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Jurisdiction at Work: Specific Personal Jurisdiction in FLSA Collective Actions After *Bristol-Myers Squibb*

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JURISDICTION AT WORK: SPECIFIC PERSONAL JURISDICTION IN FLSA COLLECTIVE ACTIONS AFTER *BRISTOL-MYERS SQUIBB*

Anaid Reyes Kipp*

ABSTRACT

In Bristol-Myers Squibb Co. v. Superior Court *(*BMS*), eighty-six California residents and five hundred ninety-two nonresidents from thirty-three different states, who had originally filed eight separate complaints, used ordinary party joinder rules to file a mass tort action in California state court, alleging that Bristol-Myers Squibb's blood-thinning drug made them sick. The Supreme Court held in 2017 that the California state court did not have specific personal jurisdiction over the national pharmaceutical company because its contacts with California were insufficient in relation to the claims by nonresident plaintiffs. Although* BMS *was a mass action filed in state court, its applicability to other forms of aggregate litigation was left open by the Court. As a result, a growing split among the courts has emerged regarding* BMS*'s effect on the claims of out-of-state plaintiffs in collective actions under the Fair Labor Standards Act (FLSA). To date, three United States Courts of Appeals have addressed the issue, reaching disparate results, while disagreements among the district courts cut across courts within the same judicial districts and circuits. This divided landscape highlights the need for further guidance from Congress and the Supreme Court to define the scope of specific personal jurisdiction in collective actions. This Note argues that to protect workers' rights, promote uniformity and judicial efficiency across the nation, deter forum shopping, and support federalism, the*

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Supreme Court, Congress, or both should formulate a clear rule granting district courts specific personal jurisdiction over employers in FLSA collective actions with respect to the claims of nonresident plaintiffs.

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INTRODUCTION

In *Bristol-Myers Squibb Co. v. Superior Court* (*BMS*), the Supreme Court held that a California state court did not have specific personal jurisdiction over a national pharmaceutical company in a mass tort action because the company's contacts with California were insufficient regarding the claims by nonresident plaintiffs.[1] Justice Alito, writing for the majority, indicated that the Court merely engaged in a "straightforward application . . . of settled principles of personal jurisdiction."[2] Yet scholars soon noted that the *BMS* decision was not simply applying unquestioned jurisdictional principles or clarifying a "notoriously hazy doctrine"; in fact, *BMS* was part of a "stealth revolution" that has narrowed the scope of personal jurisdiction in complex legal actions.[3] Moreover, *BMS* has become the landmark case in a bigger story, one that is defining the balance of power in multi-plaintiff aggregate litigation.[4]

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1. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1781–82 (2017).

2. *Id.* at 1783.

3. Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1252 (2018); Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499, 503–04, 505 (2018) ("Just as courts and scholars once described changes introduced by *International Shoe Co. v. Washington* as a 'revolution,' commentators have labeled the Court's legal turn since 2011 a 'revolution' in personal jurisdiction." (footnotes omitted)). Hoffheimer argues that "the Roberts Court's personal jurisdiction decisions are changing the shape of litigation" and that the new jurisdictional restrictions make it harder, or even impossible, for plaintiffs to find feasible courts. *Id.* at 501–02; *see also* Thomas E. Riley & Conor Doyle, *Recent Developments in Products Liability*, 53 TORT TRIAL & INS. PRAC. L.J. 545, 546 (2018) ("In recent years, the United States Supreme Court has greatly curtailed the ability of courts to exercise personal jurisdiction over out-of-state defendants, with significant consequences for products liability litigation. The Court's decisions have been said to represent the 'end of an era' concerning courts' ability to exert jurisdiction over non-resident corporate defendants."); Justin A. Stone, Note, *Totally Class-Less?: Examining* Bristol-Myers*'s Applicability to Class Actions*, 87 FORDHAM L. REV. 807, 808 (2018) ("Corporate defendants recently obtained a huge win in the U.S. Supreme Court, but the scope of the victory remains unclear."); Julialeida Sainz, *The New Personal Jurisdiction: How the Supreme Court Is Making It Easier for Corporate Defendants to Avoid Litigation*, 5 ST. THOMAS J. COMPLEX LITIG. 1, 9 (2018) ("Throughout the history of personal jurisdiction, the United States Supreme Court has narrowed the scope of personal jurisdiction to favor corporate defendants."); Mary Anne Mellow, Steven T. Walsh & Timothy R. Tevlin, *Supreme Court Strikes Another Blow to Litigation Tourism in* Bristol-Myers Squibb, DEF. COUNS. J., Apr. 2018, at 1, 7 ("*BMS* is yet another nail in the coffin to the sometimes mercenary rationale that previously allowed litigation tourism to flourish.").

4. Bradt & Rave, *supra* note 3, at 1255–56 ("But *Bristol-Myers*'s real impact will not be on the doctrine of personal jurisdiction. Indeed, it may not even be felt in much simple litigation. Instead, *Bristol-Myers* is a landmark case in a different and perhaps bigger story about the balance of power in complex litigation." (footnote omitted)).

Dissenting in *BMS*, Justice Sotomayor expressed fear that "the consequences of the majority's decision . . . [would] be substantial."[5] She noted, as she had done in other cases, that the majority's opinion had de facto "eliminate[d] nationwide mass actions in any [s]tate other than [the state] in which a defendant is 'essentially at home.'"[6] As a result, nonresident plaintiffs in those actions could no longer obtain personal jurisdiction in fora outside the place of injury, the defendant's state of incorporation, or the state in which the defendant's principal place of business is located.[7] Even worse, according to Justice Sotomayor, plaintiffs might not be able to proceed jointly in lawsuits against two corporations headquartered and incorporated in separate states when the claims arise in different fora.[8] This situation, she warned, would effectively "curtail—and in some cases eliminate—plaintiffs' ability to hold corporations fully accountable for their nationwide conduct."[9]

Although some scholars think that such concerns were overstated—and the Supreme Court's most recent personal jurisdiction opinion from early 2021 suggests that the Court might be prepared to take a more flexible, case-by-case approach to specific jurisdiction in certain cases[10]—the *BMS* opinion left many open

5. *Bristol-Myers*, 137 S. Ct. at 1788 (Sotomayor, J., dissenting).

6. *Id.* at 1789 (quoting Daimler AG v. Bauman, 571 U.S. 117, 127 (2014)); *see* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1560 (2017) (Sotomayor, J., concurring in part and dissenting in part) ("The majority's approach grants a jurisdictional windfall to large multistate or multinational corporations that operate across many jurisdictions. Under its reasoning, it is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation."); *Daimler*, 571 U.S. at 157 (Sotomayor, J., concurring in the judgment) ("[T]he majority's approach unduly curtails the States' sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries.").

7. *See* Riley & Doyle, *supra* note 3, at 550. In *BNSF Railway. Co. v. Tyrrell*, Justice Sotomayor made a similar argument, highlighting how the majority's position grants multinational corporations a "jurisdictional windfall" and makes it virtually impossible to sue such corporations in national lawsuits outside of their places of business or incorporation. *BNSF Ry. Co.*, 137 S. Ct. at 1560 (Sotomayor, J., concurring in part and dissenting in part).

8. *Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting); Hoffheimer, *supra* note 3, at 502 n.7.

9. *Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

10. *See generally* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021) (finding Montana and Minnesota courts could exercise specific jurisdiction over Ford, a global auto company

questions that have split courts across the country.[11] One such split, as Justice Sotomayor cautioned, is "the question whether [the *BMS*] opinion . . . also appl[ies] to a class action in which a plaintiff injured in the forum [s]tate seeks to represent a nationwide class of plaintiffs, not all of whom were injured there."[12] Following Justice Sotomayor's invitation, numerous scholars have since considered the effects of *BMS* on Multidistrict Litigation (MDL) and class actions.[13] *BMS*'s impact on other forms of aggregate litigation, however, remains understudied. In particular, the growing split among the courts regarding the effects of *BMS* on out-of-state plaintiffs in collective actions under the Fair

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incorporated in Delaware and headquartered in Michigan, in a products liability suit involving injuries to state residents because, even though the specific vehicles were not sold, designed, or manufactured in Montana and Minnesota, Ford sold, serviced, and advertised other cars of the same model in those states, and the resident drivers were injured in those states, thus establishing a sufficient-enough relationship for personal jurisdiction).

