NOTE

COLLECTIVE DISAGREEMENT: THE UNEASY INTERACTION OF THE FLSA AND FRCP 4(K) AFTER *BRISTOL-MYERS SQUIBB*

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INTRODUCTION

Across the country, due to a circuit split over the meaning of Federal Rule of Civil Procedure ("Rule") 4(k), federal courts are enforcing the Fair Labor Standards Act ("FLSA") inconsistently. Take, for example, two analogous plaintiffs: John Waters, a former mechanical supervisor with Day & Zimmermann NPS, and Christa Fischer, a former senior security specialist at FedEx. Both Mr. Waters and Ms. Fischer alleged that their respective former employers failed to provide time-and-a-half overtime compensation as required by the FLSA.[1] As allowed for by 29 U.S.C. § 216(b), a provision within the FLSA, both Mr. Waters and Ms. Fischer filed putative collective actions in federal court, seeking to include similarly situated coworkers from other states.[2] In both actions, the employers opposed conditional certification of the collective on the basis that personal jurisdiction was lacking with respect to the out-of-state opt-in employee-plaintiffs' claims.[3] In Ms. Fischer's case, the Third Circuit did not allow the out-of-state plaintiffs to join the suit, effectively bringing an end to the litigation.[4] By contrast, in *Waters v. Day & Zimmermann NPS*, the First Circuit affirmed denial of the employer's motion to dismiss, thus allowing Mr. Waters's collective action to proceed.[5]

Mr. Waters and Ms. Fischer encountered different outcomes because the United States Courts of Appeal are divided as to whether the Supreme Court's holding in *Bristol-Myers Squibb Co. v. Superior Court of California*[6] applies to collective actions. If it does, then employee-plaintiffs are limited to bringing nationwide collective actions in courts that possess general

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1 *See* 29 U.S.C. § 207(a)(1); Waters v. Day & Zimmermann NPS, Inc., 464 F. Supp. 3d 455, 457 (D. Mass. 2020); Fischer v. Fed. Express Corp., 509 F. Supp. 3d 275, 281 (E.D. Pa. 2020).

2 *Waters*, 464 F. Supp. 3d at 457; *Fischer*, 509 F. Supp. 3d at 281.

3 *Waters*, 464 F. Supp. 3d at 457; *Fischer*, 509 F. Supp. 3d at 284.

4 *See* Fischer v. Federal Express Corp., 42 F.4th 366, 373–80 (3d Cir. 2022), *aff'g* 509 F. Supp. 3d 275 (E.D. Pa. 2020).

5 *See* Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84 (1st Cir. 2022), *aff'g* 464 F. Supp. 3d 455 (D. Mass. 2020).

6 137 S. Ct. 1773 (2017).

jurisdiction over their employer-defendant.[7] Whether *Bristol-Myers* so applies rests on two debatable legal questions. The first, and the focus of the circuit split presently at hand, is whether unique procedural aspects of collective actions obviate the need to serve process on the defendant within the meaning of Rule 4(k) for the purpose of out-of-state opt-in employee-plaintiffs' claims. If this question is answered affirmatively, federal courts could theoretically exercise personal jurisdiction over such claims up to the limits of the Fifth Amendment. The second is whether FLSA collective actions are *categorically* exempt from *Bristol-Myers*'s holding for reasons of congressional intent or federalism.

This Note argues that, under the current state of the law, Rule 4(k) must be read to apply to out-of-state opt-in employee-plaintiffs' claims and FLSA collective actions likely cannot be categorically exempt from *Bristol-Myers*. To that end, Part I introduces the FLSA's collective action mechanism, with an emphasis on congressional intent to reach broadly.[8] Part II sets forth the present landscape of the circuit split: the Third, Sixth, and Eighth Circuits have found *Bristol-Myers* applicable to collective actions, and the First has concluded otherwise.[9] Part III presents this Note's conclusion: while the Third, Sixth, and Eighth Circuits have the better of this circuit split, it is imperative that a change in the law be made.[10] This Note ultimately endorses amending the FLSA to provide for nationwide service of process.

I
Background

This section of the Note presents the legal and historical background necessary for an understanding of the circuit split and possible solutions. Subpart I.A briefly describes the FLSA and the circumstances surrounding its enactment before explaining how district courts implement its collective action mechanism.[11] Subpart I.B clarifies that, while the Fifth

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7 *See id.* at 1781 (2017) ("As we have explained, 'a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.' This remains true even when third parties . . . bring claims similar to those brought by the nonresidents.") (citations omitted) (quoting Walden v. Fiore, 571 U.S. 277, 286 (2014)).

8 *See infra* Part I.

9 *See infra* Part II.

10 *See infra* Part III.

11 *See infra* subpart I.A.

Amendment is the outer bounds for personal jurisdiction in federal court, federal courts are limited by Federal Rule of Civil Procedure 4(k), which ties the effective scope of personal jurisdiction to service of process.[12]

A. The Fair Labor Standards Act

1. *A Brief History of the Fair Labor Standards Act*

The Fair Labor Standards Act is a federal "super-statute"[13] that Congress enacted pursuant to its Commerce Clause power against the backdrop of the Great Depression.[14] The FLSA was designed to be the "most comprehensive and pervasive" federal labor law.[15] Its purpose is to correct and eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers."[16] To that end, the FLSA prohibits "oppressive" child labor,[17] establishes a nationwide minimum wage,[18] and mandates time-and-a-half compensation for hours worked beyond forty in a week.[19] The FLSA further requires that employers keep accurate records reflecting employees' hours worked and wages paid.[20] President Roosevelt declared that, except for the Social Security Act, the FLSA was "the most far-reaching . . . program for the benefit of workers ever adopted [in the United States] or in any other country."[21]

The United States Department of Labor's Wage and Hour Division is the primary government entity responsible for administering the FLSA.[22] Its data suggests that the FLSA is

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12 *See infra* subpart I.B.

13 *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L. J. 1215, 1215–16 (2001) (defining "super-statutes" as laws that seek to establish new frameworks and which have stuck in the public culture so as to have a broad impact).

14 *See* Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219); U.S. CONST. art. I, § 8; JOSEPH E. KALET, PRIMER ON WAGE & HOUR LAWS at 3 (2d ed. 1990); Willis J. Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L. J. 715, 719–24 (Nov. 1988).

15 *See* KALET, *supra* note 14, at v.

16 29 U.S.C. § 202.

17 *Id.* § 212.

18 *Id.* § 206(a).

19 *Id.* § 207(a)(1).

20 *Id.* § 211(c).

21 Franklin D. Roosevelt, *Fireside Chat on Party Primaries*, *in* NOTHING TO FEAR: THE SELECTED ADDRESSES OF FRANKLIN DELANO ROOSEVELT 1932–1945, at 145 (B. D. Zevin ed., 1946).

22 *See* KALET, *supra* note 14, at 49.

economically significant in the aggregate but that individual employees' claims tend to be small.[23] The Secretary of Labor is empowered to enforce the FLSA by imposing penalties or suing employers for unpaid back wages.[24]

2. *Strength in Numbers: The FLSA's Collective Action Provision*

Congress also created a private right of action. The FLSA allows employees with their own claims to bring group lawsuits on behalf of other "similarly situated" employees.[25] This "collective action" mechanism allows employee-plaintiffs to minimize individual litigation expenses by pooling their resources.[26] This, in turn, enables employees to pursue claims that would otherwise be worth less than the cost of litigation. Thus, preserving the utility of the collective action mechanism is vital to the robust private enforcement of the FLSA.[27]

In the absence of statutory guidance regarding how to implement the collective action mechanism, most jurisdictions have adopted a two-step "certification" inquiry.[28] The first step, known as "conditional certification," occurs near the beginning

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23 The Wage and Hour Division reported that the 7,948 minimum wage violation cases it brought on behalf of 30,051 employees during fiscal year 2022 yielded $17,941,190 in recovered back wages (an average of recovery of $597). It further reported 5,905 cases involving unpaid overtime, resulting in a back wages recovery of $134,591,521 for 110,221 employees (an average of $1221). *See* WAGE & HOUR DIVISION, FAIR LABOR STANDARDS ACT, https://www.dol.gov/agencies/whd/data/charts/fair-labor-standards-act [http://perma.cc/EN3T-JENF] (last visited June 29, 2023).

