link between the State and the nonresidents' claims." *BMS*, 137 S. Ct. at 1781. The Court held that under the Fourteenth Amendment's Due Process Clause, a de-

fendant 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. *Ibid.* That is true even when the claims raised by the resident and nonresident plaintiffs are similar. *Ibid.* The Court has explained that this rule provides defendants with "fair warning" of where it is likely to be sued. *Ford Motor Co.* v. *Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021) (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985)). And the rule promotes important principles of federalism, by "ensur[ing] that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy." *Ibid.* (quoting *BMS*, 137 S. Ct. at 1780).

2. In the decision below, the First Circuit held that, to satisfy the due-process limits on specific personal jurisdiction, only the original named plaintiff in an FLSA collective action must establish a sufficient connection between his or her claims and the forum. See Pet. App. 20. Then, according to the First Circuit, the district court may exercise personal jurisdiction over the claims of any opt-in plaintiffs as long as those plaintiffs can establish a sufficient connection between their claims and the United States as a whole. See *id.* at 30-31.

The First Circuit premised its decision on Federal Rule of Civil Procedure 4(k)(1). That rule states that "[s]erving a summons * * * establishes personal jurisdiction over a defendant [] who is subject to the jurisdiction" of a state court in the same district (unless Congress provided otherwise for a specific claim or party). Fed. R. Civ. P. 4(k)(1). The rule has long been understood to incorporate the limitations imposed by

state long-arm statutes and the Fourteenth Amendment's Due Process Clause on the personal jurisdiction analysis in federal court. See, *e.g.*, *Walden* v. *Fiore*, 571 U.S. 277, 283 (2014). That is, it has been understood that a federal district court can exercise specific jurisdiction over a plaintiff's claim against a particular defendant only if permitted under state law and the claim has a sufficient connection to the forum State. *Ibid.*

The First Circuit took a different view of Rule 4(k)(1). It determined that the rule (and therefore the Fourteenth Amendment) applies only to the initial service of the complaint, and not to any claims or plaintiffs added afterwards. Pet. App. 18-20. It held that any additional plaintiff's claim is governed by the Fifth Amendment's Due Process Clause, which the court determined requires only a sufficient connection with the United States as a whole – a connection that will be present in every FLSA claim arising out of employment in the United States. See *id.* at 30-31.[2] As a result, the named plaintiff in an FLSA collective action can file suit anywhere he or she can establish personal jurisdiction over a defendant, and then add as many out-of-state plaintiffs as he or she desires, even

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[2] This Court has consistently declined to decide whether the personal-jurisdiction analysis differs under the Fifth Amendment as opposed to the Fourteenth Amendment. See, *e.g.*, *BMS*, 137 S. Ct. at 1784. The First Circuit has held the analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment, except that the Fifth Amendment analysis considers the defendant's contacts with the United States as a whole, rather than with the forum State. See Pet. App. 15-16 (citing *United Elec., Radio & Mach. Workers of Am.* v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992)).

though none of those additional plaintiffs could establish personal jurisdiction over the defendant in that forum.

That rule provides an end-run around *BMS*'s due-process limitations on specific personal jurisdiction. *BMS*'s concerns about fairness and federalism apply "with equal force to FLSA * * * actions that involve nonresident claims against non-forum defendants." *White* v. *Steak N Shake Inc.*, No. 20-cv-323, 2020 WL 1703938, at *4 (E.D. Mo. Apr. 8, 2020). Just as Bristol-Myers Squibb could not reasonably have expected that it would need to defend against the claims of non-California plaintiffs for Plavix taken outside of California in that State, see *BMS*, 137 S. Ct. at 1780, a business that has a few employees in one State could not reasonably expect to defend against the FLSA claims of *all* of its employees in that State. And just as allowing a California court to adjudicate the tort claims of non-California plaintiffs would have deprived the courts (and juries) of the plaintiffs' home States the opportunity to adjudicate those claims, see *ibid.*, allowing a district court in one State to decide the FLSA clams of out-of-state plaintiffs would deprive the courts (and juries) of the plaintiffs' home States the opportunity to adjudicate those claims.