11. Riley & Doyle, *supra* note 3, at 551. Some authors have predicted that "cases like [*BMS*] will not be split up and litigated in state courts all over the [nation]":

> Instead, they will wind up in [Multidistrict Litigation or MDL], which offers a means of centralizing cases filed around the country before a single federal judge. . . . *Bristol-Myers* is thus more than another chapter in the personal jurisdiction saga; it is a milestone in the ascendancy of MDL as the centerpiece of nationwide dispute resolution in the federal courts.

Bradt & Rave, *supra* note 3, at 1256 (footnote omitted). Other authors noted that the *BMS* opinion would not alter the jurisdictional analysis:

> [T]he [*BMS*] Court's fact-specific holding failed to establish a bright[-]line test for finding a sufficient level of relatedness between a plaintiff's claim and the defendant's contact with a forum[] and . . . will not greatly alter or impact the specific jurisdiction analysis. Further, the opinion is not likely to result in a great degree of negative consequences for plaintiffs litigating in mass actions.

Megan Crowe, Note, *Can You Relate?* Bristol-Myers *Narrowed the Relatedness Requirement but Changed Little in the Specific Jurisdiction Analysis*, 63 ST. LOUIS U. L.J. 505, 505 (2019); *see* David W. Ichel, *A New Guard at the Courthouse Door: Corporate Personal Jurisdiction in Complex Litigation After the Supreme Court's Decision Quartet*, 71 RUTGERS U. L. REV. 1, 49–50 (2018) ("The key point is that for most cases, there is little reason to believe that there are not plenty of options open for the filing and economically efficient prosecution of mass tort claims following the decision quartet."); Riley & Doyle, *supra* note 3, at 551 ("Two questions remain unsettled in the wake of *BMS*": first, since the decision concerned specific personal jurisdiction issues in state court, the opinion left open whether the same restrictions apply in federal court; "[s]econd, it is unclear whether *BMS* will materially affect the 'relatedness' standard in the specific jurisdiction inquiry.").

12. *Bristol-Myers*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting).

13. *See, e.g.*, A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction over Absent Class Member Claims Explained*, 39 REV. LITIG. 31, 32–33 (2019); Daniel Wilf-Townsend, *Did* Bristol-Myers Squibb *Kill the Nationwide Class Action?*, 129 YALE L.J.F. 205, 226 (2019); Grant McLeod, Note, *In a Class of Its Own:* Bristol-Myers Squibb*'s Worrisome Application to Class Actions*, 53 AKRON L. REV. 721, 724 (2019); Kellie Lerner, William Reiss & Noelle Feigenbaum, *Parting the Seas: Circuit Splits on the Horizon*, ANTITRUST, Fall 2019, at 48, 49; Stone, *supra* note 3, at 812–13; Bradt & Rave, *supra* note 3, at 1260–65.

Labor Standards Act (FLSA) and to some extent, actions under the Age Discrimination in Employment Act (ADEA), requires attention.[14] To date, despite the rising number of collective actions nationwide, only three U.S. Courts of Appeals have addressed—reaching disparate results—whether the *BMS* rule regarding personal jurisdiction of nonresident plaintiffs applies to collective actions; furthermore, district courts are equally split.[15]

This Note will address the growing split among courts deciding FLSA collective actions after *BMS* by proceeding in three parts. Part I provides a brief and general overview of personal jurisdiction, focusing on the epistemological shifts in the Court's understanding of

14. Although the Age Discrimination in Employment Act (ADEA) is enforced through FLSA collective action procedures, in substance the ADEA is closer to Title VII of the Civil Rights Act. Allan G. King & Andrew Gray, *The Unanimity Rule: "Black Swans" and Common Questions in FLSA Collective Actions*, 10 FED. CTS. L. REV. 1, 10–11 (2017).

15. Scott A. Moss & Nantiya Ruan, *No Longer a Second-Class Class Action? Finding Common Ground in the Debate over Wage Collective Actions with Best Practices for Litigation and Adjudication*, 11 FED. CTS. L. REV. 27, 29 (2019) ("Once a backwater topic compared to the Rule 23 class action, . . . FLSA litigation grew over 500% from 1994 to 2014; it now is 3% of the entire federal civil docket . . . ."); *see generally* Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84 (1st Cir. 2022), *petition for cert. filed*, No. 21-1192 (U.S. Feb. 25, 2022); Vallone v. CJS Sols. Grp., LLC, 9 F.4th 861 (8th Cir. 2021); Canaday v. Anthem Cos., 9 F.4th 392 (6th Cir. 2021), *petition for cert. filed*, No. 21-1098 (U.S. Feb. 2, 2022). District court cases that have declined to extend *BMS* to collective actions fall within the First, Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits. *See, e.g.*, Warren v. MBI Energy Servs., Inc., No. 19-cv-00800, 2020 WL 937420 (D. Colo. Feb. 25, 2020), *report and recommendation adopted in part*, No. 19-cv-00800, 2020 WL 5640617 (D. Colo. Sept. 22, 2020); Gibbs v. MLK Express Servs., LLC, No. 18-cv-434-FtM-38, 2019 WL 1980123 (M.D. Fla. Mar. 28, 2019), *report and recommendation adopted in part, denied in part*, No. 18-cv-434-FtM, 2019 WL 2635746 (M.D. Fla. June 27, 2019); Aiuto v. Publix Super Mkts., Inc., No. 19-CV-04803, 2020 WL 2039946 (N.D. Ga. Apr. 9, 2020), *motion to certify appeal denied*, No. 19-CV-04803, 2020 WL 10054617 (N.D. Ga. May 14, 2020); Mason v. Lumber Liquidators, Inc., No. 17-CV-4780, 2019 WL 2088609 (E.D.N.Y. May 13, 2019), *aff'd*, No. 17-CV-4780, 2019 WL 3940846 (E.D.N.Y. Aug. 19, 2019); O'Quinn v. TransCanada USA Servs., Inc., 469 F. Supp. 3d 591 (S.D.W. Va. 2020); Hunt v. Interactive Med. Specialists, Inc., No. 19CV13, 2019 WL 6528594 (N.D.W. Va. Dec. 4, 2019); Garcia v. Peterson, 319 F. Supp. 3d 863 (S.D. Tex. 2018); Seiffert v. Qwest Corp., No. CV-18-70-GF, 2018 WL 6590836 (D. Mont. Dec. 14, 2018); Thomas v. Kellogg Co., No. C13-5136, 2017 WL 5256634 (W.D. Wash. Oct. 17, 2017).

District court cases extending the *BMS* ruling to collective actions include courts in the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. *See, e.g.*, Pettenato v. Beacon Health Options, Inc., 425 F. Supp. 3d 264 (S.D.N.Y. 2019); Hickman v. TL Transp., LLC, 317 F. Supp. 3d 890 (E.D. Pa. 2018); Rafferty v. Denny's, Inc., No. 18-cv-2409, 2019 WL 2924998 (N.D. Ohio July 8, 2019); Turner v. Utiliquest, LLC, No. 18-cv-00294, 2019 WL 7461197 (M.D. Tenn. July 16, 2019); Vallone v. CJS Sols. Grp., LLC, 437 F. Supp. 3d 687 (D. Minn. 2020), *aff'd*, 9 F.4th 861 (8th Cir. 2021); McNutt v. Swift Transp. Co. of Ariz., LLC, No. C18-5668, 2020 WL 3819239 (W.D. Wash. July 7, 2020); Martinez v. Tyson Foods, Inc., 533 F. Supp. 3d 386 (N.D. Tex. 2021); Parker v. IAS Logistics DFW, LLC, No. 20 C 5103, 2021 WL 4125106 (N.D. Ill. Sept. 9, 2021); Bone v. XTO Energy, Inc., No. 20-CV-00697, 2021 WL 4307130 (D.N.M. Sept. 22, 2021).

personal jurisdiction since 2011 as well as the history, development, and specific features of FLSA collective actions, in comparison with other forms of aggregate litigation. Part II analyzes the current split among the various trial and circuit courts regarding the application of *BMS* to FLSA collective actions, tracing the courts' arguments both in favor of and in opposition to this application. Finally, Part III offers a discussion of the potential negative consequences of extending *BMS* to collective actions in light of specific policy implications and provides a recommendation on how to best approach personal jurisdiction in the context of FLSA collective actions. Particularly, this Note urges the Supreme Court, Congress, or both to formulate a clear rule granting federal courts personal jurisdiction over defendants in FLSA collective actions regarding the claims of opt-in plaintiffs, regardless of their nonresident status.