24 *See* WAGE & HOUR DIVISION, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT, https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa [https://perma.cc/W9YF-KJ2V] (last visited Sept. 27, 2023).

25 *See* 29 U.S.C. § 216(b) ("An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.").

26 *See* Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989) ("A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources.").

27 *See* Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 435 (5th Cir. 2021).

28 *See* 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1807 (3d ed. 2005). The United States District Court of New Jersey was the first to articulate the two-step certification process, which most courts now apply in their discretion. *See* Lusardi v. Xerox Corp., 122 F.R.D. 463 (D.N.J. 1988); Anaid Reyes Kipp, Note, *Jurisdiction At Work: Specific Personal Jurisdiction in FLSA Collective Actions After* Bristol-Myers Squibb, 38 GA. STATE UNIV. L. REV. 941, 963 n.98 (2022).

of the litigation.[29] At this stage, the "named" plaintiff—the plaintiff responsible for having initiated the lawsuit—seeks court-facilitated notice of the existence of the collective action to prospective opt-in plaintiffs.[30] The named plaintiff's burden is usually to make either "substantial allegations" or a "modest factual showing" that similarly situated employees exist.[31] There is a "loose consensus" among district courts that conditional certification entails merely a lenient review of the plaintiff's pleadings and other limited evidence.[32] As the Supreme Court recognized in *Genesis HealthCare Corp. v. Symczyk*, the "sole consequence of conditional certification is the sending of court-approved written notice" to prospective employee-plaintiffs.[33] Notified employees join the collective action if and only if they file written consent.[34]

After the plaintiff prevails at the "conditional certification" stage and other employees opt-in, the defendant typically moves for decertification.[35] The court will again inquire whether the members of the collective are similarly situated. At this stage, the plaintiffs must use the evidence produced during discovery to meet a heavier burden of proof.[36] Neither Congress nor the Supreme Court have defined "similarly situated."[37] A court might find that employee-plaintiffs are not similarly situated if they have different job types, locations, or working conditions.[38] If it chooses to decertify

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29 *See* Adam Drake, Note, *The FLSA's* Bristol-Myers Squibb *Problem*, 89 FORDHAM L. REV. 1511, 1525 (2020).

30 *See Hoffman-La Roche*, 493 U.S. at 169 (recognizing the discretionary power of district courts to implement 29 U.S.C. § 216(b) by facilitating notice to potential plaintiffs); Genesis HealthCare Corp. v. Symczyk, 569 U.S. 66, 75 (2013) ("The sole consequence of conditional certification is the sending of court-approved written notice to employees . . . who in turn become parties to a collective action only by filing written consent with the court.").

31 *See* Drake, *supra* note 29, at 1525.

32 *See* Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 89 (1st Cir. 2022). *But see* Swales v. KLLM Transp. Servs., LLC, 985 F.3d 430, 434 (5th Cir. 2021) (stating that district courts must "rigorously scrutinize" whether there are similarly situated workers "at the outset of the case").

33 *See* 569 U.S. at 75.

34 *See* 29 U.S.C. § 216(b).

35 *See* Drake, *supra* note 29, at 1526.

36 *See* Daniel C. Lopez, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS L. J. 275, 289 (2009); Scott v. Aetna Servs., 210 F.R.D. 261, 264 (D. Conn. 2002) (quoting Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213–14 (5th Cir. 1995)).

37 *See* Campbell v. City of Los Angeles, 903 F.3d 1090, 1108 (9th Cir. 2018).

38 *See* Lopez, *supra* note 36, at 289.

the collective, the court will dismiss the opt-in plaintiffs' claims without prejudice.[39] Otherwise, the court will grant a final motion for certification and the collective action will settle or proceed to trial.[40]

FLSA collective actions are procedurally distinct from Rule 23 class actions in several important ways. The FLSA specifically provides:

> No employee shall be a *party plaintiff* to any such [collective] 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.[41]

Thus, unlike Rule 23(b)(3) class actions, where members of the plaintiff class must affirmatively opt-out to avoid being bound by the judgment,[42] collective actions are opt-in. Further, employees obtain full party status upon joining a collective; this includes the right to separate counsel, to appear individually in court, and to a share of control over the litigation equal to that of the named plaintiff.[43] By contrast, in a class action, individual claimants who are not the class representative are not entitled to significant control of the litigation.[44] Opt-in plaintiffs are parties to the collective action immediately upon filing their consent forms: approval from the court is *not* required.[45]

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39 *See* 7B WRIGHT ET AL., *supra* note 28, at 503.

40 *See* Lopez, *supra* note 36, at 289.

41 *See* 29 U.S.C. § 216(b) (emphasis added).

42 *See* FED. R. CIV. P. 23(c)(3); *see also* 7B WRIGHT ET AL., *supra* note 28, § 1807 ("Rule 23(b) authorizes three types of class actions and makes participation in the first two types mandatory for individuals falling within the definition of the class. The third type of class action under Rule 23(b)(3) requires individuals falling within the definition of the class to opt out of the litigation if they do not wish to be bound by any judgment that is reached.").

43 *See* Allan G. King & Camille C. Ozumba, *Strange Fiction: The "Class Certification" Decision in FLSA Collective Actions*, 24 LAB. L. 267, 268 n.6 (2009); *see also* Rosario v. Valentine Ave. Disc. Store, Co., 828 F. Supp. 2d 508, 520 (E.D.N.Y. 2011) (discussing the need for opt-in notices to inform prospective opt-in employee-plaintiffs of their right to separate counsel); Campbell v. City of Los Angeles, 903 F.3d 1090, 1108 (9th Cir. 2018) ("[P]articipation in the collective action is a statutory 'right' held equally and individually by each party plaintiff, whether originally appearing in the complaint or later opting in.").

44 *See Campbell*, 903 F.3d at 1105.

45 *See* Simmons v. United Mortg. & Loan Inv., LLC, 634 F.3d 754, 758 (4th Cir. 2011).

B. Personal Jurisdiction

1. *Specific Jurisdiction After* Bristol-Myers

Ever since the Supreme Court's seminal decision in *International Shoe Co. v. Washington*,[46] the essence of the test for whether an exercise of personal jurisdiction is consistent with due process has been whether the defendant has sufficient "minimum contacts" with the forum such that the court's exercise of power over the defendant is fair.[47] Where the defendant's minimum contacts with the forum are so "continuous and systematic" as to render that defendant "at home," a court may exercise jurisdiction over the defendant to adjudicate any claim.[48] This is known as "general" jurisdiction.[49] In *Daimler AG v. Bauman*, the Supreme Court held that a corporation-defendant is only "at home" for jurisdictional purposes in the state(s) where it is incorporated and/or has its principal place of business.[50] Where general jurisdiction is unavailable, a court *may* nevertheless be able to assert "specific" jurisdiction.[51] This type of jurisdiction is limited to claims connected with the defendant's forum contacts.[52] The modern specific jurisdiction doctrine entails a three-prong test:[53] the defendant must have purposefully directed its activities toward the forum,[54] the cause of action for the claim sought to be adjudicated must "aris[e] out of or relate[] to" the defendant's forum contacts,[55] and exercising jurisdiction must be reasonable in light of the circumstances.[56]

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46 Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

47 *Id.* at 316.

48 *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

49 *See General Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984) ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant.").

50 *See* Daimler AG v. Bauman, 571 U.S. 117, 137–39 (2014).

51 *See Specific Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

52 *Id.*

53 *See* Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1785–86 (2017) (Sotomayor, J. dissenting) ("Our cases have set out three conditions for the exercise of specific jurisdiction over a nonresident defendant.").