Worse, the First Circuit's rule is not limited to FLSA collective actions. By its terms, Rule 4(k)(1) applies to all cases in federal court, including both federal-question cases and diversity cases. See Fed. R. Civ. P. 4(k)(1)(A). Thus, as Judge Barron explained in his dissent, the First Circuit's rule allows a plaintiff to bring *any* type of multi-plaintiff action in federal court as long as the first plaintiff can establish specific personal jurisdiction over the defendant in the forum. Pet. App. 41-42 & n.16.

The effect is to dramatically expand specific personal jurisdiction in multi-plaintiff actions. District courts in the First Circuit now can exercise personal jurisdiction over a defendant as to virtually any claim asserted by anyone across the country. Plaintiffs' lawyers would need to find just one plaintiff with one claim in the target forum State, serve the defendant with that initial complaint, and then amend the complaint to add as many other plaintiffs and claims as they wanted. See Pet. App. 30-31.

C. The First Circuit's Decision Is Wrong And Creates Circuit Splits

1. As envisioned by the Federal Rules, the Fourteenth Amendment governs personal jurisdiction over all claims in an FLSA collective action, and the First Circuit's contrary conclusion is wrong. The First Circuit took the view that Rule 4(k) applies only to the initial service of process. But by its terms, Rule 4(k) applies to all claims in an FLSA collective action, including those of opt-in plaintiffs. Thus, every plaintiff must establish that his or her claim against the defendant satisfies the Fourteenth Amendment's requirements for specific personal jurisdiction.

Congress set out the basic framework for a federal court's exercise of personal jurisdiction in Rule 4(k). Rule 4(k) provides that "[s]erving a summons" (or filing a waiver of service) "establishes personal jurisdiction over a defendant" in one of three situations: (1) the defendant is "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"; (2) the defendant is "joined under Rule 14 [which governs impleader] or 19 [which governs joinder] and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued"; or (3) the exercise of

personal jurisdiction is "authorized by a federal statute." Fed. R. Civ. P. 4(k)(1); see Pet. 21.

By its terms, Rule 4(k) addresses both *how* a federal district court can establish personal jurisdiction (through service or waiver of service), and *who* the district court can establish personal jurisdiction over (defendants who meet one of the three situations set out in the rule). See *Omni Cap. Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 103 n.6 (1987); *SEC* v. *Ross*, 504 F.3d 1130, 1138-39 (9th Cir. 2007). Here, the question is who is subject to personal jurisdiction in the forum State. And only option (1) is at issue, because there has been no impleader or joinder, and Congress has not provided rules for personal jurisdiction in the statute providing the cause of action.

Accordingly, respondent here can establish personal jurisdiction over petitioner only if petitioner 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), which is true only if the assertion of personal jurisdiction would comply with the Fourteenth Amendment's Due Process Clause. As this Court has explained, the Fourteenth Amendment is satisfied if the lawsuit is brought in a State where the defendant is at home, see *Daimler*, 571 U.S. at 137, or in a State where the lawsuit "arise[s] out of or relate[s] to" the cause of action, see *Ford Motor Co.*, 141 S. Ct. at 1026 (internal quotation marks omitted). Here, the lawsuit was brought in Massachusetts, which is not petitioner's place of incorporation or principal place of business. See Pet. App. 51. And it is undisputed that only the original named plaintiff and 3 of the 112 opt-in plaintiffs have the necessary connection to Massachusetts. *Id.* at 54.

The First Circuit's view is that the Fourteenth Amendment applies only once, to the initial plaintiff's

claim at the time of initial service, and not when opt-in plaintiffs file notice that they are joining the action. But Rule 4(k) has no temporal limit. It does not say that, to be amenable to suit, the defendant must meet the rule's requirements only once, at the initial service, and then those requirements disappear for the rest of the case. See *Molock* v. *Whole Foods Mkt. Grp.*, 952 F.3d 293, 309 (D.C. Cir. 2020) (Silberman, J., dissenting). Instead, it says that the defendant must be "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). By expressly linking "personal jurisdiction over the defendant" to amenability to suit in the forum State, the rule makes clear the Fourteenth Amendment's personal-jurisdiction rules apply to every claim brought by every plaintiff in the case. See Pet. 26-28.