I. BACKGROUND

This Section sets the stage for examining the district courts' divergent applications of *BMS* to FLSA collective actions. First, it looks at how the *BMS* opinion fits within the larger framework of personal jurisdiction jurisprudence.[16] Second, it offers an overview of the historical developments and procedural specificities of FLSA collective actions, in comparison with other forms of aggregate litigation such as class actions and MDL.[17] Finally, it introduces the two main currents driving the split among the courts.[18]

A. Personal Jurisdiction

One of the foundational principles in American jurisprudence is the requirement that courts have personal jurisdiction over the parties to render a binding judgment.[19] When plaintiffs file suit, however, they

16. *See infra* Part I.A.
17. *See infra* Part I.B.
18. *See infra* Part I.C.
19. *See* A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 19 (5th ed. 2018). The Supreme Court first articulated its concept of personal jurisdiction in *Pennoyer v. Neff*. 95 U.S. 714 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

consent to the power of the court, so personal jurisdiction issues typically arise only with defendants.[20] At the state level, this power over a nonresident defendant is ordinarily authorized by both state statutory long-arm provisions and the Fourteenth Amendment's Due Process Clause.[21] The Fifth Amendment authorizes the scope of personal jurisdiction at the federal level, and "limits federal courts to exercising jurisdiction over litigants having minimum contacts with the United States as a whole."[22] Yet absent a congressional provision of nationwide service of process, Federal Rule of Civil Procedure 4(k) (Rule 4(k)) constrains the federal court's reach of personal jurisdiction to the provisions of the state where the court is located.[23]

Since *International Shoe Co. v. Washington*, the Supreme Court has interpreted the Fourteenth Amendment's Due Process Clause as requiring that a defendant "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[24] Depending on how related the defendant's contacts are to the forum, a court can exercise either general or specific personal jurisdiction over that defendant.[25] General jurisdiction allows the court to hear any claim

20. SPENCER, *supra* note 19.

21. *Id.* at 44–45 ("States identify the range of circumstances in which they wish to exercise personal jurisdiction over defendants through jurisdictional statutes (often referred to as long-arm statutes). . . . Once it is determined that such statutory authority indeed exists, it then becomes necessary to determine whether [personal jurisdiction is constitutional]."); *see* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

22. A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979, 994, 996, 997 (2019) (emphasis omitted); *see* U.S. CONST. amend. V ("No person . . . shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

23. FED. R. CIV. P. 4(k)(1)(A) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . ."); *see* SPENCER, *supra* note 19, at 20. Although the constitutional provision limiting a federal court's exercise of personal jurisdiction in federal question cases is not the Fourteenth Amendment, but the Fifth Amendment, when a federal statute does not authorize nationwide service of process, federal courts must follow Federal Rule of Civil Procedure 4(k) (Rule 4(k)) to effectuate service of process and conduct the same personal jurisdiction analysis as in a diversity case pursuant to the state's long-arm statute. Hager v. Omnicare, Inc., No. 19-cv-00484, 2020 WL 5806627, at *2 (S.D.W. Va. Sept. 29, 2020).

24. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

25. *See* SPENCER, *supra* note 19, at 42.

against the defendant, regardless of where it arose.[26] After the Court's 2014 opinion in *Daimler AG v. Bauman*, general jurisdiction for corporations has essentially been reduced to two "at home" locations: (1) the state of the corporation's headquarters and (2) the state of incorporation.[27] Thus, the *Daimler* decision considerably reduced the reach of state and federal courts in cases implicating nonresident plaintiffs and limited plaintiffs' forum choices in nationwide mass torts actions.[28]

With specific personal jurisdiction, the Court has not provided a bright-line rule akin to the "at home" test for general personal jurisdiction.[29] Over time, however, the Court has interpreted *International Shoe*'s specific jurisdiction standard to require a three-prong test: (1) the defendant must have "purposefully availed" itself of the forum state; so that the claims (2) "arise out of or relate to" the defendant's activities in that state, and it can reasonably foresee being sued there; and (3) it must be fair and reasonable for the forum state to exercise personal jurisdiction over the defendant.[30] Since 2011,

26. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the [s]tate are so 'continuous and systematic' as to render them essentially at home in the forum [s]tate." (citing *Int'l Shoe*, 326 U.S. at 317)). Before the Court's opinions in *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *Daimler AG v. Bauman*, corporate and global defendants could potentially be subject to personal jurisdiction all over the country, as long as they had continuous and systematic contacts in the forum state. Mellow et al., *supra* note 3, at 2; Daimler AG v. Bauman, 571 U.S. 117, 127 (2014).

27. *Daimler*, 571 U.S. at 137. The Court acknowledged the possibility of extraordinary circumstances in which a state could assert general jurisdiction over a corporation that has its headquarters or place of incorporation elsewhere, but to date that continues to be a hypothetical scenario. Stone, *supra* note 3, at 810. In *BNSF Railway Co.*, the Court reinforced *Daimler*'s standard by holding that even though "BNSF has over 2,000 miles of railroad track and more than 2,000 employees in Montana," the forum state could not exercise general jurisdiction over it because it was neither incorporated nor headquartered there. BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1559 (2017); *see* Mellow et al., *supra* note 3, at 3.

28. Ashley Simpson, Brett Clements, Amy Antoniolli, Ryan Granholm, Alex Garel-Frantzen, Meghan McMeel, Kevin O'Hara, Brian Watson et al., *Recent Developments in Toxic Tort & Environmental Law*, 53 TORT TRIAL & INS. PRAC. L.J. 683, 690 (2018).

29. Crowe, *supra* note 11, at 507.

30. Bristol-Myers Squibb Co. v. Superior 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. First, the defendant must have 'purposefully avail[ed] itself of the privilege of conducting activities within the forum [s]tate' or have purposefully directed its conduct into the forum [s]tate. Second, the plaintiff's claim must 'arise out of or relate to' the defendant's forum conduct. Finally, the exercise of jurisdiction must be reasonable under the circumstances." (first alteration in original) (first

after a long period of silence regarding the constitutional limit of personal jurisdiction, the Court has heard seven personal jurisdiction cases, mostly narrowing the doctrine of personal jurisdiction and the power of courts to hear certain cases.[31] The Court has focused specifically on the "arise out of or relate to" requirement of personal jurisdiction only in its two latest opinions—*BMS* and *Ford Motor Co. v. Montana Eighth Judicial District Court*.[32] *BMS* came close to

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and second citations omitted) (first quoting J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877 (2011) (plurality opinion); and then quoting Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984))); *see* Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws." (citing *Int'l Shoe*, 326 U.S. at 319)); *Helicopteros*, 466 U.S. at 414; Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); Crowe, *supra* note 11, at 508; Stone, *supra* note 3, at 811. In *World-Wide Volkswagen Corp. v. Woodson*, a "stream of commerce" case, the Court distinguished five fairness factors that can either lower or raise the possibility of establishing minimum contacts. 444 U.S. 286, 292 (1980). These factors are as follows:

> [1 T]he burden on the defendant, . . . [2] the forum State's interest in adjudicating the dispute, [3] the plaintiff's interest in obtaining convenient and effective relief, . . . [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and [5] the shared interest of the several States in furthering fundamental substantive social policies . . . .