54 *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

55 *See Helicopteros*, 466 U.S. at 414 n.8.

56 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

Bristol-Myers is a recent Supreme Court decision which sought to clarify the second prong of the specific jurisdiction test.[57] In *Bristol-Myers,* 678 plaintiffs, eighty-six of whom were California residents, brought eight separate mass action suits in California against the manufacturer of the blood-thinning pharmaceutical drug Plavix.[58] While all plaintiffs claimed to have been injured as a result of ingesting Plavix, the nonresident plaintiffs did not allege that they had purchased or been injured by Plavix in California.[59] The California Supreme Court, adopting a "sliding scale" approach, concluded that the defendant's "wide ranging" California contacts were sufficient to support specific jurisdiction over the nonresident plaintiffs' claims despite the fact that the only connection between those claims and California was their similarity to residents' claims.[60]

The Supreme Court, rejecting the "sliding scale" approach, reversed. Writing for the majority, Justice Alito explained that lower courts must assess each claim for relatedness individually.[61] The Court further held that a defendant's relationship with one plaintiff is, standing alone, an insufficient basis to conclude that other plaintiffs' relate to the defendant's forum contacts.[62] Thus, the nonresident plaintiffs could not join the resident-plaintiffs' California lawsuit despite the fact that their claims were, in every other respect, concededly identical.[63] The Court noted that the plaintiffs could have all sued together in a state where the defendant was subject to general jurisdiction.[64]

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57 *See* Kipp, *supra* note 28 at 951–52.

58 *See Bristol-Myers*, 137 S. Ct. at 1778.

59 *See* Jonathan Stephenson, Note, *Mass Inaction: An Analysis of Personal Jurisdiction in Mass Actions in Federal Court*, 59 SANTA CLARA L. REV. 453, 466 (2019); *Bristol-Myers*, 137 S. Ct. at 1781.

60 *See* Bristol-Myers Squibb Co. v. Super. Ct., 377 P.3d 874, 889–90 (Cal. 2016), *rev'd* 137 S. Ct. 1773 (2017). Simply put, the California Supreme Court had contemplated that, in some circumstances, mere similarity between nonresident-plaintiffs' claims (not arising from the defendant's forum contacts) and resident-plaintiffs' claims (so arising) would be sufficient to support specific jurisdiction. *Id.*

61 *See Bristol-Myers*, 137 S. Ct. at 1781 ("[F]or a court to exercise specific jurisdiction *over a claim* . . . [w]hat is needed . . . is a connection between the forum and the specific claims at issue.") (emphasis added).

62 *Id.* ("As we have explained, a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.") (internal quotations omitted).

63 *Id.* at 1785 (Sotomayor, J., dissenting).

64 *Id.* at 1783 (majority opinion).

Applying *Bristol-Myers* to representative actions could significantly impact their prevalence and utility.[65] Yet, the Court expressly left unresolved whether its holding applied to representative actions or actions brought in federal court.[66] *Bristol-Myers* itself involved state law tort claims brought in state court via mass actions joined pursuant to a unique California procedural rule.[67] *Bristol-Myers* called upon the Court to interpret the *Fourteenth* Amendment.[68] While Rule 4(k)(1)(A) routinely implicates the Fourteenth Amendment in federal court personal jurisdiction analysis, that subsection does not govern all cases.[69] Justice Alito's majority opinion did, however, make clear the significant role that horizontal federalism concerns—which would be absent in a case filed in federal court—played in the *Bristol-Myers* decision.[70]

The fallout from *Bristol-Myers* has produced two circuit splits in the representative actions space. The first concerns whether *Bristol-Myers* applies to class actions brought in accordance with Rule 23.[71] The second, the subject of this Note,

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65 *See* Jordan Philley Saylor, *Mass Chaos:* Bristol-Myers Squibb *and its Application to Class Actions*, 60 UNIV. LOUISVILLE L. REV. 391, 392 (2022).

66 *See Bristol-Myers*, 137 S. Ct. at 1784 ("[W]e leave open the question [of] whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."); *id.* at 1789 n.4 (2017) (Sotomayor, J., dissenting) ("The Court today does not confront the question [of] 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.").

67 *See* CAL. CIV. PROC. § 404 (West 2022); Canaday v. Anthem Cos., Inc., 9 F.4th 392, 405 (6th Cir. 2021).

68 *See Bristol-Myers*, 137 S. Ct. at 1779; Fischer v. Federal Express Corp., 42 F.4th 366, 372 (3d Cir. 2022) ("*Bristol-Myers* addressed a requirement placed on state courts by the Fourteenth Amendment. Accordingly, it did not purport to address . . . whether a nationwide FLSA collective action brought in federal court is subject to the same jurisdictional analysis as a mass action brought in a California state court.").

69 *See, e.g.*, FED. R. CIV. P. 4(k)(1)(B)–(C) (providing other methods for effective service of process to establish personal jurisdiction over a defendant).

70 The Court was concerned that, by hearing the nonresident plaintiffs' claims, California was encroaching on the sovereignty of other states that had an interest in adjudicating the controversy. *See Bristol-Myers*, 137 S. Ct. at 1780 ("The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States . . . [a]nd, at times, this federalism interest may be decisive.") (internal quotations omitted).

71 The Sixth, Seventh, and Third Circuits have concluded that *Bristol-Myers* does not apply to Rule 23 class actions, generally reasoning that the rule's certification requirements protect defendants. *See* Mussat v. IQVIA, Inc., 953 F.3d 441 (7th Cir. 2020); Lyngaas v. Curaden AG, 992 F.3d 412 (6th Cir. 2021); Fischer v. Fed. Express Corp., 42 F.4th 366 (3d Cir. 2022). Meanwhile, the Fifth, Ninth, and D.C. Circuits have held that *Bristol-Myers* does apply to nonresident putative

concerns whether *Bristol-Myers* applies to *collective* actions, which are unique to the FLSA.[72]

2. *How Rule 4(k) Effectuates Yet Constrains Personal Jurisdiction in Federal Court*

While state courts are constrained by the Fourteenth Amendment, the outer limit for personal jurisdiction in *federal* court is set by the Fifth Amendment.[73] The Fifth Amendment prescribes the same test for personal jurisdiction as that set forth in *International Shoe* except that the relevant contacts are those between the defendant and the entire United States.[74] In most cases, however, federal courts do not possess statutory authorization to exercise personal jurisdiction to the full extent of the Fifth Amendment.[75] This is because Rule 4(k)(1)(A) instructs federal courts to analyze personal jurisdiction as if they were courts of the states in which they are geographically located.[76] Thus, in the majority of cases in federal court, the Fourteenth Amendment's Due Process Clause and the applicable state's long-arm statute still limit a federal court's personal jurisdiction indirectly.[77] Yet, personal jurisdiction in federal court need not always be established via Rule 4(k)(1)(A). The "most notabl[e]" alternative is Rule 4(k)(1)(C), which effectuates personal jurisdiction over a defendant served by a

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class members' claims once a class is certified. *See* Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240 (5th Cir. 2020); Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293 (D.C. Cir. 2020); Moser v. Benefytt, Inc., 8 F.4th 872 (9th Cir. 2021).

72 *See* Patrick M. Curran, Jr. & Jesse R. Dill, *First Circuit Creates Split Regarding Federal Court Jurisdiction Over FLSA Multistate Collective Actions*, OGLETREE DEAKINS, https://ogletree.com/insights/first-circuit-creates-split-regarding-federal-court-jurisdiction-over-flsa-multistate-collective-actions/ [https://perma.cc/L8H8-95RX] (last visited June 29, 2023).

73 *See* A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979, 980–82 (2019); Pennoyer v. Neff, 95 U.S. 714, 733 (1878) (arising from state court and applying the Fourteenth Amendment); Laurel Gardens LLC v. McKenna, 948 F.3d 105, 122 (3d Cir. 2020); Cory v. Aztec Steel Bldg., Inc. 468 F.3d 1226, 1229 (10th Cir. 2006); U.S. CONST. amend. V.

