Case 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,

Plaintiffs – Appellants,

v.

THE ANTHEM COMPANIES, INC.,

Defendant – Appellee.

On Appeal from the United States District Court
for the Western District of Tennessee (Case No. 1:19-cv-01084)
The Honorable S. Thomas Anderson

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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 Companies

Name of counsel: Adam W. Hansen

Pursuant to 6th Cir. R. 26.1, Laura Canaday
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 November 17, 2020 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/ Adam W. Hansen

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.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. This interlocutory appeal presents an important and recurring issue that has divided district courts in the Sixth Circuit and across the country: whether principles of personal jurisdiction prohibit a federal court from maintaining a collective action under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*., that includes opt-in plaintiff-employees who worked for the defendant-employer outside the state where the federal court is located. Resolution of that question requires careful analysis of the Fair Labor Standards Act, the Federal Rules of Civil Procedure, and due-process principles drawn from the Fifth and Fourteenth Amendments. Oral argument is essential to ensure the correct application of these legal principles.

STATEMENT OF JURISDICTION

The district court had federal-question jurisdiction over this action under 28 U.S.C. § 1331 because this case arose under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. Complaint, R.1, PageID.1.

This Court has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(b). The district court certified its order for interlocutory review on June 8, 2020. Order Certifying Interlocutory Appeal, R.91, PageID.710–11. Appellants filed a petition for permission to appeal on June 18, 2020. Petition for Permission to Appeal, *In re: Laura Canaday*, No. 20-504, R.1, Page.1. This Court granted the petition on August 19, 2020. Order Granting Petition for Permission to Appeal, *Id.*, R.6-2, Page.1.

STATEMENT OF THE ISSUES

Whether principles of personal jurisdiction prohibit a federal court from maintaining an FLSA collective action that includes opt-in plaintiff-employees who worked for the defendant-employer outside the state where the federal court is located.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This interlocutory appeal presents one of the most urgent questions arising today under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*.: Do principles of personal jurisdiction prohibit a federal court from maintaining an FLSA collective action that includes opt-in plaintiff-

employees who worked for the defendant-employer outside the state where the federal court is located? The answer, in short, is no. Nothing in the FLSA, the Constitution, or the Federal Rules of Civil Procedure imposes any such restriction. On the contrary, a careful examination of these sources strongly reinforces the opposite conclusion: where, as here, a *uniform employment policy* is challenged in *federal court* under a *federal statute* that *explicitly contemplates representative actions covering similarly situated employees*, the claims can—and should—proceed in a single, unified proceeding.

The FLSA permits employees to sue for unpaid minimum wages and overtime compensation on "behalf of…themselves and other employees similarly situated." 29 U.S.C. § 216(b). In these collective actions, similarly situated employees must file their "consent in writing" to be included in the action and bound by the judgment. *Id.*

For 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. *See, e.g.*, *Monroe v. FTS USA, LLC*, 860 F.3d 389, 398 (6th Cir. 2017). By their very nature, FLSA collective actions challenge common employment practices under a uniform federal law. *Id.* And for the better part of eight decades, parties and courts alike

understood the geographic scope of any given collective action to be limited only by the breadth of the challenged employment practice itself. *Id.* This makes perfect sense: the FLSA's collective-action mechanism was enacted to promote Congress' policy of ensuring uniform wage standards by encouraging "efficient resolution in *one proceeding*." *Id.* at 405 (quoting *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (emphasis added)).

Just three years ago, however, employers began asserting a novel and far-reaching constitutional limitation on FLSA collective actions. In virtually every putative multi-state FLSA collective action—including this one—employers now argue that the Constitution prohibits federal courts from exercising specific personal jurisdiction over employers with respect to the claims of any would-be opt-in plaintiffs who worked outside the state where the federal court is located. The consequences of this claimed limitation are extraordinary. Employers' position, if accepted, "would splinter most nationwide collective actions, trespass on the expressed intent of Congress, and greatly diminish the efficacy of FLSA collective actions as a means to vindicate employees' rights." *Swamy v. Title Source, Inc.*, No. C 17-01175 WHA, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017).

This case serves as a prime example. Appellant Laura Canaday filed this suit in federal court in Tennessee alleging that her employer,

Appellee The Anthem Companies, uniformly misclassified employees in her position—located all across the United States—as exempt from the FLSA's overtime rule. Complaint, R.1, PageID.4. But the district court ruled that *only employees who—like Canaday—worked for Anthem in Tennessee* are eligible to join this case. Order on Motion to Dismiss and Conditional Certification, R.68, PageID.625–31. All other similarly situated employees, the district court concluded, must sue elsewhere. *Id.*

The impetus for employers' newly proposed constitutional limitation is the Supreme Court's 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). *Bristol-Myers* held that the California state courts lacked specific personal jurisdiction over a defendant with respect to state-law personal-injury claims of nonresident plaintiffs that arose entirely outside of California. *Id.* at 1782. *Bristol-Myers* broke no new constitutional ground. By its own terms, it applied "settled principles regarding specific [personal] jurisdiction." *Id.* at 1781. But seizing on the superficial parallels between the proposed *state-court, state-law, mass-tort* action in *Bristol-Myers*, on one hand, and *federal-court FLSA collective actions*, on the other, employers now insist that federal courts are powerless to exercise specific personal jurisdiction over employers with respect to the claims of any opt-in plaintiffs who worked outside the state where the federal court is located.

For the reasons explained here, employers' proposed limitation is meritless. No statute, constitutional provision, or rule suggests—let alone requires—any such limitation. To the contrary: so long as the named plaintiff in an FLSA collective action satisfies the prerequisites of service of process and personal jurisdiction, the court may validly assert personal jurisdiction over the defendant with respect to the collective action as a whole.

To begin, the FLSA does not compel employers' preferred result. Every shred of available evidence—including, most obviously, the text of the Act—points toward Congress' unyielding desire to unify collective actions in a single proceeding. 29 U.S.C. § 216(b); *Hoffmann-La Roche*, 493 U.S. at 170.

Neither does the Constitution impose any such limitation. In *federal court*, personal jurisdiction is governed by the *Fifth*—not the *Fourteenth*—Amendment Due Process Clause. *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 449 (6th Cir. 2012). And under the Fifth Amendment, "personal jurisdiction exists whenever the defendant has 'sufficient minimum contacts with the *United States*'" as a whole. *Id.* (quoting *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 566–67 (6th Cir. 2001)). This analysis stands in contrast to the Fourteenth Amendment due-process inquiry, which is animated by federalism interests and the attendant "territorial limitations on the power of the respective States."

Bristol-Myers, 137 S. Ct. at 1780 (citing *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). Maintaining a single FLSA collective action in federal court implicates no such federalism concerns.

The Federal Rules of Civil Procedure likewise do not support employers' claimed limitation. Employers argue (1) that Rule 4 requires all opt-in plaintiffs in an FLSA collective action to effectuate service of process; (2) that these service-of-process rules require compliance with state-law personal-jurisdiction requirements, including Fourteenth Amendment due-process limitations; and (3) that under the Fourteenth Amendment, federal courts overseeing FLSA collective actions cannot exercise specific personal jurisdiction over defendants with respect to the claims of any employees who worked for the employer outside the state where the action is maintained. This argument breaks down at nearly every link in the chain.

Nothing in Rule 4 remotely suggests that opt-in plaintiffs—as opposed to *named plaintiffs*—in an FLSA collective action need to separately satisfy service-of-process requirements. Rule 4's operative provision states that "[a] summons must be served with a copy of the complaint." Fed. R. Civ. P. 4(c). Rule 4(k)(1)(A) further provides that "serving a summons…establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." *Id.* Together, these two

provisions reflect a requirement that the *named plaintiff or plaintiffs* effectuate service of process and comply with state-law personal jurisdiction rules. Rule 4 in no way suggests that every opt-in plaintiff who consents to join a collective action must separately and repetitiously meet these requirements. "In an FLSA collective action…there has never been a requirement that each individual opt-in plaintiff…achieve individual service of process upon the defendant." *Hammond v. Floor & Decor Outlets of Am., Inc.*, No. 3:19-cv-01099, 2020 WL 2473717, at *15 (M.D. Tenn. May 13, 2020).

The lack of any independent service-of-process requirement for opt-in plaintiffs is no accident. It aligns with the settled historical understanding that opt-in plaintiffs in representative litigation are not required to independently satisfy the prerequisites of federal jurisdiction. Under the text of the FLSA, the named plaintiff takes on a special fiduciary role: acting on "behalf of himself…and other employees similarly situated." *See* 29 U.S.C. § 216(b). Similarly situated employees who opt into the action play a more passive and limited role. *Monroe*, 860 F.3d at 408. Although mostly forgotten now, these sorts of opt-in representative actions were once a common feature across the legal landscape. Between 1938 and 1966, the Federal Rules explicitly contemplated opt-in representative actions under Rule 23. Prior to that, the Equity Rules did the same. And the historical record is clear: opt-in

plaintiffs in such actions were not counted for purposes of establishing jurisdiction. *See* 2 J. Moore & J. Friedman, Moore's Federal Practice ("Moore's Federal Practice") § 23.04, pp. 2241–42 (1938). The same holds true in FLSA collective actions.

These same considerations further demonstrate the lack of parallels between the state-court, state-law action in *Bristol-Myers* and FLSA collective actions. Collective actions, like their modern-day Rule 23 class-action cousins, are single lawsuits brought by named representatives. Mass-tort cases, like the one proposed in *Bristol-Myers*, are an amalgamation of individual suits. This difference is significant because the personal-jurisdiction analysis occurs "at the level of the suit." *Morgan v. U.S. Xpress, Inc.*, No. 3:17-CV-00085, 2018 WL 3580775, at *5 (W.D. Va. July 25, 2018). As the Court explained in *Bristol-Myers*, "*the suit*" must "aris[e] out of or relat[e] to the defendant's contacts with the forum." *Bristol-Myers*, 137 S. Ct. at 1780 (emphasis added). "The suit," in this case, is the FLSA collective action. And such suits arise out of and relate to a defendant's contacts with the forum when the named representatives' claims have the requisite connection to that forum.