Id. (citations omitted). In other "stream of commerce" cases, such as *J. McIntyre Machinery, Ltd. v. Nicastro*, the Court stated that "the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures" and adopted a "forum-by-forum, or sovereign-by-sovereign, analysis" to determine whether a foreign defendant's actions meant it had purposefully availed itself of the privilege of conducting business in the forum. 564 U.S. at 884, 886 (plurality opinion); James P. Donohue, *Traditional Principles of Personal Jurisdiction—Principles of Specific Jurisdiction—Stream of Commerce*, *in* 1 INTERNET LAW AND PRACTICE § 9:7, § 9:7, Westlaw (database updated Nov. 2021). In *Nicastro*, the Court held that a British manufacturing company that used a United States distributor to sell its products in the country was not subject to personal jurisdiction in a New Jersey products liability action because the company's activities did not reveal its intent to purposefully avail itself of the protections of the forum state. *Id.*

31. *See* Hoffheimer, *supra* note 3, at 501; *see also* Andre M. Mura, *Staying on Track After* Bristol-Myers, TRIAL, Apr. 2019, at 18, 19. For example, from 1989 to 2011, the Court only ruled once on personal jurisdiction in *Burnham v. Superior Court*. 495 U.S. 604 (1990); Hoffheimer, *supra* note 3, at 501 n.4. The Court found that the exercise of personal jurisdiction by the district courts violated constitutional due process in the following six cases: *Bristol-Myers*, 137 S. Ct. 1773; *BNSF Ry. Co.*, 137 S. Ct. 1549; *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler*, 571 U.S. 117; *Goodyear*, 564 U.S. 915; and *Nicastro*, 564 U.S. 873. Hoffheimer, *supra* note 3, at 501 n.6. In 2021, the Court reversed this trend for the first time since 2011 by finding a "close enough" connection between the plaintiffs' claims and the activities of a nonresident global auto company in the forum states "to support specific jurisdiction." Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1032 (2021). Interestingly, the renewed interest of the Court in personal jurisdiction coincided with the retirement of Justice John Paul Stevens in 2010. Mura, *supra*.

32. Patrick J. Borchers, Richard D. Freer & Thomas C. Arthur, Ford Motor Company v. Montana Eighth Judicial District Court*: Lots of Questions, Some Answers*, 71 EMORY L.J. ONLINE 1, 3 (2021); *Ford*, 141 S. Ct. 1017; *see* Charles W. "Rocky" Rhodes, Cassandra Burke Robertson & Linda Sandstrom Simard, Ford*'s Jurisdictional Crossroads*, 109 GEO. L.J. ONLINE 102, 105 (2020).

providing a bright-line rule with respect to the relatedness requirements of a defendant's contacts to the forum state by explicitly rejecting flexible sliding scales in favor of a direct connection between the injury and the defendant's contacts to the forum.[33] This trend, however, came to a halt in *Ford*, the first case since 2011 in which the Court found that specific personal jurisdiction was satisfied because it did not require a "strict causal relationship between the defendant's in-state activity and the litigation."[34]

1. Bristol-Myers Squibb

In *BMS*, the Supreme Court added new limits to the relatedness test for specific personal jurisdiction in a mass tort action.[35] Eighty-six California residents and five hundred ninety-two nonresidents (from thirty-three different states) used ordinary party joinder rules to file a mass action consisting of thirteen tort claims (originally filed in eight separate complaints) in California state court, alleging that Bristol-Myers Squibb's blood-thinning drug, Plavix, made them sick.[36] Bristol-Myers Squibb (Bristol-Myers) is a major pharmaceutical company headquartered in New York and incorporated in Delaware.[37]

33. *Bristol-Myers*, 137 S. Ct. at 1781 ("[T]he California Supreme Court's 'sliding scale approach[,]' [which resembles a loose and spurious form of general jurisdiction,] is difficult to square with our precedents. . . . The [California] Supreme Court found that specific jurisdiction was present without identifying any adequate link between the [s]tate and the nonresidents' claims.").

34. *Ford*, 141 S. Ct. at 1026 ("[W]e have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff's claim came about because of the defendant's in-state conduct.").

35. *See supra* Introduction; *Bristol-Myers*, 137 S. Ct. 1773; *see also* Anna-Katrina S. Christakis, Matthew Stromquist & Carter Stewart, *Class Action Developments*, 74 BUS. LAW. 561, 564–67 (2019) (discussing *BMS*).

36. *Bristol-Myers*, 137 S. Ct. at 1778. Litigation against Bristol-Myers regarding Plavix proliferated all over the country, with much of the litigation consolidated in an MDL assigned to District of New Jersey Judge Freda Wolfson. Bradt & Rave, *supra* note 3, at 1274. To avoid MDL, plaintiffs, like those in the *BMS* litigation, have sought to build a case outside the federal courts' subject-matter jurisdiction (that is, as a state-law case, not removable either under the Class Action Fairness Act (CAFA) or under diversity jurisdiction). *Id.* Thus, *BMS* could not be removed for two reasons: (1) each complaint joined fewer than one hundred plaintiffs to avoid removal under CAFA, and (2) the plaintiffs joined a second defendant, the California distributor McKesson, to avoid complete diversity. *Id.* at 1275. As a mass action, *BMS* followed the permissive joinder rules under Federal Rule of Civil Procedure 20 (Rule 20). Stone, *supra* note 3, at 819.

37. *Bristol-Myers*, 137 S. Ct. at 1777.

The California Superior Court first denied Bristol-Myers's motion to quash the service of summons for lack of personal jurisdiction on the grounds that Bristol-Myers's extensive activities in California provided for general personal jurisdiction.[38] The California Court of Appeal followed suit, rejecting Bristol-Myers's writ of mandate.[39] After *Daimler*, which the Supreme Court decided while *BMS* was pending, the California Court of Appeal changed its decision on general jurisdiction but concluded that the Superior Court nevertheless still had specific personal jurisdiction over Bristol-Myers.[40] A divided California Supreme Court affirmed the specific jurisdiction grant.[41]

38. *Id.* at 1778; *see* Plavix Prod. & Mktg. Cases, No. JCCP4748, 2013 WL 6150251, at *2 (Cal. Super. Ct. Sept. 23, 2013) ("BMS's wide-ranging, continuous, and systematic activities in California . . . are clearly sufficient to establish . . . general jurisdiction over it. Because BMS engages in extensive activities . . . and thus enjoys the benefits and protections of its laws, this Court's exercise of jurisdiction over BMS comports with [*International Shoe*]."), *aff'd sub nom.* Bristol-Myers Squibb Co. v. Superior Ct., 175 Cal. Rptr. 3d 412 (Cal. Ct. App. 2014), *aff'd*, 377 P.3d 874 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017).

39. *Bristol-Myers*, 137 S. Ct. at 1778. Bristol-Myers has five research and laboratory facilities with around 160 employees in California; the company also employs about 250 sales representatives in the state, and it maintains a state-government advocacy office there. *Id.* Although Bristol-Myers did not develop, manufacture, label, package, or create a marketing strategy for Plavix in California, it sold almost 187 million Plavix pills in the state between 2006 and 2012, comprising more than 900 million dollars. *Id.* Moreover, Bristol-Myers contracted with McKesson, its California co-defendant, to distribute Plavix nationwide. *Id.* at 1783.

40. *Id.* at 1778. The California Court of Appeal reasoned:

> Although BMS's contacts with California that were described by the trial court no longer suffice under *Goodyear* and *Daimler* for assertion of general jurisdiction, they remain pertinent and persuasive for the first step of a specific jurisdiction analysis. BMS's extensive, longstanding business activities in California . . . bear no resemblance to the "random, fortuitous, and attenuated" interests held to be insufficient in *World-Wide Volkswagen* and *Walden*. They provide evidence of far more than the minimum contacts necessary under *International Shoe* to support the exercise of specific jurisdiction.

Bristol-Myers Squibb Co. v. Superior Ct., 175 Cal. Rptr. 3d 412, 433 (Ct. App. 2014) (quoting Walden v. Fiore, 571 U.S. 277, 286 (2014)), *aff'd*, 377 P.3d 874 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017).