The First Circuit placed dispositive weight on the fact that Rule 4 addresses service of process and that Rule 4(k) is titled "territorial limits of effective service." See Pet. App. 18-19. But this Court has repeatedly explained that Congress typically regulates federal courts' exercise of personal jurisdiction by linking personal jurisdiction to service of process. See, *e.g.*, *BNSF Ry.*, 137 S. Ct. at 1555-56; *Walden*, 571 U.S. 283. Congress does so because, "absent consent, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction." *BNSF Ry.*, 137 S. Ct. at 1556. That does not mean that service *alone* is sufficient for a court to exercise personal jurisdiction for the rest of the case. Instead, one of the three conditions in Rule 4(k) must be met, and those conditions apply to every plaintiff in the lawsuit.

2. The First Circuit's decision creates two clear circuit splits.

a. The decision directly conflicts with the Sixth Circuit's decision in *Canaday* v. *Anthem Companies*, 9 F.4th 392 (6th Cir. 2021), and the Eighth Circuit's decision in *Vallone* v. *CJS Solutions Group, LLC*, 9 F.4th 861 (8th Cir. 2021). Both courts of appeals held that Rule 4(k) incorporates the Fourteenth Amendment's due-process limits with respect to every claim in an FLSA collective action. See *Canaday*, 9 F.4th at 398-400; *Vallone*, 9 F.4th at 865. Those courts then applied the Fourteenth Amendment's limitations on specific personal jurisdiction, including this Court's teaching in *BMS*. *Canaday*, 9 F.4th at 400; *Vallone*, 9 F.4th at 865. They therefore held that every opt-in plaintiff in an FLSA collective action must establish the requisite connection between his or her claim and the forum State (unless the defendant is subject to general jurisdiction in the forum). *Canaday*, 9 F.4th at 400; *Vallone*, 9 F.4th at 865; see Pet. 18-20.

In the decision below, the First Circuit expressly disagreed with *Canaday*'s and *Vallone*'s approach to Rule 4(k). Pet. App. 28. It held instead that Rule 4(k)'s limits on personal jurisdiction applied only to the initial complaint, and not to the additional claims of opt-in plaintiffs. See *id.* at 18-20. For that reason, it declined to apply this Court's teaching in *BMS*. *Id.* at 15-17. Accordingly, courts in the First Circuit now can hear the claims of any opt-in plaintiff in an FLSA collective action, regardless of where the plaintiff, defendant, or claim is based, so long as the original plaintiff's claim has the necessary connection to the forum State.

The circuit split leads to dramatic differences in the potential scope of an FLSA collective action. 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 even larger. In this case, for instance, petitioner must defend against the claims of 113 employees in Massachusetts, when only *four* of those employees worked in that State (including the original named plaintiff). Pet. App. 54. The ratio in other FLSA collective actions is similar. See, *e.g.*, *Canaday* v. *Anthem Cos.*, 439 F. Supp. 3d 1042, 1044 (W.D. Tenn. 2020) (plaintiff sought a nationwide FLSA collective action of up to 2,575 employees when fewer than 100 worked in the forum State); *Maclin* v. *Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845, 847 (N.D. Ohio 2018) (plaintiff sought a nationwide FLSA collective action of 438 employees when only 14 worked in the forum State). All of those cases could be brought as nationwide collective actions in the First Circuit, but not in the Sixth or Eighth Circuits.

b. The decision below also creates a circuit split about the meaning of Rule 4(k) more generally. See Pet. 32-34; see also Pet. App. 41-42 (Barron, J., dissenting). It has long been understood that Rule 4(k)(1) incorporates the Fourteenth Amendment's due-process limitations on personal jurisdiction for all plaintiffs' claims. See Pet. App. 39-40 (Barron, J., dissenting) (citing cases). But the First Circuit acknowledged that under its novel interpretation of Rule 4(k)(1), the Fourteenth Amendment's due-process limits do not apply to *any* claim added after the initial complaint in any case – such as claims added in an amended complaint. See *id.* at 30-31.