There are additional reasons yet to reject employers' proposed constitutional limitation. FLSA collective actions are a creature of *federal law*—and a law that explicitly contemplates collective, representative actions. None of the federalism concerns that animated *Bristol-Myers*

applies to such federal-law actions. *Bristol-Myers* is best understood as prohibiting state courts from deciding state-law claims that have nothing to do with the forum state—a practice that, if accepted, would usurp the sovereign authority of other states to apply their own law. But there is every reason to believe that both state and federal courts could maintain an FLSA collective action that includes some out-of-state opt-in plaintiffs without "offend[ing] traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). A state has no particular sovereign interest vis-à-vis its sister states in adjudicating federal wage-and-hour claims. And states have *no sovereign interest at all* that could possibly justify frustrating Congress' strong desire to unify FLSA collective actions in a single proceeding. The federalism concerns that proved "decisive" in *Bristol-Myers*, 137 S. Ct. at 1780, are entirely absent here.

Employers' argument bears all the hallmarks of a well-executed parlor trick. Because *Bristol-Myers* required state-court, state-law tort claims to be determined on a state-by-state basis, they say, FLSA collective actions brought in federal court must suffer the same fate. Like all good tricks, however, the illusion does all the work. Upon careful examination, nothing in the FLSA, the Constitution, or the Federal Rules supports the radical departure from 80 years of settled federal practice that employers seek to impose.

The district court's interlocutory order should be reversed.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

On May 7, 2019, Appellant Laura Canaday filed this action seeking unpaid overtime from Appellee The Anthem Companies, Inc. ("Anthem") in the United States District Court for the Western District of Tennessee. Complaint, R.1, PageID.1. Canaday filed the case in Tennessee because she worked for Anthem in Tennessee. *Id.* at 2. Canaday served the court's summons, along with a copy of her complaint, on Anthem's registered agent in Tennessee. Affidavit of Service, R.7, PageID.19.

Canaday's theory of liability is very common in FLSA litigation. She alleges that Anthem uniformly misclassified employees in her position—called utilization review nurses—as exempt from the FLSA's overtime rule. Complaint, R.1, PageID.4. The challenged employment practice extends far beyond the borders of any one state. *Id.* at 1. Anthem is the second largest health-insurance company in the United States. *Id.* at 2. And it employs workers in Canaday's position in many states across the country. *Id.* Given the broadscale nature of the violation alleged, Canaday brought her suit "on behalf of herself and other similarly situated" utilization review nurses. *Id.* at 1.

The FLSA authorizes suits by aggrieved employees on behalf of "themselves and other employees similarly situated." 29 U.S.C. § 216(b).

Unlike in class actions governed by the current version of Rule 23, however, similarly situated employees must affirmatively join the suit by filing their "consent in writing" "in the court in which such action is brought." *Id.* Where, as here, the named plaintiff makes a colorable showing that the challenged policy affects similarly situated workers, district courts typically "conditionally certify" the case and direct "notice concerning the pendency of the collective action, so that [similarly situated employees] can make informed decisions about whether to participate." *Hoffmann-La Roche*, 493 U.S. at 170; *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006).

After Canaday filed her complaint, dozens of similarly situated employees began joining the suit by filing consent forms with the district court.[1] *See* Consents, R.1-2, PageID.11, R.11-1, PageID.26; R.15-1, PageID.55; R.16-1, PageID.57; R.20-1, PageID.81; R.22-1, PageID.91; R.26-1, PageID.98; R.27-1, PageID.100–01; R.28-1, PageID.103; R.29-1, PageID.105; R.31-1, PageID.108; R.32-1, PageID.110; R.33-1, PageID.112; R.34-1, PageID.114; R.35-1, PageID.116–17; R.37-1,

[1] There is no requirement that similarly situated employees wait until a court has conditionally certified the case before opting into the action. The conditional certification procedure is strictly a case-management tool, *Monroe*, 860 F.3d at 397, and "[t]he sole consequence of conditional certification is the sending of court-approved written notice to employees" so that they can learn about the case and decide whether or not to opt in. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013) (citing *Hoffmann-La Roche*, 493 U.S. at 171–72).

PageID.263–64; R.40-1, PageID.272; R.41-1, PageID.274; R.42-1, PageID.276; R.43-1, PageID.278; R.48-1, PageID.287; R.51-1, PageID.293; R.56-1, PageID.455; R.58-1, PageID.517; R.63-1, PageID.571; R.76-1, PageID.666; R.77-1, PageID.668–69; R.79-1, PageID.674–75. Some of these employees, however, worked for Anthem in states other than Tennessee. *See, e.g.*, Plaintiff Declarations, R.36-6, PageID.156, 162, 168. Anthem's place of incorporation and principal place of business is Indiana. Amended Answer, R.17, PageID.61. But Anthem also operates—and employs similarly situated employees—through 171 subsidiaries incorporated and headquartered in a variety of states. Cole Declaration, R.53-2, PageID.386–87.

On September 9, 2019, Canaday filed a motion seeking conditional certification and court-authorized notice. Motion for Conditional Certification, R.36, PageID.118. Canaday asked the court to certify a nationwide collective action covering all utilization review nurses who worked for Anthem. Memorandum in Support of Motion for Conditional Certification, R.36-1, PageID.123.

Anthem argued in response that any collective action should be limited to employees who worked for Anthem in Tennessee because, in Anthem's view, the district court lacked personal jurisdiction over Anthem with respect to potential opt-in plaintiffs who worked in other states. Opposition to Conditional Certification, R.53, PageID.329–30.

Anthem also filed a motion to dismiss the claims of three opt-in plaintiffs who had already joined the suit based on the same rationale. Motion to Dismiss, R.52, PageID.297–304. These three employees worked for Anthem outside Tennessee. *Id.* at 294.

The district court granted Anthem's motion to dismiss and granted Canaday's motion for conditional certification only in part. Order on Motion to Dismiss and Conditional Certification, R.68, PageID.630–31. Citing *Bristol-Myers*, the court held that it lacked personal jurisdiction over Anthem with respect to the claims of current or putative opt-in plaintiffs who worked for Anthem outside Tennessee. Order on Motion to Dismiss and Conditional Certification, R.68, PageID.625–31. Consequently—and based solely on this justification—the court limited the certified collective action and court-approved notice to employees who worked for Anthem in Tennessee and dismissed the pending claims of the three opt-in plaintiffs who worked elsewhere. *Id.*

The district court's decision added to a growing split in the lower courts over the question presented. According to Appellants' current tally, twelve courts have concluded that principles of specific personal jurisdiction prohibit a federal court from maintaining an FLSA collective action that includes opt-in plaintiffs who worked for the defendant-employer outside the state where the federal court is located. Eighteen

courts have rejected any such limitation. To aid this Court, citations to these decisions are listed in the addendum to this brief.

Recognizing the importance of the issue and the split among lower courts, the district court certified its order for interlocutory appeal. Order Certifying Interlocutory Appeal, R.91, PageID.710–11. This Court granted Appellants' petition for permission to appeal. Order Granting Petition for Permission to Appeal, *In re: Laura Canaday*, No. 20-504, R.6-2, Page.1. The Sixth Circuit is the first appellate court to address the question presented.[2]

II. LEGAL BACKGROUND.

This case involves the intersection of three bodies of law: the FLSA, including the statute's collective-action mechanism; personal jurisdiction limitations enforced though the Fifth and Fourteenth Amendment Due Process Clauses; and service-of-process requirements contained in Rule 4 of the Federal Rules of Civil Procedure. Properly understood, these legal principles permit a court to exercise personal jurisdiction over a defendant in an FLSA collective action with respect to the claims of out-of-state opt-in plaintiffs.

[2] It won't be the last. The First Circuit recently accepted interlocutory review on the same question presented here. *See Waters v. Day & Zimmerman NPS, Inc.*, No. 20-1831 (1st Cir.).

A. The FLSA Reflects Congress' Goal of Permitting Aggrieved Employees to Challenge Unlawful Employment Practices in a Single Proceeding.

Congress enacted the FLSA in 1938 to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers…." 29 U.S.C. § 202(a). Passed "[i]n the midst of the Great Depression…to combat the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health," *Schilling v. Schmidt Baking Co., Inc.*, 876 F.3d 596, 599 (4th Cir. 2017) (citations omitted), the FLSA established a uniform minimum wage, required time-and-a-half overtime pay, and outlawed oppressive child labor. *See* 29 U.S.C. §§ 206, 207, 212. These labor standards explicitly targeted employers engaged in *interstate*—as opposed to entirely localized—commerce. FLSA, Ch. 676, 52 Stat. 1060, 1060, 1062–63 (codified at 29 U.S.C. §§ 203(b), 206, 207).

Recognizing that "broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency," courts have "consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction.'" *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 396 (1985) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)).

(1) Congress provided a collective-action mechanism to ensure that claims of similarly situated employees would be heard in a single proceeding.

Congress sought to enforce the FLSA's core minimum-wage and overtime requirements by providing the right to employees to challenge illegal practices collectively. Just as it does today, the FLSA as originally enacted authorized suits brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." Ch. 676, 52 Stat. 1060, 1069 (codified at 29 U.S.C. § 216(b)).

As the Supreme Court has recognized, collective actions promote Congress' policy of ensuring uniform pay standards by "lower[ing] individual costs to vindicate rights by the pooling of resources," thereby encouraging "efficient resolution in one proceeding." *See Hoffmann-La Roche*, 493 U.S. at 170.