41. *Bristol-Myers*, 137 S. Ct. at 1778. The California Supreme Court concluded:

> [I]n light of BMS's extensive contacts with California, encompassing extensive marketing and distribution of Plavix, hundreds of millions of dollars of revenue from Plavix sales, a relationship with a California distributor, substantial research and development facilities, and hundreds of California employees, courts may, consistent with the requirements of due process, exercise specific personal jurisdiction over nonresident plaintiffs' claims in this action, which arise from the same course of conduct that gave rise to California plaintiffs' claims: BMS's development and nationwide marketing and distribution of Plavix. BMS cannot establish unfairness: Balancing the burdens imposed by this mass tort action, and

Applying a "sliding scale approach," the majority found specific personal jurisdiction by weighing the relatedness of Bristol-Myers's contacts to the forum against the quantity of those contacts.[42] The California Supreme Court held that Bristol-Myers's "extensive contacts in California" coupled with the similarity of the nonresident claims to those of California residents (where specific jurisdiction was valid) supported finding specific personal jurisdiction.[43]

The Supreme Court reversed, comparing this sliding scale approach to "a loose and spurious form of general jurisdiction."[44] Justice Alito, writing for the *BMS* majority, concluded that the out-of-state plaintiffs could not sue Bristol-Myers in California because their specific injuries occurred outside of that forum state.[45] That is, the nonresident plaintiffs had neither "obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California."[46] Even if they had similar claims to other California plaintiffs, the Court reasoned, Bristol-Myers's relationship to resident third parties was insufficient to allow the trial court to exercise specific jurisdiction over Bristol-Myers for the nonresidents' claims.[47] As such, *BMS*'s holding

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> given its complexity and potential impact on the judicial systems of numerous other jurisdictions, we conclude that the joint litigation of the nonresident plaintiffs' claims with the claims of the California plaintiffs is not an unreasonable exercise of specific jurisdiction over defendant BMS.

Bristol-Myers Squibb Co. v. Superior Ct., 377 P.3d 874, 894 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017).

42. *Bristol-Myers*, 137 S. Ct. at 1778; *see Bristol-Myers*, 377 P.3d at 889 ("[We] adopted a sliding scale approach to specific jurisdiction in which we recognized that 'the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim.'" (quoting Vons Cos. v. Seabest Foods, Inc., 926 P.2d 1085, 1098 (Cal. 1996))).

43. *Bristol-Myers*, 137 S. Ct. at 1779.

44. *Id.* at 1781.

45. *Id.* ("[T]he nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured . . . in California.").

46. *Id.* at 1778.

47. *Id.* at 1781 ("The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."); *see* Spencer, *supra* note 13, at 32. Around 2011, Plavix was the best-selling prescription drug in the United States, yielding over forty billion dollars in revenue for Bristol-Myers. Bradt & Rave, *supra* note 3, at 1274. Thus, prior to 2011, when *Goodyear* was decided, Bristol-Myers would most likely have been subject to general personal jurisdiction in California based on its systematic contacts with the state, such as almost one billion dollars in sales, business registration in the state, operation of five offices, and employment of some four hundred people

hardened the relatedness requirement needed for specific personal jurisdiction by suggesting that the meaning of "arise out of or relate to" requires that a defendant's contacts with the forum include the very product that injured the plaintiff.[48] Yet "the Court failed to provide [further] guidance as to [this] requirement beyond its determination that a relationship between the defendant and a third party [plaintiff] is not enough to connect a claim with a forum."[49] Although the Court concluded that mass-action plaintiffs could only file a consolidated lawsuit in a state with general jurisdiction over the defendant,[50] the majority did not think that its holding would result in a "parade of horribles."[51]

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in the state. *Id.* at 1275. After the U.S. Supreme Court's decisions in *Goodyear* and *Daimler*, however, limiting general personal jurisdictions to the states where a corporation is either incorporated or headquartered, California did not have general jurisdiction over Bristol-Myers, regardless of the defendant's extensive contacts in the state. Daimler AG v. Bauman, 571 U.S. 117, 127 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011); *see* Stone, *supra* note 3, at 810–11.

48. *See Bristol-Myers*, 137 S. Ct. at 1781; *id.* at 1787 (Sotomayor, J., dissenting); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 418 (1984); Crowe, *supra* note 11, at 514 ("The Court's holding demonstrated an attempt to narrow the scope of the relatedness requirement.").

49. John V. Feliccia, Note, Bristol-Myers Squibb Co. v. Superior Court*: Reproaching the Sliding Scale Approach for the Fixable Fault of Sliding Too Far*, 77 MD. L. REV. 862, 863, 864 (2018) ("Without substituting an approach of its own, the Court left lower courts rudderless in navigating the expanse of what constitutes an 'adequate link' for the purposes of specific jurisdiction.").

50. *Bristol-Myers*, 137 S. Ct. at 1783.

51. *Id.* at 1783–84. The Supreme Court majority specifically stated:

> Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horribles that respondents conjure up. Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the [s]tates that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. Alternatively, the plaintiffs who are residents of a particular [s]tate—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home [s]tates. In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a [s]tate, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.

Id. (citations omitted). In their brief, the nonresident plaintiffs contended that a ruling denying personal jurisdiction over their claims:

> [W]ould substantially disrupt the operations of the state courts, and likely the federal courts as well. It would significantly increase the amount of litigation—causing cases that previously proceeded together efficiently to be adjudicated separately in courts around the nation, while also generating more collateral litigation about claim and issue preclusion. Enormous segments of complex civil litigation will be open to attack, and potentially unsalvageable. The Due Process Clause has never before been read to require such disruptive results.

Brief of Respondents at 38, *Bristol-Myers*, 137 S. Ct. 1773 (No. 16-466), 2017 WL 1207530, at *38.

The optimism of the *BMS* majority held true in *Ford*—a case concerning two consolidated products liability lawsuits in which forum-state residents sued Ford, a nonresident global auto company, for injuries sustained while driving Ford cars in plaintiffs' home states.[52] As mentioned above, *Ford* is the first personal jurisdiction case since 2011 in which the Court ruled in favor of the plaintiffs.[53] Building on *BMS*, the defendant in *Ford* argued that specific personal jurisdiction was improper because Ford did not design, manufacture, or sell the specific cars that caused the injuries in the forum states; thus, the plaintiffs could not establish that their injuries "arose out of" Ford's activities in the fora.[54] Yet surprisingly, the Court took a "markedly different approach to relatedness than *BMS*," reasoning that specific personal jurisdiction does not always require proving a causal link between the plaintiff's claims and the defendant's in-state activities.[55] Sometimes, the Court concluded, the claims need only be factually "related to" the defendant's actions in the forum state for specific personal jurisdiction to be proper.[56] As such, the Court essentially re-instituted a flexible sliding scale approach for specific personal jurisdiction.[57] The opinion, however, only dealt with plaintiffs who were residents of the forum states, leaving the impact of *BMS*'s refusal to grant specific personal jurisdiction over identical claims by out-of-state plaintiffs largely unanswered.[58]

At least two issues have become important for district courts when trying to decide whether to apply or reject *BMS* in the context of FLSA collective actions and other forms of aggregate litigation. First, because *BMS* focused on personal jurisdiction's due process requirements in a mass tort action under state law and before a state court, the opinion left open "what, if any, impact [*BMS* should have]

52. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1022–23 (2021); Borchers et al., *supra* note 32, at 1.

53. *See supra* Part I.A; *Ford*, 141 S. Ct. at 1024.

54. *Ford*, 141 S. Ct. at 1026; Borchers et al., *supra* note 32, at 7.

55. Borchers et al., *supra* note 32, at 7; *Ford*, 141 S. Ct. at 1026.

56. *Ford*, 141 S. Ct. at 1026.

57. *See* Borchers et al., *supra* note 32, at 9 ("How does a court decide which test ('arise out of' or 'related to') to use? Here, the Court also appeared to do what it refused to do in *BMS*: recognize (although not in so many words) a sliding scale.").