That approach conflicts with decisions from other courts of appeals. With respect to amended complaints, for example, many circuits have evaluated personal jurisdiction for all claims using Fourteenth Amendment personal-jurisdiction principles. See,

e.g., *Old Repub. Ins.* v. *Continental Motors, Inc.*, 877 F.3d 895, 902-03 (10th Cir. 2017); *Brook* v. *McCormley*, 873 F.3d 549, 551-52 (7th Cir. 2017); *Pennington Seed, Inc.* v. *Produce Exch. No. 299*, 457 F.3d 1334, 1343-44 (Fed. Cir. 2006); *Consolidated Dev. Corp.* v. *Sherritt, Inc.*, 216 F.3d 1286, 1291 (11th Cir. 2000); see also *Delta Brands Inc.* v. *Danieli Corp.*, 99 F. App'x 1, 3-4 (5th Cir. 2004). Unlike the decision below, those decisions did not treat claims in amended complaints any differently from claims in the initial complaint for personal-jurisdiction purposes.

The First Circuit attempted to reconcile its rule with those cases by suggesting that the Fourteenth Amendment's personal-jurisdiction principles apply to *state-law* claims added after the original complaint, but not to federal claims. Pet. App. 29 & n.11. But Rule 4(k) does not distinguish between federal and state-law claims, and neither did the other courts of appeals. On the contrary, the courts also evaluated federal claims added after the initial complaint under the Fourteenth Amendment's due-process principles. See, *e.g.*, *Marcinkowska* v. *IMG Worldwide, Inc.*, 342 F. App'x 632, 634-35 (Fed. Cir. 2009) (evaluating Lanham Act claim raised in amended complaint under the Fourteenth Amendment). The decision below is irreconcilable with those decisions from other circuits.

D. The First Circuit's Rule, If Left Uncorrected, Would Encourage Abusive Forum Shopping

1. Like other multi-plaintiff cases, FLSA collective actions can pose significant fairness problems for defendants. In particular, plaintiffs' lawyers have used expansive theories of personal jurisdiction to bring cases in plaintiff-friendly "magnet jurisdictions" known to produce massive and unjustified damages awards. See U.S. Chamber Inst. for Legal Reform,

BMS *Battlegrounds: Practical Advice for Litigating Personal Jurisdiction After* Bristol-Myers 3-5 (June 2018), perma.cc/8QYZ-C48M. This Court sought to end those abuses, by limiting general jurisdiction to a defendant's home State(s), see *Daimler*, 571 U.S. at 137, and requiring plaintiffs in a mass action to establish specific jurisdiction as to each claim, see *BMS*, 137 S. Ct. at 1780.

Now, the First Circuit's rule creates an end-run around these limits. Under the First Circuit's rule, plaintiffs' lawyers would need to find just *one* plaintiff with an FLSA claim in the target forum State, and they then would be free to add as many out-of-state plaintiffs as they could find. For the many businesses that operate in multiple States, it would not be difficult to find that first plaintiff.

In effect, the First Circuit's rule "reintroduce[s] general jurisdiction by another name." 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). It thus reopens the door to forum shopping and all its abuses, on a massive scale. Plaintiffs' lawyers can now choose among the district courts of Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island to bring any claim they would prefer not to litigate in a corporate defendant's home State or in the State that gave rise to the claim. And if other circuits were to adopt the First Circuit's rule, the menu of options would only grow.

2. That sort of forum shopping would impose enormous costs on businesses. The limits on personal jurisdiction protect defendants from "forum-shopping" by plaintiffs who "su[e] in [a jurisdiction] because it was thought plaintiff-friendly." *Ford Motor Co.*, 141

S. Ct. at 1031. The rules are supposed to create predictability for defendants, particularly corporate defendants, so that they can "'structure [their] primary conduct' to lessen or avoid exposure to a given State's courts." *Id.* at 1025 (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980)). That "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010).