The FLSA's drafting history demonstrates that these concerns weighed heavily in Congress' decision to enact § 216(b). The principal reference to the collective-action mechanism in the congressional debates stated that it was "a common-sense and economical method of regulation" that "puts directly into the hands of the employees…the means and ability to assert and enforce their rights," thereby ensuring they "will not suffer the burden of an expensive lawsuit." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 n.16 (1945) (quoting 83 Cong. Rec. 9,264 (1938)). House and Senate committee hearings further reinforce the importance

Congress attached to the collective-action procedure. The right to bring a representative action, along with the "similarly situated" language, was suggested by John Keating, a testifying expert, who stated that simply permitting an employee to sue was "not sufficiently broad." Joint Hearings Before the S. Comm. on Educ. & Labor and the H. Comm. on Labor on S. 2475 and H.R. 7200, 75th Cong., at 457 (1937). He asked, "[W]hat would happen if a thousand employees of one [employer] had to file a thousand separate suits[?] It just would not be done. The [employer] would *know* it would not be done." *Id.* He opined that the collective-action mechanism was necessary to incentivize private enforcement to ensure compliance with the FLSA. *Id.* The Chairman of the House Committee on Labor, who introduced the bill in the House, echoed these same concerns. *Id.* at 461 (expressing concerns about underenforcement if "a thousand men" were required to sue individually). Congress accordingly enacted the collective-action mechanism into law. *See* FLSA, Ch. 676, § 16(b), 52 Stat. 1060, 1069.

(2) The Portal-to-Portal Act reaffirmed that FLSA collective actions should function like the opt-in representative actions that were then contemplated by Rule 23.

Through the Portal-to-Portal Act of 1947, Congress added the requirement that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and

such consent is filed in the court in which such action is brought." Ch. 52, § 5(a), 61 Stat. 84, 87 (codified at 29 U.S.C. § 216(b)). This provision "codified the existing rules governing" so-called "spurious class actions"—opt-in representative actions recognized by the contemporaneous version of Rule 23. *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 257 (3d Cir. 2012); 7 W. Rubenstein, Newberg on Class Actions ("Newberg") § 23.36 (5th ed. 2011). This conclusion is important because, as discussed *infra* at 39–47, opt-in plaintiffs in such class actions were never understood to be required to independently satisfy the prerequisites of federal jurisdiction. *See* Moore's Federal Practice § 23.04, pp. 2241–42.

The Portal Act's statutory opt-in requirement was motivated by several intersecting congressional concerns. As originally enacted, the FLSA permitted aggrieved employees to "designate an agent or representative" to file suit on behalf of similarly situated employees. FLSA, § 16(b), 52 Stat. at 1069. Separately, the Supreme Court, in the years following the FLSA's enactment, interpreted the Act to require compensation for a broader-than-expected range of pre-shift activities. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25–26 (2005) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946)). The Court's unexpected interpretation led to a flood of lawsuits, nearly all of which were filed by employees' agents—typically labor unions—rather than the aggrieved employees themselves. *Knepper*, 675 F.3d at 254.

Congress also grew concerned about a handful of related procedural issues that had arisen in FLSA litigation. The original FLSA contained no statute of limitations, leading courts to apply a patchwork of analogous state laws. The Bureau of National Affairs, The Portal-to-Portal Act of 1947, 52 (1947). Courts also split over the appropriate procedural mechanism for maintaining collective actions. Between 1938 and 1966, Rule 23 recognized three categories of class actions. The first two categories (often called "true" and "hybrid" class actions) used the *opt-out* procedure most familiar to modern-day courts and practitioners. Fed. R. Civ. P. 23(a)(1)–(2) (1938). The third category, by contrast, (often called a "spurious" class action) required similarly situated class members to *opt in* to the action in order to be bound by the judgment. *Id.* at 23(a)(3); Moore's Federal Practice § 23.04, pp. 2241–42. Most courts concluded that FLSA collective actions fell into the third category and therefore had to proceed as *opt-in* representative actions, but a minority of courts disagreed. *Pentland v. Dravo Corp.*, 152 F.2d 851, 853–56 (3d Cir. 1945) (cataloging the split). Courts also split over whether the filing of a collective action tolled the statute of limitations for putative opt-in plaintiffs, and whether opt-in plaintiffs could join the case *after* the named plaintiff had received a favorable judgment. *Knepper*, 675 F.3d at 256–57.

The Portal Act resolved each of these concerns. It required collective actions to be filed by aggrieved employees themselves—not by their agents or representatives. Portal Act, Ch. 52, § 5(a), 61 Stat. 84, 87. It established that certain pre- and post-shift work was non-compensable, abrogating the Supreme Court's contrary rulings. *Id.* at 86–87. And it supplied a uniform statute of limitations. *Id.* at 88.

Most relevant here, the statutory opt-in procedure was added to § 216(b) to ensure that only "plaintiffs…[with a] personal interest in the outcome" could join collective actions. *Hoffmann–La Roche Inc.*, 493 U.S. at 173. The opt-in provision, of course, made clear that FLSA collective actions must proceed as *opt-in*—not opt-out—class actions. 29 U.S.C. § 216(b). And the Portal Act removed any doubt over whether the statute of limitations continues to run before opt-in plaintiffs join the action (it does) and "foreclosed the possibility of one-way intervention." *Knepper*, 675 F.3d at 256; *see* 29 U.S.C. § 257.

At bottom, then, § 216(b)'s opt-in provision was meant to *codify the prevailing practice* of treating FLSA collective actions as opt-in representative (or "spurious") class actions. *Knepper*, 675 F.3d at 257; 7 Newberg § 23.36. Rule 23, of course, was amended in 1966 to do away with opt-in representative class actions. *See* Fed. R. Civ. P 23(b)(3) advisory committee's note to 1966 amendment. But these revisions had

no effect on FLSA collective actions, which continue to be governed by the procedures set forth in § 216(b). *Id.*

B. Personal Jurisdiction Restricts Courts' Power to Bind Parties Through Its Adjudicatory Process.

Personal jurisdiction refers to a court's "power to bring a person into its adjudicative process." *N. Grain Mktg., LLC v. Greving*, 743 F.3d 487, 491 (7th Cir. 2014) (citation omitted). Put another way, jurisdiction to resolve a case on the merits requires "authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). Due process "constrains a [sovereign]'s authority to bind a…defendant to a judgment of its courts." *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (citing *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980)). Personal jurisdiction thus "represents a restriction on judicial power." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

(1) The Fourteenth Amendment Due Process Clause limits state courts' exercise of personal jurisdiction.

Far and away, the largest body of precedent on personal jurisdiction addresses the Fourteenth Amendment due-process limitations on *state courts*, as instrumentalities of *states as sovereigns*, to bind foreign defendants to *state-court judgments*. Those due-process limitations, in turn, are animated by both fairness and federalism concerns.

Under the Fourteenth Amendment's due-process inquiry, a state court may exercise personal jurisdiction over an out-of-state defendant that has "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). "[T]he defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *World–Wide Volkswagen*, 444 U.S. at 297.

The Supreme Court has recognized two strands of personal jurisdiction applicable to state courts under the Fourteenth Amendment. The first, general jurisdiction, allows a court to "hear any and all claims against [defendants] when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). "The paradigm forums in which a corporate defendant is at home…are the corporation's place of incorporation and its principal place of business." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (internal quotation marks omitted).

The second strand is specific, or "case-linked" jurisdiction. *Walden*, 571 U.S. at 283 n.6. Specific jurisdiction recognizes that "[w]here a

defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,' [the defendant] submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State." *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (quoting *Hanson*, 357 U.S. at 253). The specific-jurisdiction analysis "focuses on the relationship among the defendant, the forum, and the litigation." *Walden*, 571 U.S. at 284 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). A state court may exercise specific jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *Nicastro*, 564 U.S. at 881 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, n.9 (1984) and *Goodyear*, 564 U.S. at 923–24).

These limitations on state-court personal jurisdiction are rooted in notions of fairness to defendants. Due process "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Nicastro*, 564 U.S. at 903 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

But these same constraints are equally rooted in *interstate federalism concerns*. Due-process limitations on state-court personal jurisdiction "are more than a guarantee of immunity from inconvenient

or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson*, 357 U.S. at 251. "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State...implie[s] a limitation on the sovereignty of all its sister States." *World–Wide Volkswagen*, 444 U.S. at 293. The "Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.* at 294. Due process thereby protects defendants from "submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers*, 137 S. Ct. at 1780. "[A]t times, this federalism interest may be decisive." *Id.*

(2) The Fifth Amendment Due Process Clause limits federal courts' exercise of personal jurisdiction.

In *federal court*—in contrast to state court—personal jurisdiction is governed by the Fifth Amendment Due Process Clause. *Carrier*, 673 F.3d at 449. And under the Fifth Amendment analysis, "personal jurisdiction exists whenever the defendant has 'sufficient minimum contacts with the *United States*'" *as a whole*. *Id.* (quoting *Med. Mut. of Ohio*, 245 F.3d at 566–67); *In re Sealed Case*, 932 F.3d 915, 925 (D.C. Cir. 2019).

This national-contacts approach makes sense in light of the fundamental difference between state and federal courts. "[A]ll federal

courts, regardless of where they sit, represent the same federal sovereign,"—the United States—"not the sovereignty of a…state government." *Sloan v. General Motors LLC*, 287 F. Supp. 3d 840, 858–59 (N.D. Cal. 2018); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); *Handley v. Ind. & Mich. Elec. Co.*, 732 F.2d 1265, 1271 (6th Cir. 1984).