74 *See* Spencer, *supra* note 73, at 979 ("[T]he Fifth Amendment's Due Process Clause . . . permits jurisdiction over persons with sufficient minimum contacts with the United States and over property located therein.").

75 *See* Drake, *supra* note 29, at 1521. Technically, the Federal Rules of Civil Procedure are not statutes but rather rules promulgated by the Supreme Court in accordance with the procedures set forth by the Rules Enabling Act of 1943 (codified as amended at 28 U.S.C. §§ 2071–2077).

76 *See* FED. R. CIV. P. 4(k)(1)(A).

77 *See* Spencer, *supra* note 73, at 981.

summons authorized by a federal statute, such as one providing for nationwide service of process.[78]

II
The Circuit Split

A. Where *Bristol-Myers* Applies to Opt-in Employee-Plaintiffs' Claims

1. *The Sixth Circuit*

With its decision in *Canaday v. Anthem Companies*, the Sixth Circuit became the first federal circuit court to weigh in regarding whether *Bristol-Myers* applies to FLSA collective actions brought in federal court.[79] In *Canaday*, a nurse filed a putative collective action in Tennessee against her employer, Anthem, alleging that it had misclassified her and other similarly situated employees as exempt from overtime.[80] A number of Anthem nurses from other states opted into the collective action, but the district court dismissed their claims without prejudice for lack of personal jurisdiction.[81] The Sixth Circuit affirmed, finding that the "principles animating *Bristol-Myers*'s application to mass actions under [state] law apply with equal force to FLSA collective actions."[82]

The Sixth Circuit began by noting that, because the FLSA does not provide for nationwide service of process and Anthem was not a party joined under Rules 14 or 19, Rule 4(k)(1)(A) was the only potential means of establishing personal jurisdiction.[83] The court accordingly conducted a minimum contacts analysis under the Fourteenth Amendment's Due Process Clause, as if the named plaintiff had filed in Tennessee state court.[84] The court examined whether each claim was related to Anthem's Tennessee contacts and, applying *Bristol-Myers*, found the nonresident plaintiffs' claims lacking.[85] It explained that, while the named plaintiff's claim arose out of Anthem employing her

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78 *See* Fed. R. Civ. P. 4(k)(1)(C); Spencer, *supra* note 73, at 981.

79 9 F.4th 392 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 2777 (2022).

80 *See* Canaday v. Anthem Cos., Inc., 9 F.4th 392, 394 (6th Cir. 2021).

81 *See* Canaday v. Anthem Cos., Inc., 439 F. Supp. 3d 1042, 1050 (W.D. Tenn. 2020), *aff'd* 9 F.4th 392 (6th Cir. 2021).

82 *See Canaday*, 9 F.4th at 397.

83 *See id.* at 396.

84 *Id.*

85 *Id.* at 397 ("Have the nonresident plaintiffs . . . brought claims arising out of or relating to Anthem's conduct in Tennessee? We think not.").

in Tennessee, the nonresident opt-in plaintiffs' claims arose out of Anthem employing them elsewhere.[86]

The Sixth Circuit dedicated part of its opinion in *Canaday* to differentiating collective actions from class actions. In a prior case, the Sixth Circuit had held that, in a Rule 23 class action, only the named plaintiff's claims must satisfy personal jurisdiction requirements.[87] The Sixth Circuit had reasoned that class members are not parties for jurisdictional purposes, that a class action is formally and practically a single suit, and that the Supreme Court intended its holding in *Bristol-Myers* narrowly.[88] The court acknowledged that collective and class actions bear similarities, but explained that party status is a key difference.[89] Because opt-in plaintiffs in a collective action become real parties in interest, able to exercise a certain degree of individualized control over the litigation, the Sixth Circuit concluded that a collective action is better analogized to a mass action of the sort at issue in *Bristol-Myers*.[90]

The Sixth Circuit next proceeded to address the plaintiff's objections, providing greater insight into its decision to apply *Bristol-Myers*.[91] The plaintiffs first argued that opt-in plaintiffs are required merely to serve the defendant with "written notice" under Rule 5(a)(1)(E), not process under Rule 4(k).[92] The Sixth Circuit found this argument unpersuasive. It

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86 *Id.*

87 *See* Lyngaas v. Curaden AG, 992 F.3d 412, 433 (6th Cir. 2021).

88 *Id.* at 433–35. The Sixth Circuit also relied on a prior judgment in a nationwide class action—brought originally outside the defendant's home—that the Supreme Court had passed upon without commenting on personal jurisdiction. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

89 *See Canaday*, 9 F.4th at 397, 402–03.

90 *Id.* at 397. In fact, the Sixth Circuit concluded that Congress had entirely stripped collective actions of their representative character when it amended the FLSA via the Portal-to-Portal Act of 1947. *See id.* at 402. The Sixth Circuit appears to have misunderstood that amendment. The Portal-to-Portal Act of 1947 amended Section 216(b) merely to remove the power of *legally disinterested* third-parties, such as union representatives, to bring claims on behalf of employees. *See* Pub. L. No. 80-99, 61 Stat. 84 (1947) (codified as amended at 29 U.S.C. §§ 251 *et seq.*); Jason C. Marsili, *A Brief History of the Fair Labor Standards Act*, *in* THE FAIR LABOR STANDARDS ACT 9 (Dennis M. McClelland et al. eds., 4th ed., 2020). Section 216(b) continues to provide that an employee may bring a collective action "*for and in behalf of* himself . . . *and* other employees similarly situated." *See* 29 U.S.C. § 216(b) (emphasis added).

91 *See Canaday*, 9 F.4th at 398–404.

92 *See id.* at 399–400; FED. R. CIV. P. 5(a)(1)(E) ("Unless these rules provide otherwise, each of the following papers must be served on every party: . . . a *written notice*, appearance, demand, or offer of judgment, or any similar paper.") (emphasis added). The essence of the plaintiffs' argument was that, because opt-in plaintiffs' claims do not implicate Rule 4(k)(1)(A), no rule constrains the federal

explained that the limitations Rule 4(k) imposes on personal jurisdiction remain "operative constraints" throughout the litigation.[93] The plaintiffs next contended that denying personal jurisdiction for nonresident opt-in plaintiffs' claims would break up collective actions along state lines and prevent efficient enforcement of the FLSA.[94] The Sixth Circuit likewise rejected this argument. It explained that the principal purpose of personal jurisdiction is to protect defendants, not to facilitate plaintiffs' claims.[95] Finally, it noted that employees are still permitted to file nationwide collective actions in forums where the defendant is amenable to general jurisdiction.[96]

2. *The Eighth Circuit*

A single day after the Sixth Circuit's *Canaday* opinion was released, the Eighth Circuit decided a case that presented the same issue: *Vallone v. CJS Solutions Group, LLC*.[97] The plaintiffs in *that case* alleged that their employer had not paid them required wages for traveling out-of-town to and from remote jobsites.[98] The Eighth Circuit applied *Bristol-Myers* without discussing, or seemingly even considering, whether opt-in plaintiffs' claims in collective actions might be exempt.[99] The Eighth Circuit noted that each failure to pay wages was a separate violation of the FLSA.[100] The Eighth Circuit concluded that a district court could not base jurisdiction to hear all of the claims merely upon the subset of those claims which did satisfy the relatedness requirement.[101]

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court to exercising jurisdiction only if a court of the state in which the district court is located could have done the same.

93 *See Canaday*, 9 F.4th at 400 (quoting A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction Over Absent Class Member Claims Explained*, 39 REV. LITIG. 31, 44 (2019)).

94 *See id.* at 400–01.

95 *Id.* at 400.

96 *Id.* at 400–01.

97 9 F.4th 861 (8th Cir. 2021).

98 *Id.* at 863.