58. *See id.* at 11.

on a federal court's exercise of personal jurisdiction" in federal question cases.[59] Second, given that *BMS* involved numerous distinct lawsuits with named plaintiffs that were consolidated as a state mass action, the question remains whether the Court's *BMS* ruling applies to out-of-state defendants in other forms of aggregate litigation, such as class and collective actions.[60]

B. Class Actions, Multidistrict Litigation, and FLSA Collective Actions

Before the codification of the Federal Rules of Civil Procedure (FRCP) in September 1938—just one month before the passage of the FLSA—decisions on representative litigation were scattered.[61] The FRCP originally created three Rule 23 class action categories based on the rights being litigated: "true" class actions (joint rights), "hybrid" class actions (several rights concerning the same property), and "spurious" class actions (rights involving a common question of fact).[62] The first two categories did not provide a mechanism for class members to join affirmatively.[63] But the "spurious" class, by contrast, required members to opt in to the action affirmatively and awarded

59. Christakis et al., *supra* note 35, at 566. Personal jurisdiction is different in a case in which subject-matter jurisdiction is based on diversity jurisdiction (28 U.S.C. § 1332) rather than on federal question jurisdiction (28 U.S.C. § 1331). O'Quinn v. TransCanada USA Servs., Inc., 469 F. Supp. 3d 591, 611 (S.D.W. Va. 2020). For federal question cases, the Fifth Amendment's Due Process Clause merely requires that defendants maintain "adequate contacts with the United States as a whole" rather than specifically with the forum state. Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 99 (1st Cir. 2022) (quoting United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 618 (1st Cir. 2001)), *petition for cert. filed*, No. 21-1192 (U.S. Feb. 25, 2022).

60. Christakis et al., *supra* note 35, at 566–67.

61. Daniel C. Lopez, Note, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS L.J. 275, 284–85 (2009). Prior to 1938, there were only a few isolated cases of representative litigation relegated to the Federal Equity Rules. *Id.* at 284.

62. Scott Dodson, *An Opt-In Option for Class Actions*, 115 MICH. L. REV. 171, 176 (2016); *see also* William C. Jhaveri-Weeks & Austin Webbert, *Class Actions Under Rule 23 and Collective Actions Under the Fair Labor Standards Act: Preventing the Conflation of Two Distinct Tools to Enforce the Wage Laws*, 23 GEO. J. ON POVERTY L. & POL'Y 233, 235 (2016).

63. Dodson, *supra* note 62. Unlike the modern version, the original Rule 23 did not require plaintiffs to notify absent class members about the class action or to make an affirmative motion for class certification; instead, defendants had to move to strike the class, proving that the requirements of Rule 23 were not satisfied. Jhaveri-Weeks & Webbert, *supra* note 62, at 236. Additionally, common questions among the class did not have to "predominate" over other individual claims. *Id.*

plaintiffs money damages, just like the FLSA collective action mechanism does today.[64]

In 1966, the Advisory Committee on Civil Rules revised Rule 23, creating the modern class action.[65] Under the modern rule, all class actions must comply with four prerequisites: numerosity, commonality, typicality, and adequacy.[66] Additionally, Rule 23(b) transformed the three prior class action categories into "'mandatory' classes; group-remedy classes; and economy-based, common-interest classes."[67] Specifically, Rule 23(b)(3) transformed the "spurious" action into the money-damages class action where the ruling binds all class members unless they affirmatively opt out of the class.[68]

The 1960s saw the development of another aggregation tool—MDL, codified in the Multidistrict Litigation Act of 1968 (MDL Act).[69] The MDL Act gives the Judicial Panel on Multidistrict

64. Dodson, *supra* note 62, at 176, 209; *see infra* Part II.B.1.

65. Dodson, *supra* note 62, at 177.

66. FED. R. CIV. P. 23(a). Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

67. Dodson, *supra* note 62, at 177. Under Rule 23(b)(1), parties can maintain a class action if prosecuting separate actions would create risk of inconsistent adjudications or adjudications that would be dispositive of the interests of non-party members regarding the individual adjudications. FED. R. CIV. P. 23(b)(1). Under Rule 23(b)(2), parties can maintain a class action if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). Finally, under Rule 23(b)(3), a class action is proper when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3); *see also* Stone, *supra* note 3, at 813–15 (discussing the types of class actions under Rule 23). The modern Rule 23 requires that courts affirmatively certify the class action. Jhaveri-Weeks & Webbert, *supra* note 62, at 237.

68. James M. Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 400 (2004). Notice and opt-out rights are only mandatory in money-damage class actions under Rule 23(b)(3). Stone, *supra* note 3, at 815. In 23(b)(1) and 23(b)(2) class actions, giving notice to unnamed members is discretionary because "constitutional due process concerns are not as prevalent in these class action types." *Id.*

69. Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407); *see* Bradt & Rave, *supra* note 3, at 1262–63.

Litigation ample powers to consolidate or centralize cases from courts all over the country into a single federal court in any location.[70] The MDL judge, like any other federal district judge, has the power to oversee discovery and make rulings on dispositive pretrial motions.[71] In theory, the cases are to be remanded back to their original districts at the conclusion of pretrial proceedings; however, in practice, remand seldomly happens.[72] For purposes of personal jurisdiction, such transfer is valid as long as the case is filed in, or removed to, a district court with personal jurisdiction over the defendant.[73] Lately, many mass tort actions like *BMS* are in MDL, which in 2015 comprised over one-third of the federal civil docket.[74]

1. The FLSA

On June 25, 1938, after ten bill revisions, President Franklin D. Roosevelt finally signed the FLSA into law.[75] Borrowing from earlier legal provisions developed over the past seventy years, the FLSA embodied a new compromise between labor unions and political party factions to standardize labor laws and regulate interstate commerce.[76] For the first time in United States history, an omnibus federal statute

70. Bradt & Rave, *supra* note 3, at 1254, 1262. Multidistrict Litigation has been used to consolidate mass torts, antitrust claims, securities actions, environmental suits, and claims involving business and consumer fraud, among others. Ichel, *supra* note 11, at 50.

71. Bradt & Rave, *supra* note 3, at 1262.

72. *Id.* at 1263. About 97% of the transferred cases are concluded in the MDL court, either by a settlement agreement or dispositive motion. *Id.*

73. *Id.* at 1258; *see* Ichel, *supra* note 11, at 51 ("Once an MDL proceeding has been established by the Judicial Panel on Multi-District Litigation, there will typically be later-filed 'tag-along' cases that are either transferred to the district court presiding over the MDL proceeding as additional MDL cases or directly filed in the MDL district court.").

74. Bradt & Rave, *supra* note 3, at 1261; Judith Resnik, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899, 1913 (2017) ("[A]s of the fall of 2015, almost 40 percent of federal civil cases were part of MDLs . . . .").

75. Lopez, *supra* note 61, at 280; Carl Engstrom, Note, *What Have I Opted Myself Into? Resolving the Uncertain Status of Opt-In Plaintiffs Prior to Conditional Certification in Fair Labor Standards Act Litigation*, 96 MINN. L. REV. 1544, 1548 (2012). A year earlier, in *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court upheld the National Labor Relations Act, finding that Congress has the proper authority to enact legislation to protect and advance interstate commerce. 301 U.S. 1, 36–37 (1937); 1 LES A. SCHNEIDER & J. LARRY STINE, WAGE AND HOUR LAW: COMPLIANCE AND PRACTICE § 1:2, Westlaw (database updated Dec. 2021). This decision was important in supporting Congress's revision of a wage and hour law of general applicability. *See id.*

76. Lopez, *supra* note 61, at 280.

recognized employees' right to a minimum wage; standardized eight-hour workdays and forty-hour workweeks; required time-and-a-half overtime payments; and prohibited child labor.[77] If an employer violated the statute, the FLSA allowed the Secretary of Labor or private plaintiffs to seek enforcement in a federal or state court.[78] Under the original statute, employees had three procedural options: (1) bring a claim individually; (2) sue on their own behalf and on behalf of other similarly situated employees; or (3) bring a claim through an outside agent or representative.[79]

Soon after the FLSA's enactment, a debate arose regarding the definition of work time.[80] Between 1944 and 1947, the Supreme Court held in three separate cases that on-the-job travel time (or "portal-to-portal" time) was work for FLSA purposes and had to be considered in the calculation of wages and overtime payments.[81] In both *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* and *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, the Court held that the time it took miners to travel underground to the mine was compensable work time.[82] In *Anderson v. Mount Clemens Pottery Co.*, importantly, the Court extended the "portal-to-portal" pay to factories, holding that "the time necessarily spent by the employees in walking to work on the employer's premises, following the punching of the time clocks, was working time."[83] This ruling soon generated thousands of new suits, most of them brought by third-party

77. 29 U.S.C. §§ 203-219; 1 SCHNEIDER & STINE, *supra* note 75, § 1:3; Lopez, *supra* note 61, at 280.