A national-contacts analysis also follows from the practical differences between state and federal court. A plaintiff who sues an Ohio corporation in Kentucky state court fully commits the adjudicatory process to the sovereign state of Kentucky. The Kentucky Supreme Court sits as the final arbiter of all questions of state law—even questions arising under Ohio law. Moreover, principles of res judicata and full faith and credit bar the defendant from relitigating any claims or defenses in its home court—even if the Ohio courts ultimately "disagree[] with the reasoning underlying the judgment or deem[] it to be wrong on the merits." *V.L. v. E.L.*, 136 S. Ct. 1017, 1020 (2016). These are the reasons a decision by one state court operates as "a limitation on the sovereignty of [other] States." *World–Wide Volkswagen*, 444 U.S. at 293. But run the same hypothetical in *federal court*, and the state-sovereignty concerns dissipate entirely. Defendants remain free to ask for a change of venue based on uniform federal standards. 28 U.S.C. § 1404. Cases filed in either Kentucky or Ohio federal court are equally appealable to *this*

Court, which typically acts as the final arbiter of state law. Dispute resolution in federal court raises no horizontal federalism concerns over *who decides* the dispute. The federal judiciary does.

Under the Fifth Amendment, therefore, "the interstate federalism concerns which animate fourteenth amendment due process analysis under *International Shoe* and its progeny are diminished." *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 294 n.4 (3d Cir. 1985) (citing von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1144–63 (1966)); *Handley*, 732 F.2d at 1271. Instead, the Fifth Amendment due-process inquiry "focus[es] more on the national interest in furthering the policies of the law(s) under which the plaintiff is suing." *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 371 (3d Cir. 2002).

C. Service of Process Provides Defendants with Notice of the Pendency of a Lawsuit.

"Service of process…is properly regarded as a matter discrete from a court's [personal] jurisdiction." *Henderson v. United States*, 517 U.S. 654, 671 (1996). *Compare* Fed. R. Civ. P. 12(b)(2) (defense of lack of personal jurisdiction) *with* Fed. R. Civ. P. 12(b)(5) (defense of insufficient service of process). "The core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the

defendant a fair opportunity to answer the complaint and present defenses and objections." *Henderson*, 517 U.S. at 672.

Service of process and personal jurisdiction are nevertheless conceptually linked: "Service of process…provide[s] a ritual that marks the court's assertion of jurisdiction over the lawsuit." *Washington v. Norton Mfg., Inc.*, 588 F.2d 441, 443–44 (5th Cir. 1979). In the absence of "proper service of process…a court may not exercise personal jurisdiction over a named defendant." *King v. Taylor*, 694 F.3d 650, 655 (6th Cir. 2012) (citations omitted).

Rule 4 governs service of process in federal court. The Rule's core operative provision states that "[a] summons must be served with a copy of the complaint." Fed. R. Civ. P. 4(c)(1). "Serving a summons," in turn, "establishes personal jurisdiction over a defendant:" (1) "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located," *id.* 4(k)(1)(A), or (2) "when authorized by a federal statute," *id.* 4(k)(1)(C).

D. *Bristol-Myers*, Applying Settled Fourteenth Amendment Due Process Principles, Held that State Courts Lack Personal Jurisdiction Over State-Law Tort Suits Filed by Plaintiffs Who Lack Any Connection to the Forum State.

The foregoing principles help frame the Supreme Court's decision in *Bristol-Myers*.

In *Bristol-Myers*, a group of 678 plaintiffs filed eight separate complaints in California state court against Bristol-Myers Squibb, 137 S. Ct. at 1778. The plaintiffs claimed injuries from taking Plavix, a drug manufactured and distributed by Bristol-Myers. *Id.* Among the plaintiffs, 86 resided in California. *Id.* The rest lived elsewhere. *Id.* More to the point, these nonresident plaintiffs alleged no meaningful connection to the state of California: they made no allegation that they were prescribed Plavix, injured by Plavix, or treated for their injuries in California. *Id.* Bristol-Myers, for its part, did not develop Plavix in California. *Id.* It did, however, conduct some unrelated activities in California. *Id.* And it sold Plavix in all 50 states. *Id.* The plaintiffs all stated 13 identical claims arising under California law. *Id.* Their claims were consolidated before a single district court judge. *Id.*

The California Supreme Court held that Bristol-Myers was subject to specific personal jurisdiction in California. *Id.* It employed a "sliding scale approach" under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Id.* at 1779. Given Bristol-Myers' contacts with California generally, the California Supreme Court reasoned, specific jurisdiction existed, even with respect to the claims of nonresidents, because their claims "were similar in several ways to the claims of the California residents." *Id.* (citations omitted).

The Supreme Court reversed. *Id.* at 1777. Engaging in a "straightforward application…of settled principles of personal jurisdiction," the Court held that no personal jurisdiction existed over Bristol-Myers with respect to the nonresident plaintiffs' claims. *Id.* at 1783. The Court reaffirmed that, under the Fourteenth Amendment due-process inquiry, specific jurisdiction requires an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Id.* at 1781 (quoting *Goodyear*, 564 U.S. at 919). That affiliation was absent, the Court reasoned, given that the "nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California." *Id.* Moreover, the Court observed, "[t]he mere fact that" *California-resident* plaintiffs engaged in these activities in California "d[id] not allow the State to assert specific jurisdiction over the nonresidents' claims." *Id.* "[A] defendant's relationship with a third party, standing alone," the Court explained, "is an insufficient basis for jurisdiction." *Id.* (quoting *Walden*, 571 U.S. at 286).

The Court's analysis may have been "straightforward," but it was far from mechanical. The Court reaffirmed that "[i]n determining whether personal jurisdiction is present, a court must consider a variety of interests." *Id.* at 1780. These include the "the interests of the forum

State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice" as well as "the burden on the defendant." *Id.* "Assessing th[e] burden" on the defendant, the Court explained, requires more than simply evaluating "the practical problems resulting from litigating in the forum." *Id.* It "also encompasses the more abstract matter" of determining whether litigating in the plaintiff's chosen forum will force the defendant to "submit[] to the coercive power of a State that may have little legitimate interest in the claims in question." *Id.* "[A]t times," the Court explained, "this federalism interest may be decisive." *Id.* "[T]he States retain…the sovereign power to try causes in their courts." *Id.* (quoting *World–Wide Volkswagen*, 444 U.S. at 293). "The sovereignty of each State…implie[s] a limitation on the sovereignty of all its sister States." *Id.* And when the state court has little to no legitimate interest in resolving the claims in question, "the Due Process Clause, acting as an instrument of interstate federalism, may…act to divest the State of its power to render a valid judgment." *Id.* at 1781 (quoting *World–Wide Volkswagen*, 444 U.S. at 294).

The Court explicitly "le[ft] open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Id.* at 1784. And as Justice Sotomayor noted in her dissent, "[t]he Court…d[id] not confront the question whether its opinion here would also apply to a class action in which a

Plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there." *Id.* at 1789 n.4 (Sotomayor, J., dissenting).

ARGUMENT

Employers like Anthem make the unprecedented claim that federal courts are powerless to entertain FLSA collective actions that include employees who worked outside the state where the federal court is located unless the court can exercise general jurisdiction over all defendants. In evaluating that claim, this Court should remain laser-focused on this question: *what source of law requires this result?* The answer, in short, is none. Nothing in the FLSA, the Fifth Amendment, the Federal Rules of Civil Procedure, or—assuming it applies—the Fourteenth Amendment supports the limitation Anthem is seeking to impose. On the contrary, an examination of these legal sources demonstrates that Anthem's novel proposed constitutional limitation is at once at war with congressional intent, the settled understanding of due-process limitations, and the plain text of the Federal Rules.

I. STANDARD OF REVIEW.

This Court reviews the district court's personal-jurisdiction decisions de novo. *Parker v. Winwood*, 938 F.3d 833, 839 (6th Cir. 2019).

II. THE FLSA DOES NOT SUPPORT EMPLOYERS' PROPOSED LIMITATION ON COLLECTIVE ACTIONS.

The FLSA does not support employers' proposed limitation. Quite the opposite: every shred of available evidence supports the conclusion that Congress wanted the claims of similarly situated employees to proceed in a single collective action.

The text of the FLSA permits collective actions without any geographic limitation. Congress authorized suits by aggrieved employees on behalf of "themselves and other employees similarly situated"—without any further qualification. 29 U.S.C. § 216(b); *Seiffert v. Qwest Corp.*, No. CV-18-70-GF-BMM, 2018 WL 6590836, at *3 (D. Mont. Dec. 14, 2018) ("Nothing in the plain language of the FLSA limits its application to in-state plaintiffs' claims."). The text of the FLSA further reflects Congress' understanding that the FLSA would apply to *multi-state employers* engaged in *interstate commerce*. *See* Ch. 676, 52 Stat. 1060, 1060, 1062-63 (codified at 29 U.S.C. §§ 203(b), 206, 207).

The legislative history is equally unequivocal. *See supra* at 16–17. Congress understood that if employees had to "file a thousand separate suits" that "[i]t just would not be done," employers "would *know* it would not be done," and the FLSA's remedial goals would be defeated. Joint

Hearings Before the S. Comm. on Educ. & Labor and the H. Comm. on Labor on S. 2475 and H.R. 7200, 75th Cong., at 457, 461 (1937).

The text and the legislative history of the FLSA both point in the same direction: Congress enshrined collective actions into the law to promote the goals of ensuring uniform minimum-pay standards by encouraging "efficient resolution in *one proceeding*"— regardless of where the employees who opted in to the suit were located. *See Hoffmann-La Roche*, 493 U.S. at 170 (emphasis added).