99 *See* Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 91 n.4 (1st Cir. 2022) (noting that, in *Vallone*, the Eighth Circuit did not reach the question of whether opt-in plaintiffs in a collective action have independent party status).

100 *Vallone*, 9 F.4th at 865.

101 *Id.*

The Eighth Circuit thus affirmed the dismissal of certain nonresident plaintiffs' claims.[102]

3. *The Third Circuit*

In *Fischer v. Fed. Express Corp.*, an unpaid overtime case like *Canaday*, the Third Circuit expressed its agreement with the Sixth and Eighth Circuits.[103]

The Third Circuit reaffirmed party status as a key difference between collective and class actions, while also recognizing Rule 23's demanding certification and post-certification requirements as another fundamental distinction.[104] The Third Circuit suggested that Congress and the courts impose these requirements in part to protect defendants "by making the res judicata implications of a class action clearer."[105] It further reasoned that these requirements lend class actions a unique status which justifies the claim of the entire class being the relevant claim for personal jurisdiction analysis.[106] The Third Circuit next noted that the FLSA's collective action mechanism does not impose any of the same requirements on collectives, leaving defendants unprotected.[107] Rather, as the Third Circuit observed, the common law collective action "certification" process merely guides court-facilitated notice and does not protect defendants.[108] The Third Circuit additionally noted that the Supreme Court has in another context described collective and class actions as "fundamentally different."[109] In light of these differences, the Third Circuit concluded that *Bristol-Myers* could apply to collective and class actions differently.[110]

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102 *Id.* at 866–67.

103 Fischer v. Fed. Express Corp., 42 F.4th (3d Cir. 2022), *cert. denied*, 143 S. Ct. 1001 (2023).

104 *Id.* at 376–77 ("The FLSA collective action device contains none of the crucial requirements that allow the class action to be excepted from certain rules of 'general application in Anglo-American jurisprudence.'" (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940))); *see also e.g.*, FED. R. CIV. P. 23(a) (establishing numerosity, commonality, typicality, and adequacy as prerequisites for class certification); FED. R. CIV. P. 23(e) (requiring a court to conduct a hearing and make certain findings before it approves any settlement that would bind class members).

105 *See Fischer*, 42 F.4th at 373.

106 *Id.* at 373, 375.

107 *Id.* at 376.

108 *Id.*

109 *Id.* at 379 (quoting Genesis HealthCare Corp. v. Symczyk, 569 U.S. 66, 74 (2013) (internal quotations omitted)).

110 *Id.* at 379–80.

By contrast, the Third Circuit found significant similarities between collective actions and mass tort actions of the type at issue in *Bristol-Myers*. It noted that both the FLSA and the California statute[111] permitting aggregation in *Bristol-Myers* provided for each plaintiff to retain individual party status and to be able to proceed with individual claims.[112] The court further observed that, like the FLSA's collective action mechanism, the California statute lacked extensive procedural protections or limitations.[113] The Third Circuit thus concluded that both the FLSA's collective action mechanism and the California statute were "species of joinder."[114] Indeed, the FLSA's collective action mechanism has been described that way before, including by the Supreme Court.[115]

The Third Circuit noted that Rule 4(k)(1)(A) constrained the district court's jurisdiction to the bounds of Pennsylvania's long-arm statute[116] and the Due Process Clause of the *Fourteenth* Amendment.[117] Applying *Bristol-Myers*, the court concluded that the nonresident plaintiffs' claims were not sufficiently related to the forum state.[118] While the court agreed that Congress *could* constitutionally authorize personal jurisdiction to the outer limits of the Fifth Amendment, it concluded Congress had not done so when it enacted the FLSA.[119]

B. Where *Bristol-Myers* Does Not Apply to Opt-in Employee-Plaintiffs' Claims

1. *The First Circuit*

At present, the First Circuit is the only federal appellate court to have held that *Bristol-Myers* does not apply to opt-in

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111 CAL. CIV. PROC. § 404 (West 2022).

112 *See Fischer*, 42 F.4th at 378.

113 *Id.*

114 *Id.*

115 *See* Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 70 n.1 (2013).

116 42 PA. STAT. AND CONS. STAT. § 5322 (West 2023). Pennsylvania's long-arm statute authorizes personal jurisdiction to the fullest extent permitted by the Fourteenth Amendment. *See id.* § 5322(b).

117 *See Fischer*, 42 F.4th at 383.

118 *Id.* at 380, 383 ("[The named plaintiff] was able to establish [specific] personal jurisdiction over FedEx with respect to her claims . . . [because those claims] arose out of her work for FedEx in [its] Pennsylvania locations. By contrast, the opt-in plaintiffs lived in New York and Maryland. They were employed by FedEx in New York and Maryland. And they do not contend they had any connection to, let alone injury arising from, FedEx's activities in Pennsylvania.").

119 *Id.* at 385.

plaintiffs' claims in collective actions brought in federal court. Its decision in *Waters v. Day & Zimmermann NPS, Inc.* created the circuit split that is the subject of this Note.[120] That case, like *Canaday* and *Fischer*, involved employee claims for unpaid overtime.[121] The named plaintiff, Waters, filed a putative collective action against his former employer in the United States District Court for the District of Massachusetts, serving process pursuant to Rule 4(k)(1)(A).[122] Day & Zimmermann made three key concessions: first, that specific jurisdiction existed with respect to Waters's claims because it had employed Waters in Massachusetts; second, that Waters's service was valid; and third, that opt-in plaintiffs in collective actions are not required to serve process.[123] A large number of similarly situated current and former employees, including some who were not Massachusetts residents, then opted into the suit.[124] The district court denied Day & Zimmermann's motion to dismiss the nonresident opt-in plaintiff's claims.[125] The First Circuit affirmed that order on interlocutory appeal.[126] The First Circuit interpreted Rule 4(k) to not impose any continuing restraint on a court's exercise of jurisdiction after process has been validly served. In the First Circuit's own words, "Rule 4 is concerned with initial service, not jurisdictional limitations after service."[127] According to this view, because opt-in plaintiffs' claims in collective actions are added after the named plaintiff has validly served process, a federal court's jurisdiction with respect to these claims is constrained merely by the *Fifth* Amendment.[128] Because *Bristol-Myers* is, undisputedly, an interpretation of the *Fourteenth* Amendment,[129] the First Circuit concluded that it is not implicated by such claims.[130]

The First Circuit based its interpretation of Rule 4(k) on the rule's title, text, and pseudo-legislative history.[131] It noted

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120 23 F.4th 84 (1st Cir. 2022), *cert. denied*, 142 S. Ct. 2777 (2022).

121 *Id.* at 87.

122 *Id.*

123 *Id.*

124 Waters v. Day & Zimmermann NPS, Inc., 464 F. Supp. 3d 455, 457 (D. Mass. 2020).

125 *Id.* at 461.

126 *Waters*, 23 F.4th at 86–87.

127 *Id.* at 98–99.

128 *Id.* at 96.

129 *See* Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1779 (2017).

130 *See Waters*, 23 F.4th at 92–93.

131 *Id.*

that Rule 4 is entitled "Summons" and that subsection (k) is entitled "Territorial Limits of Effective Service."[132] The First Circuit explained that these titles suggest that Rule 4(k)'s requirements were intended to apply only at the time of service of process and not to remain operative constraints throughout the litigation.[133] The First Circuit reasoned that, had the drafters intended Rule 4(k) to constrain personal jurisdiction in federal court after service had been effectuated, they could have easily so provided.[134] The First Circuit found that Rule 4 had been amended throughout the twentieth century not to change jurisdictional law but rather to simplify service.[135] The First Circuit additionally cited Rule 82, which provides that the Rules "do not extend or limit the jurisdiction of the district courts . . . ."[136]

The First Circuit further argued that because (in its view) Rule 20—entitled "Permissive Joinder of Parties"—limits "the court's authority over the added plaintiffs," Rule 4(k) cannot do the same.[137] Rule 20 requires that claims arise "out of the same transaction [or] occurrence" and present at least one common "question of law or fact" before the parties asserting those claims may "join in one action as plaintiffs."[138] According to the First Circuit, the FLSA's collective action mechanism is a substitute joinder rule that "displaces Rule 20."[139] Under the First Circuit's approach, prospective opt-in plaintiffs in federal court are subject with respect to personal jurisdiction only to the FLSA's "similarly situated" requirement and the outer bounds set by the Fifth Amendment.[140]

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132 *Id.* at 93; *see also* FED. R. CIV. P. 4.