78. 29 U.S.C. § 216(b); 2 SCHNEIDER & STINE, *supra* note 75, § 20:7.

79. 29 U.S.C. § 216(b); Lopez, *supra* note 61, at 280–81.

80. Lopez, *supra* note 61, at 281.

81. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), *superseded by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, *as recognized in* Integrity Staffing Sols., Inc. v. Busk, 574 U.S. 27 (2014); Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 161 (1945), *superseded by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84; Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944), *superseded by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, *as recognized in* Integrity Staffing Sols, Inc. v. Busk, 574 U.S. 27 (2014); *see* 2 SCHNEIDER & STINE, *supra* note 75, § 20:7.

82. *Jewell Ridge Coal*, 325 U.S. at 161; *Tenn. Coal*, 321 U.S. at 590; 1 SCHNEIDER & STINE, *supra* note 75, § 1:16.

83. *Anderson*, 328 U.S. at 691; 2 SCHNEIDER & STINE, *supra* note 75, § 20:7.

unions on behalf of their members, seeking back pay for portal-to-portal violations under the FLSA.[84]

As a result, in 1947, Congress enacted the Portal-to-Portal Act (PPA), making the first major and most enduring changes to the FLSA since its enactment nine years earlier.[85] Congress envisioned the following four primary objectives for the PPA that shape collective actions to date: (1) to prohibit suits by union representatives on behalf of workers; (2) to abolish opt-out class actions by requiring consent from all plaintiffs before they join the lawsuit; (3) to provide notice to employers by requiring employees to join the action early; and (4) to bind opt-in plaintiffs to the outcome in the suit.[86] Such changes represented a major victory for employers.[87] In particular, the PPA excluded travel to the workplace from compensable time, created a two-year statute of limitations, provided employers with new defenses, and restricted private rights of actions to individuals—eliminating representative suits.[88] These measures continue to distinguish collective actions today.[89]

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84. 1 SCHNEIDER & STINE, *supra* note 75, § 1:16 ("In the period between July 1, 1946[,] and January 31, 1947, 1,913 FLSA actions were filed in federal district courts. One case was settled for $4,656,000 to 4,200 employees for a period from September 9, 1940[,] to September 9, 1946. The actions were predominately class action cases which were estimated to cover 395,223 employees." (footnote omitted)); *see also* 2 *id.* § 20:7.

85. Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 216, 251-262); *see* 1 SCHNEIDER & STINE, *supra* note 75, § 1:16.

86. Engstrom, *supra* note 75, at 1549.

87. *See* Lopez, *supra* note 61, at 283.

88. 1 SCHNEIDER & STINE, *supra* note 75, § 1:15; Lopez, *supra* note 61, at 283–84.

89. In 1966, Congress amended the statute of limitations to provide for a three-year period of limitations for willful violations. 1 SCHNEIDER & STINE, *supra* note 75, § 1:17. Moreover, if an employer does not post a notice regarding its employees' FLSA rights, the period of limitations may be extended under the equitable tolling doctrine. JOHN E. SANCHEZ & ROBERT D. KLAUSNER, STATE AND LOCAL GOVERNMENT EMPLOYMENT LIABILITY § 3:17, Westlaw (database updated Oct. 2021). Examples of new defenses include: (1) the affirmative defense for reliance on administrative rulings, if the employer, in good faith, acted in conformity with the Secretary of Labor's written rules; and (2) a defense to the assessment of liquidated damages, if the employer, acting in good faith, reasonably believed its acts or omissions were in conformity with the FLSA. 1 SCHNEIDER & STINE, *supra* note 75, § 1:17. During the next forty years after the enactment of the PPA, the "key litigant" of FLSA actions was the government. King & Gray, *supra* note 14, at 9. Yet this has changed considerably and currently, the "modern landscape" comprises mainly private actions to recover money damages. *Id.* at 10; *see also* 2 SCHNEIDER & STINE, *supra* note 75, § 20:1 ("[T]here has been a dramatic change in the litigation landscape. . . . At this juncture, lawsuits filed by private parties comprise the vast majority of wage and hour lawsuits being filed.").

2. Collective Actions Under the FLSA

Section 216(b) permits employees to join in collective actions against any employer who violates the statute, providing:

> An action . . . may be maintained against any employer (including a public agency) in any [f]ederal or [s]tate court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No 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.[90]

This statutory language distinguishes collective actions from other forms of aggregate litigation, notably Rule 23 class actions, in at least four ways.[91] First, potential plaintiffs must opt in to the lawsuit by filing a written consent form.[92] Second, the FLSA requires that plaintiffs are "similarly situated," but the statute has left defining the term to the courts.[93] Third, plaintiffs' claims are not tolled for statute-of-limitations purposes until a plaintiff consents.[94]

90. 29 U.S.C. § 216(b). The FLSA describes several forms of enforcement: (1) the Department of Justice can obtain criminal penalties under 29 U.S.C. § 216(a); (2) the Secretary of Labor can sue for civil liability under 29 U.S.C. § 216(c), seek civil fines if the employer uses child labor under 29 U.S.C. § 216(e), or obtain an injunction under 29 U.S.C. § 217; and (3) employees may bring private actions to seek back pay under 29 U.S.C. § 216(b). SANCHEZ & KLAUSNER, *supra* note 89; *see also* 1 SCHNEIDER & STINE, *supra* note 75, § 1:3.

91. *See* Lopez, *supra* note 61, at 284–85. *See generally* FED. R. CIV. P. 23.

92. 29 U.S.C. § 216(b); *see* Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 87 (1st Cir. 2022), *petition for cert. filed*, No. 21-1192 (U.S. Feb. 25, 2022). If the Department of Labor files the representative action, employees do not have to opt in. King & Gray, *supra* note 14, at 9. In contrast, Rule 23 class actions follow an opt-out mechanism in which putative class members automatically become plaintiffs once the class is certified, unless they affirmatively opt out of the action. *See* FED. R. CIV. P. 23(c)(2). In 1966, during the revision of Rule 23 and the creation of modern Rule 23(b)(3), the Advisory Committee on Civil Rules rejected any intentions to affect 29 U.S.C. § 216(b) with the new opt-out rule. FED. R. CIV. P. 23 advisory committee's note to 1966 amendment, *as reprinted in* 39 F.R.D. 69, 104 (1966); 2 SCHNEIDER & STINE, *supra* note 75, § 20:7.

93. Engstrom, *supra* note 75, at 1550. In contrast, Rule 23(b)(3) classes seeking monetary judgments must comply with a personal notice requirement, heightened certification prerequisites, and an opt-out provision to protect the due process rights of absent class members. Lopez, *supra* note 61, at 286.

94. Engstrom, *supra* note 75, at 1550. Under Rule 23 class actions, the claims of all members are tolled starting on the date the lawsuit is filed. *Id.*

Fourth, § 216(b) does not permit unnamed class members.[95] That is, all plaintiffs who opt in to a collective action have party status.[96] Even though the original plaintiffs can sue on a representative basis, "each FLSA claimant has the right to be present in court to advance his or her own claim . . . [and] only those plaintiffs who have opted in [to the collective action] are bound by the results of the litigation."[97]

Procedurally, the "similarly situated" requirement has evolved into a two-step certification process first articulated in *Lusardi v. Xerox Corp.*, an age discrimination case brought under the ADEA.[98] The first procedural step is "conditional certification," which imposes a low burden of proof, requiring plaintiffs to merely show that they "abstractly share common questions of fact with the rest of the [collective]" and are therefore "similarly situated."[99] If the court grants conditional certification, the plaintiff can send opt-in notices to other prospective members.[100] The second step happens when the defendant moves for decertification after discovery is complete or almost complete, and the collective members have responded to the notice.[101] The court once again examines if the members are "similarly situated"

95. *See* King & Gray, *supra* note 14, at 13–14 ("In a collective action, no new legal entity is created, and no lawyer is appointed to represent any group of plaintiffs. Rather, each member of the collective is a 'party-plaintiff' and may be represented in the lawsuit by an attorney of his or her choosing." (footnote omitted)).