Employers' proposed limitation also conflicts with settled practice and established precedent under the FLSA. Accepting employers' proposed rule would require implicitly overruling nearly *every major precedent* addressing FLSA collective actions in this Circuit. *See, e.g.*, *Monroe*, 860 F.3d at 393–94; *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 577–79 (6th Cir. 2014); *Comer*, 454 F.3d at 545; *Wilks v. Pep Boys*, 278 F. App'x 488, 489–90 (6th Cir. 2008). In each of these cases (plus others too numerous to count), the collective action included opt-in plaintiffs who worked for the employer (who was not subject to general jurisdiction) outside the forum state. Employers' current position necessarily embraces the astonishing claim that for nearly 80 years, *no one noticed* that defendants' due-process rights were supposedly being routinely violated. That is reason enough to be extremely skeptical of employers' proposed innovation. *See Martin v. Hunter's Lessee*, 1 Wheat.

304, 326 (1816) (evaluating—and rejecting—a proposed constitutional limitation in view of the fact that no one "ever breathed a…doubt on the subject…until the present occasion"); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020) ("Decades of case law show that" employers' novel limitation conflicts with "the practice of the federal courts.").

Employers, including Anthem, respond by arguing that their proposed rule does not offend the FLSA because employees remain free to sue employers in a single collective action in the employer's home state. This is not true.

Many FLSA collective actions involve numerous defendants sued as joint employers. *See, e.g.*, *Skills Dev. Servs., Inc. v. Donovan*, 728 F.2d 294, 300 (6th Cir. 1984). Such multi-defendant cases have become more common in recent years as employers have balkanized their operations in an attempt to minimize liability. *See* David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* 7, 76 (2014); Richard B. Freeman, *The Subcontracted Labor Market*, 18 Labor and Employment Relations Association: Perspectives on Work 38, 38 (2014). In such cases, unless *all* of the defendants are "essentially at home"—and thus subject to general jurisdiction—in the same forum, *Goodyear*, 564 U.S. at 918, employees aggrieved by a common unlawful practice cannot proceed in a single collective action *anywhere*.

These are not hypothetical concerns. In cases holding that *Bristol-Myers* applies to FLSA collective actions, courts have candidly acknowledged that a single, nationwide collective action cannot proceed anywhere. *See, e.g.*, *Pettenato v. Beacon Health Options, Inc.*, No. 19-1646, 2019 WL 5587335, at *10 n.6 (S.D.N.Y. Oct. 25, 2019). Nor are these concerns hypothetical in *this case*. Anthem operates—and employs similarly situated employees—through 171 subsidiaries incorporated and headquartered in a variety of states. Cole Declaration, R.53-2, PageID.386–87. These various corporate entities are not necessarily subject to general jurisdiction in the same state as Anthem.

It is not true, therefore, that plaintiffs in this case—or any case—can simply congregate in their employer's backyard. As the majority of district courts to analyze the question presented have correctly concluded, adopting employers' proposed rule "would splinter most nationwide collective actions, trespass on the expressed intent of Congress, and greatly diminish the efficacy of FLSA collective actions as a means to vindicate employees' rights." *See Swamy*, 2017 WL 5196780, at *2; *Hammond*, 2020 WL 2473717, at *13; *Aiuto v. Publix Super Mkts., Inc.*, No. 1:19-cv-04803, 2020 WL 2039946, at *4 (N.D. Ga. Apr. 9, 2020); *Gibbs v. MLK Express Servs., LLC*, No. 2:18-cv-434, 2019 WL 1980123, at *6 (M.D. Fla. Mar. 28, 2019); *Warren v. MBI Energy Servs., Inc.*, No. 19-0800, 2020 WL 937420, at *6–7 (D. Colo. Feb. 23, 2020); *Waters v. Day*

& Zimmermann NPS, Inc., No. 19-11585- NMG, ___ F. Supp. 3d ___, 2020 WL 2924031, at *4 (D. Mass. June 2, 2020).

III. THE FIFTH AMENDMENT DUE PROCESS CLAUSE DOES NOT SUPPORT EMPLOYERS' POSITION; IT REQUIRES ONLY MINIMUM CONTACTS WITH THE UNITED STATES AS A WHOLE.

Fifth Amendment due-process principles likewise do not compel employers' preferred result.

Just the opposite. The Fifth Amendment due-process analysis, applicable in federal court, holds that "personal jurisdiction exists whenever the defendant has 'sufficient minimum contacts with the *United States*'" *as a whole*. *Carrier*, 673 F.3d at 449 (quoting *Med. Mut. of Ohio*, 245 F.3d at 566–67); *In re Sealed Case*, 932 F.3d at 925. Anthem, a large health-insurance provider based in Indiana, unquestionably meets that standard. Complaint, R.1, PageID.2.

Some district courts have nevertheless held, without engaging in any meaningful analysis, that the Fifth Amendment and Fourteenth Amendment due-process inquiries must be treated as entirely coextensive. *See, e.g.*, *Maclin v. Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845, 850–51 (N.D. Ohio 2018); *Rafferty v. Denny's, Inc.*, No. 5:18-cv-2409, 2019 WL 2924998, at *6–7 (N.D. Ohio July 8, 2019). But these courts fail to account for the important differences between the two provisions. As discussed earlier, in *federal court*, "the interstate

federalism concerns which animate fourteenth amendment due process analysis under *International Shoe* and its progeny are diminished." *Max Daetwyler Corp.*, 762 F.2d at 294 n.4. That is certainly true in this case. A Tennessee federal court does not impugn the sovereignty of other federal district courts—or the states in which they sit—by maintaining a nationwide collective action. To the contrary, maintaining a single collective action strongly vindicates the Fifth Amendment's "focus[]…on the national interest in furthering the policies of the law(s) under which the plaintiff is suing." *Pinker*, 292 F.3d at 371.

For similar reasons, Anthem cannot plausibly point to any "burden" caused by being forced to "submit[] to the coercive power of a State" that has "little legitimate interest in the claims in question." *Bristol-Myers*, 137 S. Ct. at 1780. Anthem is not being haled into a distant state court with no meaningful connection to the dispute. It is in federal court answering for violations of federal law. It can appeal any adverse judgment to the United States Court of Appeals and Supreme Court. And it remains free to seek a change of venue if it believes the litigation should proceed elsewhere. *See* 28 U.S.C. §§ 1391, 1404. Somewhat tellingly, it has not done so; Anthem instead invokes a categorical constitutional limitation that, if accepted, would make it impossible to bring a single collective action *anywhere*.

IV. RULES GOVERNING SERVICE OF PROCESS AND THE FOURTEENTH AMENDMENT DO NOT SUPPORT EMPLOYERS' POSITION.

Employers' proposed limitation finds no support in the text of the FLSA or under the settled meaning of the Fifth Amendment's Due Process Clause applicable in federal court. They insist, however, that the Federal Rules of Civil Procedure provide the textual grounding necessary to support their rule. That claim is equally wrong.

Employers' argument, embraced by a handful of district courts, proceeds like this:

(1) In an FLSA collective action, all opt-in plaintiffs who join the suit via written consent must comply with the service-of-process requirements set forth in Rule 4.

(2) Because Congress has not authorized nationwide service of process for claims arising under the FLSA, Rule 4(k)(1)(C) does not apply, and all opt-in plaintiffs must individually comply with Rule 4(k)(1)(A).

(3) Under Rule 4(k)(1)(A), service of process establishes personal jurisdiction only to the extent that it would do so in "a court of general jurisdiction in the state where the district court is located."

(4) State courts are bound by the Fourteenth Amendment and the cases interpreting and applying it, including *Bristol-Myers*. Therefore, federal courts are also bound by the same Fourteenth Amendment limitations when service of process is made under Rule 4(k)(1)(A).

(5) Under the Fourteenth Amendment, as interpreted by *Bristol-Myers*, there is no personal jurisdiction over employers with respect to opt-in plaintiffs who worked outside the forum state because opt-in plaintiffs raising federal claims under the FLSA are indistinguishable from the mass-tort plaintiffs raising state-law claims in *Bristol-Myers*. *See, e.g.*, *Weirbach v. The Cellular Connection, LLC*, No. 5:19-cv-05310, 2020 WL 4674127, at *4–5 (E.D. Pa. Aug. 12, 2020); *McNutt v. Swift Transp. Co. of Arizona, LLC*, No. C18-5668, 2020 WL 3819239, at *8–9 (W.D. Wash. July 7, 2020); *Roy v. FedEx Ground Package Sys., Inc.,* 353 F. Supp. 3d 43, 59–60 (D. Mass. 2018).

This line of argument fails, for several independent reasons.

A. Opt-in Plaintiffs in an FLSA Action Are Not Required to Satisfy Service of Process Requirements.

Employers' argument falters first right out of the gate. Nothing in the text of Rule 4—or any other source—suggests that opt-in plaintiffs in an FLSA collective action must comply with service-of-process requirements *at all*. Rule 4 is therefore satisfied when the *named plaintiff or plaintiffs* effectuate service of process.

A careful examination of the text of Rule 4 confirms the point. Rule 4 contains only one operative command: "[a] summons must be served with a copy of the complaint." Fed. R. Civ. P. 4(c)(1). "Serving a summons" in turn, "establishes personal jurisdiction over a defendant who is subject

to the jurisdiction of a court of general jurisdiction in the state where the district court is located." *Id.* 4(k)(1)(A). These provisions, of course, were fully satisfied when Canaday served her complaint and summons on Anthem. Affidavit of Service, R.7, PageID.19.

Employers, however, put an extra-textual gloss on the rule, effectively adding unwritten requirements for *who* must serve process and *when* it must be served (or re-served). They insist that *every opt-in plaintiff* who ultimately files a notice with the court consenting to join the action must separately and individually satisfy Rule 4's service-of-process requirements. But the rule simply does not impose any such requirement.

Rule 4 instead is better read to require only that *named plaintiffs* effectuate service of process and, if traveling under Rule 4(k)(1)(A), establish personal jurisdiction under state law. It is only the named plaintiffs, after all, who are listed as parties in the "complaint" and who must serve that complaint with the summons. *Id.* 4(c)(1). Opt-in plaintiffs, by contrast, simply file notices of consent—they do not serve or amend the complaint or appear as named parties in the complaint. 29 U.S.C. § 216(b); *Brown v. Dunbar & Sullivan Dredging Co.*, 189 F.2d 871, 874–75 (2d Cir. 1951). That's because opt-in consent forms are not "complaints" under Rule 4(c)(1). *See also* Rule 7(a) (listing the "pleadings" that are allowed; these include complaints but not opt-in consent forms).

