NO. 21-1684

IN THE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CHRISTA FISCHER,

Individually and on Behalf of Other
Similarly Situated Employees,

Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION
FEDEX GROUND PACKAGE SYSTEM, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
No. 5:19-cv-04924-JMG
Hon. John M. Gallagher
United States District Court Judge

BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The International Association of Defense Counsel is a not-for-profit corporation organized under the laws of the State of Illinois. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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STATEMENT OF INTEREST

The **International Association of Defense Counsel ("IADC")** respectfully submits this brief as *amicus curiae*. It is filing due solely to its interest in the important issues raised by this case.[1]

IADC is an invitation-only, peer-reviewed membership organization of about 2,500 in-house and outside defense attorneys and insurance executives. It is dedicated to the just and efficient administration of civil justice and improvement of the civil justice system. IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. IADC regularly appears as *amicus curiae* before the United States Supreme Court, federal courts of appeals and state supreme courts in cases involving issues of importance to its members. *See, e.g., Johnson & Johnson v. Ingham*, No. 20-1223 (U.S.

[1] *Amicus* herby affirms that no counsel for either party authored any part of this brief in whole or in part. No party, counsel for a party, or person other than *amicus*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. *Amicus* notified all parties of its intent to submit this brief at least 10 days before it was due and all parties provided written consent to the filing of this brief.

Apr. 1, 2021) (brief in support of certiorari petition); *Janssen Pharms. v. A.Y.,* No. 20-1069 (U.S. Mar. 8, 2021) (brief in support of certiorari petition); *TransUnion LLC, v. Ramirez*, No. 20-297 (U.S. Feb. 8, 2021) (brief in support of judgment reversal).

IADC members have considerable experience defending employers in litigation involving "collective actions" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). The personal jurisdiction standard that plaintiffs-appellants advance here would improperly force these entities into defending against claims that have no relationship to the forum state. Instead, plaintiffs-appellants' desired standard would cast aside established jurisdictional requirements in favor of an approach that would allow plaintiffs' counsel to file nationwide collective actions in any jurisdiction most convenient and advantageous for them. The Court should reject that request and affirm the district court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The answer to the question posed on this appeal will shape the direction of FLSA collective actions for years to come: may a court exercise personal jurisdiction over a defendant in a collective action with

respect to the claims of plaintiffs who have no meaningful connection to the forum?

Scores of district courts have issued decisions on the subject, with the results going both ways. Until two weeks ago, no federal court of appeal had weighed in on the issue. However, on August 17, 2021, the Sixth Circuit issued an opinion affirming a district court's dismissal of out-of- state FLSA plaintiffs on personal jurisdiction grounds. *See Canaday v. Anthem Cos.,* No. 20-5947, 2021 WL 3629916 (6th Cir. Aug. 17, 2021). The First Circuit will be next to speak on this topic, having recently heard oral arguments in a similar FLSA case. *See Waters v. Day & Zimmerman NPS, Inc.*, No. 20-1997 (1st Cir. June 7, 2021).

The fact that the district courts have been divided is surprising, given the United States Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017). There, the Court analyzed a mass tort action filed against Bristol-Myers Squibb ("BMS") in California state court. Some of the plaintiffs were California residents; most were from elsewhere. The Court concluded that because BMS was not subject to general jurisdiction in California, and the non-resident plaintiffs' claims had no tie to

California, BMS could not be subjected to specific jurisdiction in California for those claims.

The Court should reach the same result here, just as the Sixth Circuit did in *Canaday*. Despite appellants' spirited argument to the contrary, there is no meaningful difference between a mass tort action and a collective action for purposes of this analysis. Like a mass tort action, the plaintiffs in a collective action are parties as soon as they file their written consent to become a party with the court.