133 *Waters*, 23 F.4th at 93.

134 *Id.* at 94 ("[T]he FRCP drafters . . . could have simply said that additional plaintiffs may be added to an action if they could have served a summons on a defendant consistent with Rule 4(k)(1)(A).").

135 *Id.* at 95–96.

136 *Id.* at 94; FED. R. CIV. P. 82. There is substantial reason to believe that Rule 82 refers only to subject-matter jurisdiction and that the First Circuit's reliance on it is therefore misplaced. *See* FED. R. CIV. P. 82 advisory committee's note to 2001 amendment ("That sentence is a flat lie if 'jurisdiction' includes personal or quasi-in rem jurisdiction.").

137 *See Waters*, 23 F.4th at 96 ("We are not aware of, and [Day & Zimmermann] has not cited, a case in which a court held that Rule 4 applies to plaintiffs joined under Rule 20."); FED. R. CIV. P. 20.

138 *See* FED. R. CIV. P. 20(a)(1).

139 *See Waters*, 23 F.4th at 96.

140 *Id.* at 96–99.

The First Circuit additionally reasoned that declining to extend *Bristol-Myers* to opt-in plaintiff's claims in FLSA collective actions better fit the FLSA's purpose and legislative history.[141] The First Circuit observed that Congress, in providing for collective actions, had sought "to enable *all* affected employees working for a single employer" to sue *together*.[142] The First Circuit therefore reasoned that state lines should not be a barrier to the FLSA's enforcement.[143] The First Circuit additionally observed that permitting nationwide collective actions more broadly would further both judicial efficiency and the robust private enforcement of the FLSA.[144] It thus concluded that imposing *Bristol-Myers* as a barrier to collective actions was "not what the FLSA contemplated."[145]

III
ARGUMENT

The First Circuit's split from the Sixth, Eighth, and Third Circuits has exacerbated the need for Congress or the Supreme Court to address *Bristol-Myers*'s uncertain application to collective actions. As many courts and commentators have noted, applying *Bristol-Myers* to collective actions jeopardizes the utility of the mechanism and stymies effective private enforcement of the FLSA.[146] As a result of the circuit split, multi-state employers operating within the territorial reach of the First Circuit may be subject to larger and more numerous collective actions than competitors located in other areas of the United States. A firm answer from Congress or the Supreme Court in either direction would help parties in the remaining circuits reach the merits of their cases—or not—more quickly.

The remainder of this Note critiques the present circuit split and compares two possible solutions. Subpart III.A explains why the First Circuit's unorthodox interpretation of

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141 *Id.* at 96–97.

142 *Id.* (emphasis added).

143 *Id.*

144 *Id.*

145 *Id.*

146 *See, e.g.*, Kipp, *supra* note 28, at 978–85 (providing that important at-risk policy implications include "congressional policy regarding worker's [sic] rights," "judicial efficiency," "uniformity," and "predictability."); *Waters*, 23 F.4th at 97 ("[Barring] collective actions by out-of-state employees would frustrate a collective action's two key purposes: (1) enforcement (by preventing violations and letting employees pool resources when seeking relief); and (2) efficiency (by resolving common issues in a single action)." (internal quotations omitted)).

Rule 4(k) must be mistaken. Subpart III.A also identifies what the First Circuit got right: applying *Bristol-Myers* to collective actions frustrates congressional intent and undermines federal wage and hour protections.[147] Subpart III.B then introduces this Note's recommended solution: Congress should obviate the need to apply *any* Fourteenth Amendment personal jurisdiction jurisprudence to collective actions in federal court by amending the FLSA to add nationwide service of process.[148] Finally, subpart III.C explains that the Supreme Court has likely narrowed the availability of specific jurisdiction too much to resolve this circuit split on alternative grounds.[149]

A. Why the First Circuit is Mistaken

To avoid extending *Bristol-Myers* to opt-in plaintiffs' claims in federal court collective actions, the First Circuit adopted a truly unconventional reading of Rule 4(k).[150] Though the First Circuit reached an outcome that is in some respects more desirable, its interpretation of Rule 4(k) presents a number of logical issues which ultimately demonstrate that it is mistaken. The better reading of Rule 4(k)(1)(A) is that it establishes a constraint on personal jurisdiction which remains operative throughout the litigation. Other courts and commentators have therefore concluded that, despite the fact that opt-in plaintiffs are not required to serve process on the defendant, their claims must satisfy Rule 4(k)'s territorial limitations on jurisdiction.[151] The First Circuit's textual analysis does, however, highlight the need to speak with precision and distinguish this constraint from Rule 4(k)(1)(A) itself. Simply put, Rule 4(k)(1)(A) only ever "establishes" personal jurisdiction to the extent that it could be

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147 *See infra* subpart III.A.

148 *See infra* subpart III.B.

149 *See infra* subpart III.C.

150 *See, e.g.*, *Waters*, 23 F.4th at 103 (Barron, J., dissenting) ("I [am not] aware of any other case in which any court (including our own) have ever read Rule 4(k)(1)(A) in the narrow, time-of-service-limited way that the majority reads it.").

151 *See* Canaday v. Anthem Cos., Inc., 9 F.4th 392, 400 (6th Cir. 2021) ("Even with amended complaints and opt-in notices, the district court remains constrained by Civil Rule 4(k)'s—and the host State's—personal jurisdictional limitations."); Spencer, *supra* note 93, at 43–44 ("There is no question that—notwithstanding that such amended complaints are not served with a summons under Rule 4—new claims appearing in amended complaints must satisfy the jurisdictional constraints imposed by Rule 4(k). . . . [T]he personal jurisdiction limitations of the district court that are imposed by Rule 4(k) remain the operative constraints that district courts apply to . . . new claims by *newly joined* parties." (internal quotations omitted)).

so established in state court.[152] District courts therefore require a means of *extending* their jurisdiction to add any claims that fall outside that scope. However, no such means presently exists. Only this interpretation faithfully observes Rule 4(k)(1)(A)'s textual emphasis on service of process while also accounting for the real and lasting jurisdictional implications recognized by precedent.

The principal obstacle to the First Circuit's interpretation of Rule 4(k) is that it creates a loophole whereby any plaintiff could, by amending their complaint, circumvent important limitations on personal jurisdiction. Imagine a plaintiff seeking to sue in a district court that can assert specific jurisdiction over the defendant, but not for the purposes of the plaintiff's intended claim. To obtain jurisdiction anyways, the plaintiff could initially plead a stand-in cause of action sufficiently related to the defendant's forum contacts to support jurisdiction. Then, after using the initial complaint to serve process on the defendant pursuant to Rule 4(c)[153] and Rule 4(k)(1)(A), the plaintiff could amend their complaint by right[154] and replace the stand-in cause of action with the claim the plaintiff truly intended to bring.[155] Because the First Circuit's interpretation of Rule 4(k)(1)(A) does not entail any continuing restraint on jurisdiction, it would not allow the district court to prevent the plaintiff from substituting nearly any cause of action.[156] This loophole would reduce Rule 4(k)(1)(A), which must, as even the First Circuit acknowledges, apply meaningfully at the outset of the litigation, to a farce.[157]

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152 *See* FED. R. CIV. P. 4(k).

153 *See* FED. R. CIV. P. 4(c) ("A summons must be served with a copy of the complaint.").

154 *See* FED. R. CIV. P. 15(a)(1) ("A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.").