Instead, these consent forms are "written notice[s]" under Rule 5(a)(1)(E), which must be served consistent with the service requirements of Rule 5 rather than those of Rule 4. *See* Rule 5(b). Accordingly, filing a notice of consent does not independently trigger any independent obligation to serve (or re-serve) *process* or independently establish personal jurisdiction. *See Drabkin v. Gibbs & Hill*, 74 F. Supp. 758, 762 (S.D.N.Y. 1947) ("The filing of the written consent to become a party is not a prerequisite to the issuance of the summons by the Clerk of the Court under Federal Rules of Civil Procedure, rule 4").[3]

These rules explain why "[i]n an FLSA collective action…there has never been a requirement that each individual opt-in plaintiff…achieve individual service of process upon the defendant." *Hammond*, 2020 WL 2473717, at *15. The text of Rules 4 and 5 imposes no such obligation. And without any textual requirement that opt-in plaintiffs satisfy service

[3] The Federal Rules support the conclusion that an *amended complaint* that adds new *named plaintiffs* must be re-analyzed under Rule 4's service-of-process and personal-jurisdiction requirements. "[A]n amended pleading super[s]edes all prior complaints" and renders the original pleading "a nullity." *B & H Medical, L.L.C. v. ABP Admin., Inc.*, 526 F.3d 257, 267 n.8 (6th Cir. 2008). *See generally* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure ("Wright & Miller") § 1476 (3d ed. 2010). Once filed, the amended complaint is generally "treated as if it were filed on the date of the original complaint." *Heglund v. Aitkin Cty.*, 871 F.3d 572, 579 (8th Cir. 2017). In this scenario, a court may direct the plaintiffs to serve an amended summons. Fed. R. Civ. P. 4(a)(2). But even without taking that step, the amended complaint must be analyzed for personal jurisdiction under Rule 4(k)(1)(A) *as if it were served* with the original summons. *See Heglund*, 871 F.3d at 579.

of process, Rule 4(k)(1)(A)'s limits on *effective service*—including any required analysis of state-law personal-jurisdiction limitations—simply do not enter the picture. In FLSA collective actions, "[j]urisdiction over the defendant is obtained by the service of the summons issued by the Clerk after the filing of the complaint." *Drabkin*, 74 F. Supp. at 762. No additional steps by the opt-in plaintiffs are required.

Opt-in plaintiffs hardly stand alone here. Aggregate litigation comes in many shapes and sizes, and the Federal Rules frequently do not require added parties to satisfy the prerequisites of service of process or personal jurisdiction.

One prime example is intervenors. Like FLSA opt-ins, intervenors are considered parties. *See U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009). And much like an opt-in plaintiff filing a notice of consent, "[a] motion to intervene must be served on the parties as provided in Rule 5." Fed. R. Civ. P. 24(c). But "personal service under Rule 4 is not required" to intervene because "the opposing parties already are subject to the jurisdiction of the court." Wright and Miller, 20 Fed. Prac. & Proc. Deskbook § 80, Intervention (2018); *see Vanderbilt Mortg. & Fin., Inc. v. Flores*, 789 F. Supp. 750, 765 (S.D. Tex. 2011) ("[T]he Court finds it had personal jurisdiction over [the defendant, who asserted that court did not have personal jurisdiction over it vis-à-vis intervenors' claims,] from the start of the lawsuit, as well as at the time judgment was

entered, and that there are no personal jurisdiction grounds for vacating the judgment against [the defendant]."), *affirmed in relevant part and reversed in part*, 692 F.3d 358, 376 (5th Cir. 2012).

Rule 23 class members provide another example. Absent class members are considered parties, at least for some purposes. *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002). But nothing in Rule 4 suggests that absent class members must individually satisfy service-of-process and state-law personal-jurisdiction requirements. *Mussat*, 953 F.3d at 447. The same is true for parties represented by executors, administrators, guardians, and trustees, among others. *Id.* (citing Fed. R. Civ. P. 17(a)(1)).

The absence of any independent service-of-process requirement for these parties was no oversight by Congress or the rule-makers. As discussed in the next section, opt-in plaintiffs in representative litigation need not serve process in large part because they have never been understood to be required to separately establish personal jurisdiction in the first place. It makes perfect sense, then, that there is nothing in the rules requiring FLSA opt-in plaintiffs to separately comply with Rule 4's service-of-process requirements.

B. Even Assuming the Fourteenth Amendment Must Be Satisfied, Courts May Exercise Personal Jurisdiction over the Defendant with Respect to the Collective Action as a Whole When Personal Jurisdiction Is Established by the Named Plaintiff.

Even if FLSA opt-in plaintiffs had to individually effectuate service of process under Rule 4, Anthem's proposed rule still would not follow, for a whole host of reasons. The Fourteenth Amendment[4] does not require opt-in plaintiffs in representative litigation to separately establish personal jurisdiction. The personal jurisdiction analysis occurs, generally, at the level of the suit, and there is only one lawsuit here. That is certainly true of FLSA collective actions, which typically proceed to trial on the basis of representative proof. And it is equally true where, as here, the claims arise under a federal law that explicitly contemplates collective actions. In cases like this one, the federalism concerns that proved "decisive" in *Bristol-Myers* are entirely absent. Ultimately, none of the traditional factors supporting due process limitations on personal jurisdiction—fairness, convenience, and state sovereignty—support balkanizing collective actions in the way employers suggest.

[4] The Tennessee long-arm statute, Tenn. Code Ann. § 20-2-214(a)(6), is "coterminous with the limits on personal jurisdiction imposed by the due process clause." *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 455 (6th Cir. 1993). No separate analysis of Tennessee state law is therefore required.

FLSA collective actions are *representative actions*. And opt-in plaintiffs in representative actions have never been understood to be required to independently establish personal jurisdiction.

FLSA collective actions are different than modern, opt-out Rule 23 class actions in one important respect: parties must affirmatively assent to be represented in the action and bound by the court's judgment. But "collective actions remain 'representative actions.'" Scott Moss & Nantiya Ruan ("Moss & Ruan"), *No Longer a Second-Class Class Action?*, 11 Fed. Cts. L. Rev. 27, 107 (2019). The text of the FLSA, which authorizes suits "by any one or more employees for and *in behalf of* himself or themselves and other employees similarly situated," makes this plain. 29 U.S.C. § 216(b) (emphasis added). "[T]he opt-in provision," which Congress later added, concerns only "*how* individuals become represented, not *whether* they are represented." Moss & Ruan at 55.

Because of their representative nature, collective actions "do not require individualized treatment of each plaintiff." *Id.* at 107. To the contrary, "the use of representative testimony to establish class-wide liability has long been accepted." *Monroe*, 860 F.3d at 408. At trial, the overwhelming share of opt-in plaintiffs—somewhere on the order of 95 to 99.5 percent of them—typically offer no testimony at all. *Id.* Instead, the testimony of the representative plaintiffs "may be considered representative proof on behalf of the whole class." *Id.* at 400. Employers

can hardly complain about the burden of litigating opt-in plaintiffs' claims in any particular court when the vast majority of opt-ins will not even be required to present evidence at trial.

Historical practice strongly supports the conclusion that opt-in plaintiffs in representative actions need not independently establish federal jurisdiction. *See* Moore's Federal Practice § 23.04, pp. 2241–42. As discussed above, *see supra* at 18–21, Congress added the FLSA's opt-in procedure to codify the prevailing practice of treating FLSA collective actions as opt-in representative (or "spurious") class actions. *Knepper*, 675 F.3d at 257; 7 Newberg § 23.36. And "[t]he ability of other persons similarly situated to intervene without regard to jurisdictional limitations applicable to the original parties is the raison d'etre of the spurious class suit." *Zachman v. Erwin*, 186 F. Supp. 681, 689 (S.D. Tex. 1959); *see Union Carbide & Carbide Corp. v. Nisley*, 300 F.2d 561, 588–89 (10th Cir. 1961) (spurious class actions "obviate the jurisdictional requirements" where "there are numerous persons who have claims or defenses that involve a common question of law or fact"); *Hunter v. S. Indem. Underwriters*, 47 F. Supp. 242, 243–44 (E.D. Ky. 1942) (spurious class actions allow similarly situated individuals "to participate by intervention without independent grounds of jurisdiction"); *Shipley v. Pittsburgh & Lake Erie R.R. Co.*, 70 F. Supp. 870, 874–75 (W.D. Pa. 1947) (same); *McGrath v. Tadayasu Abo*, 186 F.2d 766, 770–71 (9th Cir. 1951)

(same). Before the adoption of the Federal Rules in 1938, the same rule obtained under the Equity Rules. Equity Rule 48 (1842). And before that, English common law recognized the same thing. Opt-in class actions sought to provide a remedy where "it was impracticable or impossible to get all interested persons before the court," including situations where "effective joinder of certain interested persons was impossible because *they were not subject to the jurisdiction of the court*." Moore's Federal Practice § 23.02, pp. 2224–25 (emphasis added).

The historical treatment of class and collective actions aligns perfectly with modern-day personal-jurisdiction doctrine. The personal-jurisdiction analysis generally occurs "at the level of the suit"—not necessarily on a plaintiff-by-plaintiff basis. *See, e.g.*, *Aiuto*, 2020 WL 2039946, at *5; *Hammond*, 2020 WL 2473717, at *14. Specific jurisdiction "depends on an 'affiliatio[n] between the forum and the *underlying controversy*.'" *Goodyear*, 564 U.S. at 918 (citation omitted) (emphasis added); *Walden*, 571 U.S. at 284 n.6 (describing specific jurisdiction as "case-linked"); *Burger King*, 471 U.S. at 472 (specific jurisdiction exists where "the litigation" results from injuries that "arise out of or relate to" the defendant's activities directed at the forum).