Moreover, while some district courts have concluded that limiting the scope of collective actions that can be brought in certain jurisdictions would run counter to the intent of the FLSA, Congress *never authorized* nationwide service of process for FLSA claims in whatever jurisdictions plaintiffs choose. It could have. It did not. Accordingly, the Federal Rules of Civil Procedure mandate that plaintiffs' claims must bear a connection to the state in which they are filed if the plaintiffs are going to file a collective FLSA action in a state where the defendant is not subject to general jurisdiction.

To this end, if plaintiffs-appellants and their counsel wish to have a nationwide collective action against Federal Express Corporation

("FedEx Express"), they can do so, either in Delaware (FedEx Express's state of incorporation) or Tennessee (FedEx Express's principal place of business).[2] They have no right, however, to bring such an action in Pennsylvania, where the courts do not have general personal jurisdiction over FedEx Express or specific personal jurisdiction over FedEx Express with respect to the claims of all plaintiffs. This Court should decline plaintiffs-appellants' invitation to ignore applicable jurisdictional rules so that they and their counsel can secure a perceived litigation advantage.

ARGUMENT

I. Mass Actions and Collective Actions Should be Treated Similarly for Jurisdictional Purposes.

In this case, there are three plaintiffs from three states: Pennsylvania; New York; and Maryland. The district court found it had specific jurisdiction over FedEx Express with respect to the Pennsylvania plaintiff's claims but not as to the claims of the out-of-state plaintiffs.

[2] Plaintiffs also sued FedEx Ground Package System, Inc. Because FedEx Express was plaintiffs' employer, however, the district court's jurisdictional analysis focused on FedEx Express.

The district court's order relies heavily, and appropriately, on *Bristol-Myers Squibb ("BMS")*, 137 S. Ct. at 1773. Plaintiffs-appellants urge this Court to sidestep *BMS*, crafting various explanations as to why that decision should not apply in this instance.

The primary argument they advance as to the inapplicability of *BMS* is that mass tort actions and collective actions are different, and therefore different rules should apply. For example, the former involves state law, while the latter concerns federal law. Moreover, a mass tort action incorporates a slew of separate personal injury claims while a collective action addresses a common employment policy. Ultimately, this Court should reject those justifications, as they are unpersuasive. There is far more similarity to mass tort actions and collective actions than dissimilarity.

BMS was a mass tort action with more than 600 individual plaintiffs. *See* 137 S. Ct. at 1777. The Supreme Court examined the claims of each of those plaintiffs in determining whether it had personal jurisdiction over BMS. Ultimately, it found that it had jurisdiction over the claims of the 86 California-based plaintiffs but not over the claims of the 592 plaintiffs from elsewhere. *See id.* at 1783-84.

Plaintiffs-appellants suggest there is no need to undertake a similar analysis in FLSA collective actions. Simply looking at whether there is jurisdiction over the claims of the named plaintiffs is good enough. Under plaintiffs-appellants' proposed approach, the plaintiffs who opt in after the original complaint is served do not matter to the jurisdictional analysis.

Why that should be so is not immediately apparent. Plaintiffs-appellants note that *BMS* involved state law claims in a state court and point to federalism as a reason for a different result under the FLSA. But there is nothing about the limits of state court power that suggests a need to look at every single plaintiff for jurisdiction over state law claims yet only the original named plaintiff for jurisdiction over federal law claims.

Opt-in plaintiffs in an FLSA collective action are not second-class citizens or in any way less important than the individual plaintiffs in a mass tort action. Opt-in plaintiffs must affirmatively certify, in writing, that they want to be a party in the lawsuit and then file that certification with the court. *See* 29 U.S.C. § 216(b) ("[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."). Once they have done that, they are parties to the case. *See Mickles v. Country Club, Inc.*, 887 F.3d 1270, 1273 (11th Cir. 2018) ("We conclude that filing a written consent pursuant to § 216(b) is sufficient to confer party-plaintiff status.").