The decision below eviscerates predictability for corporate defendants. Businesses that operate in several States across the country would have no way of knowing where they would be sued for any given claim (other than where they are at home), and no way of avoiding nationwide lawsuits in any of those States. Here, for example, petitioner is incorporated in Delaware and has its principal place of business in Pennsylvania, so it had no reason to expect that it would be required to litigate the claims of at least 109 non-Massachusetts plaintiffs in federal court in Boston. See Pet. 51, 54. And short of ceasing to do business entirely in Massachusetts, there is nothing it can do to "lessen or avoid exposure" to that court. *Ford Motor Co.*, 141 S. Ct. at 1025.

The costs of litigation surely would increase if businesses were forced to litigate high-stakes multi-plaintiff cases in unexpected forums. If nothing else, defendants likely would have to bear the added burden of litigating claims in jurisdictions far from the relevant witnesses, documents, and other evidence. See *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947). Further, aggregating large, nationwide actions in plaintiff-friendly jurisdictions will inevitably increase the pressure on defendants to settle those cases, even when they are unmeritorious. See *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011); *In re*

Dow Corning Corp., 419 F.3d 543, 547 (5th Cir. 2005); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. Rev. 333, 340 (2006).

The harmful consequences of this unpredictability would not be limited to businesses. Some of those costs would invariably be borne by consumers in the form of higher prices, and by employees in the form of lower wages.

3. The judicial system also would suffer under the First Circuit's rule. The increased pressure to settle high-stakes, multi-plaintiff cases means that fewer cases will be litigated on the merits. See, *e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 250 (D.C. Cir. 2013). That increases the likelihood that novel and unsettled legal issues will go unresolved, harming the interest of courts and the public in clarity in the law. See, *e.g.*, *In re George*, 322 F.3d 586, 591 (9th Cir. 2003) (recognizing the "public policy favoring disposition of cases on their merits").

Further, as this Court, Congress, and others have long recognized, forum shopping saps public confidence in the integrity of the judiciary. See, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206, 222-23 (1960) (holding that the "imperative of judicial integrity" justified prohibiting prosecutors from bringing charges in federal court to use evidence that would be inadmissible in state court); S. Rep. No. 97-275, at 5, 20 (1981) (finding that the "serious problem of forum shopping among the regional courts of appeals" "demean[ed] the entire judicial process"); Richard K. Greenstein, *The Three Faces of ORPP: Value Clashes in the Law*, 54 La. L. Rev. 95, 113-14 (1993) (recognizing that forum shopping "threaten[s]" "the integrity of [the] court system"). The decision below would exacerbate that concern.

And as a practical matter, the district courts in the First Circuit must now disproportionately shoulder the burden of adjudicating massive, nationwide FLSA collective actions and other mass actions. Those courts alone now face the prospect of adjudicating nationwide lawsuits against not just the corporations at home in the circuit, but potentially any corporation that does any business or employs a single individual in the circuit.

Conversely, there is no benefit to adopting the First Circuit's rule. It is not required to advance the rights of employees, for whom Congress enacted the FLSA. They still can bring state-specific collective actions in their own States, and nationwide collective actions anywhere the defendant is subject to general personal jurisdiction. See *BMS*, 137 S. Ct. at 1783 ("Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS.").

That outcome is fair and sensible. If the defendant's allegedly unlawful policy or practice were specific to one State, then it would make sense to bring a collective action in the State where the employees are located. On the other hand, if the allegedly unlawful policy were nationwide, it often would be most efficient to litigate the case in the defendant's home State, where the executives who set nationwide policies usually are based. And nothing would prevent a defendant from reevaluating a nationwide policy after an adverse decision with respect to that policy in one State. There thus is no need to force the defendant to litigate that case in a distant forum, away from both the vast majority of plaintiffs and the defendant's headquarters. The only group that would benefit from that outcome is plaintiffs' lawyers.

Thus, the decision below, if uncorrected, would have far-reaching effects and impose serious costs on the courts, businesses, and consumers. For this and the other reasons explained above, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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