Bristol-Myers is entirely consistent with this premise. *Bristol-Myers* engaged in the specific-jurisdiction analysis on a plaintiff-by-plaintiff basis, but that's because the case "arose in the context of consolidated

individual suits." *Mussat*, 953 F.3d at 446. The consolidation procedure employed by the California courts "has no analogue in the Federal Rules of Civil Procedure." *Id.* But, in general, consolidated cases "remain distinct." *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018). That is certainly true in the mass-tort context, where each plaintiff's claims typically raise complex and individualized issues related to liability, causation, and harm. *See Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1196 & n.8 (6th Cir. 1988).

Bristol-Myers' plaintiff-by-plaintiff mode of analysis also stemmed from the federalism concerns that animated the decision. *Bristol-Myers*, 137 S. Ct. at 1780–81. Personal-injury tort cases are paradigmatically creatures of state law. Where, as in *Bristol-Myers*, one state's courts presume to resolve state-law tort claims for plaintiffs injured all across the country, interstate-federalism concerns loom especially large. *Id.* And these considerations of state sovereignty are not mere background music; states' federalism interests *must* be "consider[ed]," and may prove "decisive" in certain cases. *Id.* at 1780. The individualized nature of each plaintiff's suit and the extraordinary federalism concerns at issue explain why *Bristol-Myers* analyzed specific jurisdiction on a plaintiff-by-plaintiff basis.

In many other contexts, however, courts exercise personal jurisdiction where there is an "affiliatio[n] between the forum and the

underlying controversy" *as a whole*. *Goodyear*, 564 U.S. at 918 (citation omitted). For example, in cases involving two or more parties joined as named plaintiffs, a court can maintain "jurisdiction over a defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative fact with a claim in the same suit over which the court does have personal jurisdiction." *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004). This rule, often referred to as "pendent personal jurisdiction," has been recognized by "every circuit court of appeals to address the question." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002).[5] Courts have continued to exercise personal jurisdiction on this basis after *Bristol-Myers*.[6] In keeping with *Bristol-Myers* and the cases that preceded it, courts *may not* exercise pendent personal jurisdiction when doing so would unreasonably burden the defendant or raise serious federalism concerns. S*ee Knowledge Based*

[5] *See, e.g.*, *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1362–63 (Fed. Cir. 2001); *Robinson Eng'g Co., Ltd. Pension Plan Tr. v. George*, 223 F.3d 445, 449–50 (7th Cir. 2000); *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 628–29 (4th Cir. 1997); *IUE AFL–CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056–57 (2d Cir. 1993); *Oetiker v. Werke*, 556 F.2d 1, 4–5 (D.C. Cir. 1977); *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 555–56 (3d Cir. 1973).

[6] *See, e.g.*, *Laurel Gardens, LLC v. McKenna*, 948 F.3d 105, 123 (3d Cir. 2020); *Chavez v. Stellar Mgmt. Grp. VII, LLC*, No. 19-cv-01353-JCS, 2020 WL 4505482, at *10 (N.D. Cal. Aug. 5, 2020); *Ingram Barge Co. v. Bunge N. Am., Inc.*, 455 F. Supp. 3d 558, 575 (M.D. Tenn. 2020); *J.M. Smucker Co. v. Promotion in Motion, Inc.*, 420 F. Supp. 3d 646, 658–59 (N.D. Ohio 2019).

Sols., Inc. v. Dijk, No. 16-cv-13041, 2017 WL 3913129, at *9–11 (E.D. Mich. Sept. 7, 2017); *SunCoke Energy Inc. v. MAN Ferrostaal Aktiengesellschaft*, 563 F.3d 211, 221 (6th Cir. 2009) (noting that "'pendent personal jurisdiction' has been sparingly permitted in federal diversity cases") (Rogers, J., dissenting). But absent these concerns, courts may exercise personal jurisdiction over a defendant as to the *suit as a whole* where doing so would be fair and convenient to the parties, promote judicial economy, and avoid piecemeal litigation. *See Action Embroidery*, 368 F.3d at 1181; *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966) ("Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties.").

These same principles support the exercise of personal jurisdiction in an FLSA collective action based on an "affiliatio[n] between the forum and the underlying controversy" as a whole. *Goodyear*, 564 U.S. at 918 (citation omitted). Unlike a mass-tort case, which is an amalgamation of individual suits, collective actions are single, unified suits. Congress' repeated use of the singular term "action" in § 216(b) demonstrates Congress' understanding that the named plaintiff's and opt-in plaintiffs' claims jointly constitute a single *action*—or a single "constitutional case." *ESAB Grp.*, 126 F.3d at 628 (quoting *Gibbs*, 383 U.S. at 725). And unlike in the mass-tort context, where each plaintiff's right to relief turns on

highly individualized factors, in collective actions, class-wide liability is established through the representative testimony of a small group of employees. *Monroe*, 860 F.3d at 408.

Collective actions also undoubtedly share a common nucleus of operative fact. *Action Embroidery*, 368 F.3d at 1180. Only "similarly situated" employees may proceed in a collective action. 29 U.S.C. § 216(b). Such employees typically "suffer from a single, FLSA-violating policy." *Monroe*, 860 F.3d at 298. That is certainly true here: Anthem has a uniform and nationwide practice of misclassifying and failing to pay overtime to utilization review nurses like Canaday. Complaint, R.1, PageID.4; *see Chavez*, 2020 WL 4505482, at *10.

Considerations of judicial economy, convenience, and fairness also support exercising jurisdiction over collective actions as a whole. Doing so would promote efficiency and avoid piecemeal litigation by enabling this case to be heard in a single proceeding, rather than splintering it into dozens of smaller suits. *See Chavez*, 2020 WL 4505482, at *10; *Swamy*, 2017 WL 5196780, at *2; *Hammond*, 2020 WL 2473717, at *13; *Aiuto*, 2020 WL 2039946, at *4. Exercising jurisdiction also would be the most fair and convenient course for the parties. It would free the non-Tennessee employees from the unfairness and inconvenience of having to bring new individual or state-specific collective actions. *See id.* And it would spare Anthem from the burden of defending dozens of lawsuits, all

of them asserting identical claims based on the same employment policy. *See Capitol Specialty Ins. v. Splash Dogs LLC*, 801 F. Supp. 2d 657, 668 (S.D. Ohio 2011). These considerations all point in the same direction: exercising personal jurisdiction over employers with respect to the collective action in its entirety furthers Congress' objective of permitting similarly situated workers to vindicate their rights in a single proceeding. *See Hoffmann-La Roche*, 493 U.S. at 170.

The fact that this case arises under *federal law*—not state law—provides another compelling reason to exercise personal jurisdiction over the entire action. Unlike in a diversity case, where exercising jurisdiction over pendent state-law claims may encroach on a state's sovereign power, *see SunCoke Energy*, 563 F.3d at 221 (Rogers, J., dissenting), federalism concerns pose no bar to asserting personal jurisdiction over an entire action arising under *federal law*, *see Chavez*, 2020 WL 4505482, at *10. *See also Oetiker*, 556 F.2d at 5; *Hager v. Omnicare, Inc.*, No. 5:19-cv-00484, 2020 WL 5806627, at *6 (S.D. W. Va. Sept. 29, 2020) (federalism concerns that proved decisive in *Bristol-Myers* are "wholly inapplicable" to cases arising under the FLSA); *O'Quinn v. TransCanada USA Services, Inc.*, 2:19-cv-00844, ___ F. Supp. 3d ___, 2020 WL 3497491, at *14 (S.D. W.Va. June 29, 2020) (same). That's because "[w]hen a federal court is hearing and deciding a federal question case there are no problems of 'coequal sovereigns.'" *Handley*, 732 F.2d at 1271; *see* Wright

& Miller, Personal Jurisdiction in Federal Question Cases, 4 Fed. Prac. & Proc. Civ. § 1068.1 (4th ed.).

That is doubly true for the FLSA, which, unlike most federal laws, contains an explicit statutory collective-action mechanism. Congress can provide courts with the authority to assert personal jurisdiction over related claims that constitute a single action. *See Hargrave v. Oki Nursery, Inc.*, 646 F.2d 716, 719–20 (2d Cir. 1980). Congress has done just that with the FLSA. *See* 29 U.S.C. § 216(b).

This Court reached a similar conclusion in addressing the jurisdictional limits for multi-district litigation ("MDL"). *See Howard v. Sulzer Orthopedics, Inc.*, 382 F. App'x 436, 442 (6th Cir. 2010). Ordinarily, a federal court may not transfer a case to another district, *see* 28 U.S.C. § 1404(a), unless the transferee court can exercise personal jurisdiction over the defendant. *See Hoffman v. Blaski*, 363 U.S. 335, 343–44 (1960). The MDL statute, 28 U.S.C. § 1407, though, operates differently: "Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction…." *Howard*, 382 F. App'x at 442 (quoting *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976)). Although the MDL statute does not authorize nationwide service of process, 28 U.S.C. § 1407, it nevertheless functionally "authoriz[es] the federal courts to exercise nationwide

personal jurisdiction." *Howard*, 382 F. App'x at 442 (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987)).[7]

The FLSA's collective-action mechanism does the exact same thing. Similarly situated employees—no matter where they are located—may opt into a collective action. *See* 29 U.S.C. § 216(b). Because opt-in plaintiffs in collective actions are not required to serve process, *see supra* at 39–43, and likewise are not required to independently establish personal jurisdiction, *see supra* at 44–52, no separate nationwide service-of-process provision has ever been necessary to achieve the FLSA's goal of promoting "efficient resolution in one proceeding," *see Hoffmann-La Roche*, 493 U.S. at 170. Just like the MDL statute, § 216(b) effectively "authoriz[es] the federal courts to exercise nationwide personal jurisdiction." *Howard*, 382 F. App'x at 442.