Thus, there is no material difference between mass tort plaintiffs and collective action opt-in plaintiffs for jurisdictional purposes. They both have party status from the moment they join the case. *See Halle v. W. Penn Allegheny Health Sys., Inc.*, 842 F.3d 215, 225 (3d Cir. 2016) ("[E]very plaintiff who opts in to a collective action has party status, whereas unnamed class members in Rule 23 class actions do not.") (citing 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1807 (3d ed. 2016)); *Prickett v. DeKalb Cnty.*, 349 F.3d 1294, 1297 (11th Cir. 2003) ("[B]y referring to them as 'party plaintiff[s]' Congress indicated that opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as do the named plaintiffs."). Accordingly, if opt-in plaintiffs are parties, they should be considered in the jurisdictional analysis, just as in *BMS*.

That mass tort actions involve plaintiffs who may have been injured by the product at issue in disparate ways rather than by a purportedly

common employment policy should have nothing to do with the jurisdictional inquiry either. In most mass tort actions the basic issue is whether the product at issue caused the plaintiff's harm. Similarly, the issue in most collective actions is whether the defendant's employment policy harmed the plaintiffs. That some of the plaintiffs in a mass tort action may have suffered greater harm, or to a different body part than other plaintiffs, provides no reason to distinguish those cases from collective actions for jurisdictional purposes. Indeed, some plaintiffs in a collective action also allege greater harm than other plaintiffs in the same suit.

In short, there is no reason *BMS* should not apply to FLSA collective actions. *See Canaday*, 2021 WL 3629916, at *4 ("The principles animating *Bristol-Myers's* application to mass actions under California law apply with equal force to FLSA collective actions under federal law.").

II. Because Congress Did Not Authorize Nationwide Service of Process under the FLSA, the Personal Jurisdiction Analysis of the Fourteenth Amendment Applies.

BMS was a state court action. As such, the personal jurisdiction analysis was conducted under the due process clause of the Fourteenth Amendment. This is a federal court action. Accordingly, plaintiffs-

appellants contend that the Fifth Amendment's due process clause should apply. Congress, though, did not authorize nationwide service of process under the FLSA. Therefore, the Federal Rules of Civil Procedure mandate that the due process analysis proceed under the Fourteenth Amendment, just like in *BMS*.

The personal jurisdiction analysis under the Fourteenth Amendment looks at whether the defendant has sufficient "minimum contacts" with the forum state. The personal jurisdiction analysis under the Fifth Amendment is similar, but reviews whether the defendant has sufficient minimum contacts with the entire United States.

The practical impact of the difference is obvious. The Fifth Amendment's due process clause permits a wider jurisdictional reach. Yet the full impact of that breadth is limited by Federal Rule of Civil Procedure 4(k), which prohibits federal courts from exercising personal jurisdiction over a party if state courts could not do so too. *See* Fed. R. Civ. P. 4(k)(1)(A). In other words, Rule 4(k) generally imposes state court personal jurisdictional limits on federal courts.

Nonetheless, Congress has determined that for certain federal statutes, nationwide service of process is appropriate and the typical

strictures of Rule 4(k) should not apply. *See* Fed. R. Civ. P. 4(k)(1)(C). Examples of statutes under which nationwide service of process is permitted include the Sherman Act (15 U.S.C. § 22), RICO (18 U.S.C. § 1965(a)), and ERISA (29 U.S.C. § 1132(e)(2)). If Congress has not explicitly provided for nationwide service of process, though, then Rule 4(k) requires the application of the same Fourteenth Amendment personal jurisdiction analysis as would apply to state courts.

The FLSA says nothing about nationwide service of process. *See* 29 U.S.C. § 216(b); *see also Canaday*, 2021 WL 3629916, at *5 ("The FLSA, however, does not offer nationwide service of process."). That means Rule 4(k), and the due process analysis of the Fourteenth Amendment, apply. If Congress believes this to be unfair, it is free to amend the FLSA at any time, just as it has done on several other occasions. *See* Luke Norris, *The Workers' Constitution*, 87 Fordham L. Rev. 1459, 1508-09 (2019) (discussing amendments to the FLSA). This Court, however, should not "amend" the FLSA by judicial fiat.