155 *See* Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 309 (D.C. Cir. 2020) (Silberman, J., dissenting) ("[L]itigants could easily sidestep the territorial limits on personal jurisdiction simply by adding claims—or by adding plaintiffs, for that matter—after complying with Rule 4(k)(1)(A) in their first filing . . . [but t]hat, too, is decidedly not the law."). Molock involved a putative class action. *Id.* at 295.

156 *See id.* at 309.

157 *See Waters*, 23 F.4th at 94 ("To be sure, Rule 4(k)(1)(A) does make the due process standard of the Fourteenth Amendment applicable . . . in federal court when a plaintiff relies on a state long-arm statute for service of the summons.").

The First Circuit's interpretation of Rule 4(k) also cannot prevail because it would create a wholly unwarranted difference between collective actions in state and federal court. The FLSA authorizes employee-plaintiffs to maintain collective actions "in any Federal or State court of competent jurisdiction."[158] As the Sixth Circuit observed in *Canaday*, "it would be odd to attribute to [Congress] a desire to confine state court FLSA actions to the conventional Fourteenth Amendment rules" while permitting jurisdiction to the outer bounds of the Fifth Amendment for the same action in federal court.[159] Yet, the *Waters* decision threatens to have exactly this effect. The First Circuit did not squarely address whether *Bristol-Myers* applies categorically to FLSA collective actions; its ruling is instead predicated on procedural considerations uniquely affecting federal courts.[160] Thus, *Waters* leaves open the possibility, or even likelihood, that opt-in nonresident plaintiffs' claims in state court would be barred by *Bristol-Myers* absent circumstances suggesting a specific basis to connect those claims to the forum. While the First Circuit correctly acknowledged the FLSA's "broad remedial goal,"[161] that goal ought to be effectuated equally in state and federal court.

Yet another reason to reject the First Circuit's interpretation of Rule 4(k) is that, absent Rule 4(k), district courts need some other source of statutory authorization before they can establish jurisdiction over opt-in plaintiffs' claims. It is well-established law that a district court must analyze personal jurisdiction on a claim-by-claim basis.[162] Yet, if Rule 4(k) is implicated only at the service of process stage, it cannot be used to establish jurisdiction for the purposes of nonresident opt-in plaintiffs' claims because opt-in plaintiffs are not required to serve process.[163] The Due Process Clauses do not themselves authorize a court to exercise personal jurisdiction—they are not, in other words, "self-executing."[164] As the Third

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158 *See* 29 U.S.C. § 216(b).

159 *See* Canaday v. Anthem Cos., Inc., 9 F.4th 392, 401 (6th Cir. 2021).

160 Namely Rule 4(k) and the Due Process Clause of the Fifth Amendment. *See* FED. R. CIV. P. 4(k); U.S. CONST. amend. V.

161 *See Waters*, 23 F.4th at 94 (quoting Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 173 (1989)).

162 Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1781 (2017) ("What is needed . . . is a connection between the forum and the specific *claims* at issue." (emphasis added)).

163 *See Canaday*, 9 F.4th at 339–40.

164 *See* U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V; Fischer v. Fed. Express Corp., 42 F.4th 366, 381 (3d Cir. 2022).

Circuit has correctly and compellingly observed, the FLSA's collective action provision explicitly requires that the employee-plaintiff bring the collective action in a "court of competent jurisdiction."[165] That language would not make any sense had Congress intended the FLSA to contain an independent grant of jurisdiction.

Despite these shortcomings, the First Circuit's holding in *Waters* correctly and virtuously recognized the broad remedial intent Congress acted upon in passing the FLSA. In light of Congress's declaration that the FLSA's purpose is "to correct and . . . eliminate" detrimental labor conditions nationwide[166]—and the Supreme Court's instruction that the FLSA "should be enforced to the full extent of its terms,"[167]—the First Circuit is the only federal appellate court to have reached the correct policy outcome. The First Circuit's interpretation also promotes clarity; to know whether service has been effective, a litigant need only consider what occurred up until the summons was served.[168] In sum, the First Circuit's interpretation of Rule 4(k) reduces the likelihood of Rule 4(k) imposing a "seemingly unintended" obstacle to representative actions.[169]

The key to reconciling Rule 4(k)'s textual emphasis on service of process and its complex relationship to personal jurisdiction is to differentiate its parts. This approach finds support in Supreme Court precedent.[170] Rule 4(k)(1)(A) lays out territorial restrictions on service of process.[171] Rule 4(k)(1) establishes the connection between effective service of process and personal jurisdiction being established.[172] The result is that—consistent with the history noted in the First Circuit's *Waters* opinion—service of process both provides the defendant with notice of the lawsuit and formally marks the point at which the court begins exercising its power.[173] While Rule 4(k) itself is limited

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165 *Fischer*, 42 F.4th at 381 (quoting 29 U.S.C. § 216(b)).

166 *See* 29 U.S.C. § 202.

167 *See* Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 173 (1989).

168 *See Waters*, 23 F.4th at 102 (Barron, J., dissenting).

169 *Id.*

170 *See* Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 103 n.6 (1987) (distinguishing method of service from amenability to service).

171 *See* FED. R. CIV. P. 4(k)(1)(A); Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 309 (D.C. Cir. 2020) (Silberman, J., dissenting) ("[T]erritorial limitations on amenability to service (and therefore personal jurisdiction) [are] set out in [Rule 4(k)(1)'s] subsections.").

172 *See* FED. R. CIV. P. 4(k)(1).

173 *See* Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 95–96 (1st Cir. 2022); Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74

to service of process, these territorial restrictions continue to have indirect force throughout the action.[174] This "continuing effect" is so because, where a district court establishes specific jurisdiction over a defendant via Rule 4(k)(1)(A), it only ever obtains jurisdiction for the purpose of claims which satisfy the requirements of the Fourteenth Amendment (including relatedness to the forum state).

This approach carefully avoids the logical shortcomings which stymy the First Circuit's "time-of-service-limited" interpretation of Rule 4(k), while retaining some of *Waters*'s virtues. By providing that jurisdiction remains limited to the scope initially established, this interpretation closes any loopholes. To add a plaintiff whose claims would not have satisfied Rule 4(k)(1)(A)'s service of process requirements due to lack of relatedness to the forum state, a court would have to cite some presently nonexistent source of statutory authorization. This approach also maintains consistency between FLSA collective actions brought in both state and federal court; the due process limitations of the Fourteenth Amendment remain applicable at all times unless more permissive statutory authority can be cited. Finally, this approach reconciles the First Circuit's close textualist reading with how the Third, Sixth, Eighth Circuits have applied Rule 4(k). It does so by clarifying that courts derive "statutory" authorization from Rule 4(k)(1)(A)—not Rule 20 or any other joinder rules.[175] By contrast, a less precise formulation could mistakenly give the impression that Rule 4(k)(1)(A) *itself* remains an operative constraint at the time parties amend their complaints or opt into the collective action.[176]

However, given that Rule 4(k), when properly interpreted, does impose a "seemingly unintended" obstacle to collective actions,[177] intervention from Congress or the Supreme Court is warranted.

N.Y.U. ANN. SURV. AM. L. 23, 103 (2018) (concluding that notice and personal jurisdiction have long been "tied together by the mechanics of service of process").

174 *See Molock*, 952 F.3d at 309 (Silberman, J., dissenting) ("Rule 4(k)(1)['s] . . . territorial limitations on . . . personal jurisdiction . . . remain operative throughout the proceedings.").

175 Rule 82 is not to the contrary. *See supra* note 136.

176 *See* Spencer, *supra* note 93, at 43–44 ("[N]ew claims appearing in amended complaints must satisfy the jurisdictional constraints imposed by Rule 4(k) . . . [T]he personal jurisdiction limitations of the district court that are imposed by Rule 4(k) remain the operative constraints that district courts apply to . . . new claims by *newly joined* parties.").

177 *Waters*, 23 F.4th at 102 (Barron, J., dissenting).