Even making the generous (and legally incorrect) assumption that *each opt-in plaintiff* in an FLSA collective action must separately comply

[7] Accepting employers' proposed limitation would bring about a fairly ironic result. Employees, no longer able to use the FLSA's collective action mechanism to challenge unlawful employment practices on a nationwide basis, would likely file various single-state collective actions and then move to consolidate them for pre-trial proceedings before a single court. A case like this one, then, could end up centralized before a federal judge in Tennessee. That outcome would rest on the awkward conclusion that an MDL consolidation before a single court would not offend employers' due process rights but maintaining a single FLSA collective action—that is, following the precise procedure Congress enacted for these cases—in the same court *would* violate the very same due process rights.

with service-of-process and personal-jurisdiction requirements, Anthem's conclusion that out-of-state opt-in plaintiffs cannot establish personal jurisdiction does not follow. That's because the claims of opt-in plaintiffs relate to Anthem's unlawful employment practices in Tennessee, thereby satisfying the requirements of the Due Process Clause of the Fourteenth Amendment.

In light of the FLSA's unique collective-action procedure, the claims of any out-of-state opt-in plaintiffs "relate[] to the defendant's contacts with the forum." *Nicastro*, 564 U.S. at 881. With respect to the level of relatedness required, *Bristol-Myers* reaffirmed that "a defendant's relationship with a third party, standing alone, is an insufficient basis for jurisdiction." 137 S. Ct. at 1781 (quoting *Walden*, 571 U.S. at 286). But unlike the out-of-state plaintiffs in *Bristol-Myers*, the opt-in plaintiffs who worked for Anthem outside Tennessee can point to far more than Anthem's "relationship with a third party." *Id.* All plaintiffs, regardless of location, suffered the same harm stemming from the same unlawful policy. And all plaintiffs enjoy the same federal-law statutory right to band together in a single proceeding, with one or more employees representing the rest on identical claims. In these circumstances, the act of misclassifying an employee who works in, say, Kentucky "relates to" the employer's act of misclassifying an employee in Tennessee, because the actions in both states stem from the same uniform national policy.

There is therefore "an affiliation between the forum and the underlying controversy." *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (quoting *Goodyear*, 564 U.S. at 919).

The out-of-state opt-in plaintiffs' claims relate to Anthem's activities in Tennessee for an additional reason. Congress has the power to "define[]…legal relationships." *See Goldstein v. California*, 412 U.S. 546, 570 n.28 (1973). Congress has done so here by authorizing similarly situated employees to band together in a single collective action. 29 U.S.C. § 216(b). In light of that congressional judgment, claims brought by out-of-state opt-in plaintiffs "relate to" the employer's activities in the forum state. *See Nicastro*, 564 U.S. at 881.

At the end of the day, employers' proposed limitation contravenes nearly every principle that animates the personal-jurisdiction inquiry and the FLSA. Employers are not being haled into an unfamiliar or inconvenient foreign court based on "random," "fortuitous," or "attenuated" contacts. *World–Wide Volkswagen*, 444 U.S. at 297; *Burger King*, 471 U.S. at 475. They are being sued by their employees where many of the employees worked. Employers are not being subjected to a state's sovereign authority in a way that usurps the rightful authority of other states. They are being sued in federal court for a violation of federal law. Employers are not being forced to litigate claims brought by forum-shopping plaintiffs who have no business proceeding in the same court.

They are simply being called to account in a manner consistent with Congress' explicit direction and nearly 80 years of settled practice. Employers' novel proposed limitation would do little more than frustrate the will of Congress, make life harder for courts, and discourage worthy plaintiffs from vindicating their rights. That is not "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316.

CONCLUSION

The district court's judgment should be reversed.

Dated: November 17, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because the brief contains 12,741 words, as determined by the word-count function of Microsoft Word for Office 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and this Court's Rule 32(b)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

Date: November 17, 2020

s/Adam W. Hansen
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

DISTRICT COURT DECISIONS ADDRESSING THE QUESTION PRESENTED

Case Citation	Prevailing Party
Hager v. Omnicare, Inc., No. 5:19-cv-00484, 2020 WL 5806627 (S.D. W. Va. Sept. 29, 2020)	Plaintiffs
Weirbach v. The Cellular Connection, LLC, No. 5:19-cv-05310, 2020 WL 4674127 (E.D. Pa. Aug. 12, 2020)	Defendant
Chavez v. Stellar Managment Grp. VII, LLC, No. 19-cv-01353-JCS, 2020 WL 4505482 (N.D. Cal. Aug. 5, 2020)	Plaintiffs
McNutt v. Swift Transp. Co. of Arizona, LLC, No. C18-5668, 2020 WL 3819239 (W.D. Wash. July 7, 2020)	Defendant
O'Quinn v. TransCanada USA Services, Inc., No. 2:19-cv-00844, ___ F. Supp. 3d ___, 2020 WL 3497491 (S.D. W.Va. June 29, 2020)	Plaintiffs
Waters v. Day & Zimmermann NPS, Inc., No. 19-11585-NMG, --- F. Supp. 3d ----, 2020 WL 2924031 (D. Mass. June 2, 2020)	Plaintiffs
Hammond v. Floor & Decor Outlets of Am., Inc., No. 3:19-cv-01099, 2020 WL 2473717 (M.D. Tenn. May 13, 2020)	Plaintiffs
Aiuto v. Publix Super Mkts., Inc., No. 1:19-cv-04803, 2020 WL 2039946 (N.D. Ga. Apr. 9, 2020)	Plaintiffs
White v. Steak N Shake, Inc., No. 4:20 CV 323 CDP, 2020 WL 1703938 (E.D. Mo. Apr. 8, 2020)	Defendant
Camp v. Bimbo Bakeries USA, Inc., No. 18-cv-378-SM, 2020 WL 1692532 (D.N.H. Apr. 7, 2020)	Defendant

Warren v. MBI Energy Servs., Inc., No. 19-0800, 2020 WL 937420 (D. Colo. Feb. 23, 2020)	Plaintiffs
Vallone v. The CJS Sols. Grp., LLC, No. 19-1532, 2020 WL 568889 (D. Minn. Feb. 5, 2020)	Defendant
Turner v. Concentrix Servs., Inc., No. 1:18-1702, 2020 WL 544705 (W.D. Ark. Feb. 3, 2020)	Plaintiffs
Canaday v. The Anthem Cos., No. 19-cv-01084-STA-jay, --- F. Supp. 3d. ----, 2020 WL 529708 (W.D. Tenn. Feb. 3, 2020) *report and recommendation adopted*, 2020 WL 1891754 (W.D. Tenn. Feb. 3, 2020)	Defendant
Hunt v. Interactive Med. Specialists, Inc., No. 1:19CV13, 2019 WL 6528594 (N.D.W. Va. Dec. 4, 2019)	Plaintiffs
Pettenato v. Beacon Health Options, Inc., No. 19-1646, 2019 WL 5587335 (S.D.N.Y. Oct. 25, 2019)	Defendant
Szewcyzyk v. United Parcel Serv., Inc., No. 19-1109, 2019 WL 5423036 (E.D. Pa. Oct. 22, 2019)	Plaintiffs
Meo v. Lane Bryant, Inc., No. CV 18-6360 (JMA) (AKT), 2019 WL 5157024 (E.D.N.Y. Sept. 30, 2019)	Plaintiffs
Chavira v. OS Rest. Servs., LLC, No. 18-cv-10029-ADB, 2019 WL 4769101 (D. Mass. Sept. 30, 2019)	Defendant
Mason v. Lumber Liquidators, Inc., No. 17-CV-4780 (MKB) (RLM), 2019 WL 3940846 (E.D.N.Y. Aug. 19, 2019)	Plaintiffs
Turner v. UtiliQuest, LLC, No. 3:18-cv-00294, 2019 WL 7461197 (M.D. Tenn. July 16, 2019)	Defendant
Rafferty v. Denny's, Inc., No. 5:18-cv-2409, 2019 WL 2924998 (N.D. Ohio July 8, 2019)	Defendant

Saenz v. Old Dominion Freight Line, Inc., No. 1:18-cv-4718-TCB, 2019 WL 6622840 (N.D. Ga. June 7, 2019)	Plaintiffs
Gibbs v. MLK Express Servs., LLC, No. 2:18-cv-434, 2019 WL 1980123 (M.D. Fla. Mar. 28, 2019), *report and recommendation adopted in part, rejected in part*, 2019 WL 2635746 (M.D. Fla. June 27, 2019)	Plaintiffs
Maclin v. Reliable Reports of Tex., Inc., 314 F. Supp. 3d 845 (N.D. Ohio 2018)	Defendant
Roy v. FedEx Ground Package Sys., Inc., 353 F. Supp. 3d 43 (D. Mass. 2018)	Defendant
Garcia v. Peterson, 319 F. Supp. 3d 863 (S.D. Tex. 2018)	Plaintiffs
Seiffert v. Qwest Corp., No. CV-18-70-GF-BMM, 2018 WL 6590836 (D. Mont. Dec. 14, 2018)	Plaintiffs
Swamy v. Title Source, Inc., No. C 17-01175 WHA, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017)	Plaintiffs
Thomas v. Kellogg Co., No. C13-5136RBL, 2017 WL 5256634 (W.D. Wash. Oct. 17, 2017)	Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of November, 2020, I caused the foregoing brief and addendum to be filed electronically with the Court, where they are available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a notice of electronic filing constituting service. I certify that all parties required to be served have been served.

s/Adam W. Hansen
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