That is precisely what certain district courts have attempted to do with their decisions on this issue. They have reasoned that because Congress passed the FLSA to address adverse employment practices

nationwide, they must have also intended to provide for nationwide service of process. *See, e.g., Meo v. Lane Bryant, Inc.,* No. 18-CV-6360, 2019 WL 5157024 (E.D.N.Y. Sept. 30, 2019); *Swamy v. Title Source, Inc.*, No. 17-CV-1175, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017). This Court should leave the legislating to Congress and stay away from grafting a perceived intent onto a statute when that intent is not expressed in the statute itself and, when desired, has been expressed in other statutes. The FLSA should not be treated differently from any other federal statute in this regard.

As the Supreme Court remarked in *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*, while analyzing the federal Commodity Exchange Act ("CEA"), Congress knew how to provide for nationwide service of process and its failure to do so for the CEA "argues forcefully that such authorization was not its intention." 484 U.S. 97, 106 (1987). So too for the FLSA.

III. Employees Remain Free to Bring Nationwide Collective Actions in Any States That Can Exercise General Personal Jurisdiction over their Employer.

Contrary to plaintiffs-appellants' intimations, affirming the district court will not make nationwide collective actions disappear. Indeed, just

as now, employees will be able to bring nationwide collective actions against an employer in states that have general personal jurisdiction over that employer. The two most likely candidates are: 1) states where the employer has its principal place of business; and 2) states where the employer is incorporated. *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (explaining general jurisdiction analysis for corporations).

If the employee does not wish to sue in one of those states, she may still file a statewide collective action in her own state of residence. While the employee (or his or her counsel) may prefer the plaintiffs'-side leverage a nationwide suit affords, nothing in the FLSA currently provides employees the right to bring such a nationwide suit in any state of their choosing. *See Canaday*, 2021 WL 3629916, at *6 ("No doubt, Civil Rule 4(k) and an absence of nationwide personal jurisdiction under the FLSA create jetties, cross currents, and other obstacles to prompt relief for the plaintiffs. The short answer is that these limitations are designed principally to protect defendants, not to facilitate plaintiffs' claims."). If Congress decides that employees should have that power, it may amend the FLSA. This Court has no authority to make such an amendment.

Plaintiffs-appellants in this case are free to bring a nationwide collective action against FedEx Express in either Delaware (where FedEx Express is incorporated) or Tennessee (where it has its principal place of business). For whatever reason, though, they want to bring such a lawsuit in Pennsylvania. But the jurisdictional rules do not permit that.

Delaware is in the Third Circuit. So, if suit were filed in federal court there, the applicable law would be the same. Moreover, Wilmington is likely closer to the Maryland-based plaintiff than Allentown, where the district court in this case is located. For any opt-in plaintiffs that might join the case from other states throughout the country, the location of the courthouse is not likely to affect them beyond potentially having to appear for trial. And two of the three plaintiffs' law firms on the case are from outside Pennsylvania, and could get to Delaware (or Tennessee) as easily as they can get to Pennsylvania.

What is really going on here is that plaintiffs' counsel perceives an advantage to venue in Pennsylvania and wants the case there. While there is nothing inherently wrong with plaintiff's counsel picking the venue that they think best, the choices must be limited to those venues in which the court has personal jurisdiction over the defendants for the

claims of the plaintiffs they choose to represent. Here, for a nationwide collective action, those choices are Delaware or Tennessee. Pennsylvania is not an option.

CONCLUSION

For all the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP, WORD COUNT, IDENTICAL COMPLIANCE OF BRIEFS, AND VIRUS CHECK

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/s/ Philip S. Goldberg
Philip S. Goldberg

CERTIFICATE OF SERVICE

I certify that on August 30, 2021, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case, including all parties required to be served.

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