B. Adding Nationwide Service of Process to the FLSA

Between Congress and the Supreme Court, Congress is better to resolve the present circuit split. It is well-established law that Congress may statutorily authorize district courts to exercise personal jurisdiction up to the outer bounds of the Fifth Amendment.[178] In fact, Congress has done so with respect to claims brought under many federal statutes, including other employment law statutes and statutes enacted both before and after the FLSA.[179] Where Congress has authorized nationwide service of process, district courts may exercise jurisdiction over any defendant who has sufficient minimum contacts with the entire United States.[180] Thus, Congress could authorize employee-plaintiffs to bring collective actions against their multi-state employers in district courts across the country by amending the FLSA to provide for nationwide service of process. This solution would remove any obstacle *Bristol-Myers* might pose to FLSA collective actions in federal court. By authorizing nationwide service of process, but limiting where collective actions could be brought to the states in which the employer-defendant employs employees, Congress could restore the efficacy of FLSA collective actions in federal court to their pre-*Bristol-Myers* levels without going beyond that point.[181] Adding nationwide service of process

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178 *See* Pinker v. Roche Holdings Ltd., 292 F.3d 361, 368–69 (3d Cir. 2002).

179 *See, e.g.*, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended in scattered sections of the U.S.C.) (providing for nationwide service of process in the Clayton Act); Pub. L. No. 93-406, § 502(e)(2), 83 Stat. 829, 891 (1974) (codified as amended at 29 U.S.C. § 1132(e)(2)) (providing for nationwide service of process in the Employee Retirement Income Security Act ("ERISA")).

180 *See* FED. R. CIV. P. 4(k)(1)(C); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974) (observing that personal jurisdiction based on a nationwide service of process provision "remains subject to the constraints of the Due Process [C]lause of the Fifth Amendment"); Spencer, *supra* note 73, at 979 ("[T]he Fifth Amendment's Due Process Clause . . . permits jurisdiction over persons with sufficient minimum contacts with the United States.").

181 Without this limitation, providing for nationwide service of process in the FLSA could enable employees to bring FLSA collective actions in forums which, even before *Bristol-Myers*, could not have heard the employee's claims. *See* Canaday v. Anthem Cos., Inc., 9 F.4th 392, 395–96 (6th Cir. 2021) ("One path is for Congress to include a nationwide service of process provision in the regulatory statute itself, one that *could* permit claimants to sue a defendant in any of the 94 federal district courts in the country." (emphasis added)). Congress should instead model any amendment to the FLSA after ERISA, which provides that an action "may be brought *in* the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." *See* 29 U.S.C. § 1132(e)(2).

to the FLSA is also feasible; the FLSA has been amended many times since its enactment, sometimes to expand its scope and often simply to raise the minimum wage.[182]

The effect of such an amendment would be to allow federal courts to establish jurisdiction on the basis of Rule 4(k)(1)(C). As one commentator has observed, "[u]nder FRCP 4(k)(1)(C), Congress's provision for nationwide service of process in a particular statute establishes an adequate basis for federal courts to reach beyond the limits imposed on state courts and exercise jurisdiction in line with congressional intent."[183] However, as Rule 4(k)(1)(C) is not available in state court, even this solution would create a gap between federal and state courts inconsistent with Congress's original vision. Employee-plaintiffs could at least continue to bring nationwide collective actions in state courts with general jurisdiction over the defendant.[184]

C. Why the Supreme Court's Hands Are Likely Tied

While the Supreme Court *may* be able to close or otherwise avoid a gap between federal and state courts, its hands are likely tied by precedent. Nevertheless, one approach taken by a small number of district courts before the present circuit split emerged was to distinguish collective actions from the state law causes of action in *Bristol-Myers* on the basis of congressional intent or the absence of horizontal federalism concerns. The Northern District of California became one of the first courts to adopt this approach with its decision in *Swamy v. Title Source, Inc.*[185] As the Northern District of California recognized, the Supreme Court had reasoned in *Bristol-Myers* that California had so little legitimate interest in adjudicating the state law claims of nonresident plaintiffs that for it to do

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182 For example, the Fair Minimum Wage Act of 2007 amended the FLSA to raise the federal minimum wage to $7.25 per hour. *See* Pub. L. No. 110-28, tit. VIII (2007); *see also* Marsili, *supra* note 90, at 12 (describing how Congress amended the FLSA in 1966 to expand coverage and increase the minimum wage).

183 *See* Drake, *supra* note 29, at 1521.

184 *See* Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1783 (2017) (noting that nothing in the Court's holding would prevent "out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction").

185 Swamy v. Title Source, Inc., No. 17-01175, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017) ("[Applying *Bristol-Myers*] 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.").

so would actually violate other states' sovereignty.[186] Other district courts which later adopted the Northern District of California's reasoning similarly observed that adjudicating a federal question did not present the same federalism problems.[187] Any claim based on the FLSA is automatically a federal question because the FLSA is a federal law. However, this line of district court cases is now of at-best questionable authority. It is axiomatic that mere congressional intent cannot overcome a constitutional limitation.[188] Thus, the absence of horizontal federalism concerns of the kind at issue in *Bristol-Myers* is likely the better argument for categorically exempting collective actions from *Bristol-Myers*'s reach. Still, *Canaday*, *Vallone*, and *Fischer* each implicitly reject *Swamy* in holding that *Bristol-Myers* applies to collective actions.[189] And, though the District of Massachusetts had cited *Swamy* approvingly in its *Waters* opinion,[190] the First Circuit ultimately affirmed on a different basis.

While the Supreme Court could theoretically hear a future case in the present circuit split and resolve it on this basis, it is unlikely to do so. The Supreme Court has unfortunately already denied certiorari in *Canaday*, *Fischer*, and *Waters*.[191] Further, relaxing the relatedness requirement specifically for collective actions would resemble the "sliding scale" approach the Supreme Court rejected in *Bristol-Myers*.[192] It would also likely contravene the Supreme Court's pronouncement in *Walden v. Fiore* that "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction."[193] Thus, amending the FLSA to provide for nationwide service of process remains the best and most feasible solution.

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186 *See Bristol-Myers*, 137 S. Ct. at 1780.

187 *See, e.g.*, O'Quinn v. TransCanada USA Services, Inc. 469 F. Supp. 3d 591 (S.D.W. Va. 2020) (observing that no horizontal federalism problems are present when a court adjudicates a federal question claim).

188 *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that the Constitution is the supreme law of the land and invalidating a section of the Judiciary Act of 1789 on that basis).

189 *See supra* subpart II.A.

190 Waters v. Day & Zimmermann NPS, Inc., 464 F. Supp. 3d 455, 459–60 (D. Mass. 2020).

191 *See* Canaday v. Anthem Cos., Inc., 142 S. Ct. 2777 (Mem.) (2022); Fischer v. Fed. Express Corp., 143 S. Ct. 1001 (Mem.) (2023); Day & Zimmermann NPS, Inc. v. Waters, 142 S. Ct. 2777 (Mem.) (2022).

192 *See* Bristol-Myers, 137 S. Ct. 1773, 1781 (2017).

193 Walden v. Fiore, 571 U.S. 277, 286 (2014).

Conclusion

The circuit split that has emerged regarding whether *Bristol-Myers* applies to opt-in employee-plaintiff's claims in collective actions threatens to undermine Congressional intent and the utility of the collective action mechanism. The split presently centers on competing interpretations of Federal Rule of Civil Procedure 4(k). The Sixth, Eighth, and Third Circuits—which hold *Bristol-Myers* applicable to collective actions—advance the better interpretation of Rule 4(k). The current state of the law thus requires that *Bristol-Myers* be found applicable to collective actions. Because this outcome thwarts congressional intent, however, the Supreme Court or Congress should take action. This Note argues that the best and most feasible solution would be for Congress to amend the FLSA to provide for nationwide service of process. By so doing, Congress could assure the continued utility of the FLSA's collective action mechanism and protect American workers' federal wage and hour rights.