96. 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1807 (3d ed. 2005), Westlaw (database updated Apr. 2021).

97. *Id.* (footnote omitted).

98. Engstrom, *supra* note 75, at 1551–52. Although the District Court of New Jersey first articulated the two-step certification process in *Lusardi v. Xerox Corp.*, the Fifth Circuit was the first appellate court to endorse it in 1995. *Id.* The test is discretionary, but its application has become the norm. *Id.* at 1552; *see* Lusardi v. Xerox Corp., 122 F.R.D. 463, 465–66 (D.N.J. 1988) (using two-step certification process on remand to de-certify class because the class was not "similarly situated"). ADEA and FLSA collective actions developed together and still apply the same framework partly because Congress has required that the ADEA be enforced through FLSA collective action procedures. King & Gray, *supra* note 14. Scholars have noted, however, that the ADEA is closer to Title VII of the Civil Rights Act. *Id.* at 11. In *Hoffmann-La Roche Inc. v. Sperling*, the Supreme Court gave lower courts procedural authority to supervise the notification of other "similarly situated" employees to let them know of their right to join the lawsuit. 493 U.S. 165, 170–71 (1989); *see* King & Gray, *supra* note 14, at 11–12. Equal-pay suits under the Equal Pay for Equal Work Act also developed together and apply the same collective action framework. 7B WRIGHT ET AL., *supra* note 96.

99. Lopez, *supra* note 61, at 288.

100. *Id.*

101. *Id.* at 289; Engstrom, *supra* note 75, at 1553.

but this time under a heavier burden of proof.[102] If the court denies the motion, the action will proceed as a collective; otherwise, the opt-in plaintiffs are dismissed without prejudice.[103]

C. The Growing Split

Since 2017, the courts have struggled to determine how the *BMS* rule applies to collective actions.[104] District courts that have declined to extend *BMS*'s holding to collective actions generally draw from *Swamy v. Title Source, Inc.*[105] The *Swamy* district court held that, unlike the state law mass tort action at issue in *BMS*, FLSA collective actions are "federal claim[s] created by Congress specifically to address employment practices nationwide."[106] Thus, according to these courts, applying *BMS* to collective actions "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."[107] In 2022, the First Circuit similarly declined to follow *BMS*, concluding that in FLSA federal question cases, once a federal court complies with service of process

102. Lopez, *supra* note 61, at 289.

103. Engstrom, *supra* note 75, at 1553. Because of its treatment of opt-in plaintiffs, some commentators have noted that FLSA collective actions are closer to mass actions than to Rule 23 class actions. *See* King & Gray, *supra* note 14, at 17–18 ("Multi-plaintiff FLSA cases adhere to the mass action model. Although these claims may raise common questions, there is no presumption that mere joinder diminishes any one plaintiff's burden of proof."). Moreover, courts have noted that the FLSA conditional certification process is less stringent than the permissive joinder of parties' requirements under Rule 20. *Id.* at 23; Engstrom, *supra* note 75, at 1573; *see* FED. R. CIV. P. 20(a)(1) ("Persons may join in one action as plaintiffs if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action.").

104. *Compare, e.g.*, Garcia v. Peterson, 319 F. Supp. 3d 863, 880 (S.D. Tex. 2018) ("The court . . . declines to extend the *Bristol-Myers*' requirement to analyze personal jurisdiction with regards to each individual plaintiff to the FLSA collective action jurisdictional analysis."), *with, e.g.*, Roy v. FedEx Ground Package Sys., Inc., 353 F. Supp. 3d 43, 55 (D. Mass. 2018) ("[T]he court concludes that '*Bristol-Myers* applies to FLSA claims, in that it divests courts of specific jurisdiction over the FLSA claims of non-[Massachusetts employed] plaintiffs against [FedEx Ground].'" (second and third alterations in original) (quoting Maclin v. Reliable Reps. of Tex., Inc., 314 F. Supp. 3d 845, 850 (N.D. Ohio 2018))).

105. Swamy v. Title Source, Inc., No. C 17-01175, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017).

106. *Id.* at *2.

107. *Id.*

under Rule 4(k), the Fifth Amendment authorizes jurisdiction over the claims of nonresident plaintiffs.[108]

The district courts and appellate courts that have extended *BMS* to collective actions generally draw from *Maclin v. Reliable Reports of Texas, Inc.*[109] In *Maclin*, an Ohio district court held that "[t]he federal overtime claims of non-Ohio [plaintiffs] against [defendant] have less of a connection to the [s]tate of Ohio than the non-California plaintiffs' claims had to the [s]tate of California in [*BMS*]."[110] Additionally, these courts have concluded that even though *BMS* was about a mass action in state court, as opposed to a federal court action, this distinction is inconsequential because "the Fifth Amendment Due Process Clause would [not] have any more or less effect on the outcome respecting FLSA claims than the Fourteenth Amendment Due Process Clause, and this district court will not limit the holding in *Bristol-Myers* to mass tort claims or state courts."[111] The following Section will further analyze the reasoning supporting these two approaches.

II. ANALYSIS

On the one hand, district courts in the First, Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have declined to apply *BMS* to FLSA collective actions.[112] In 2022, the First Circuit Court of Appeals

108. Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 96 (1st Cir. 2022) ("[A]lthough serving a summons in accordance with state or federal law is necessary to establish jurisdiction over a defendant in the first instance, the Fifth Amendment's constitutional limitations limit the authority of the court after service has been effectuated at least in federal-law actions."), *petition for cert. filed*, No. 21-1192 (U.S. Feb. 25, 2022).

109. *Maclin*, 314 F. Supp. 3d 845; *see, e.g.*, Pettenato v. Beacon Health Options, Inc., 425 F. Supp. 3d 264, 278–79 (S.D.N.Y. 2019).

110. *Maclin*, 314 F. Supp. 3d at 850.

111. *Id.* at 850–51.

112. This includes the District Court of Colorado in the Tenth Circuit, the Middle District of Florida and Northern District of Georgia in the Eleventh Circuit, the Eastern District of New York in the Second Circuit, the Northern and Southern Districts of West Virginia in the Fourth Circuit, the Southern District of Texas in the Fifth Circuit, and the Northern District of California, Western District of Washington, and the District of Montana in the Ninth Circuit. *See generally* Warren v. MBI Energy Servs., Inc., No. 19-cv-00800, 2020 WL 937420 (D. Colo. Feb. 25, 2020), *report adopted in part*, No. 19-cv-00800, 2020 WL 5640617 (D. Colo. Sept. 22, 2020); Gibbs v. MLK Express Servs., LLC, No. 18-cv-434-FtM-38, 2019 WL 1980123 (M.D. Fla. Mar. 28, 2019), *report and recommendation adopted in part, denied in*

put to rest a split among the district courts in that circuit.[113] On the other hand, district courts in the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have extended *BMS* to FLSA collective actions.[114] Both the Courts of Appeals for the Sixth and Eighth Circuits—the other two circuit courts to have opined on the issue—limited specific personal jurisdiction to the claims of in-state

part, No. 18-cv-434-FtM, 2019 WL 2635746 (M.D. Fla. June 27, 2019); Aiuto v. Publix Super Mkts., Inc., No. 19-CV-04803, 2020 WL 2039946 (N.D. Ga. Apr. 9, 2020), *motion to certify appeal denied*, No. 19-CV-04803, 2020 WL 10054617 (N.D. Ga. May 14, 2020); Mason v. Lumber Liquidators, Inc., No. 17-CV-4780, 2019 WL 2088609 (E.D.N.Y. May 13, 2019), *aff'd*, No. 17-CV-4780, 2019 WL 3940846 (E.D.N.Y. Aug. 19, 2019); O'Quinn v. TransCanada USA Servs., Inc., 469 F. Supp. 3d 591 (S.D.W. Va. 2020); Hunt v. Interactive Med. Specialists, Inc., No. 19CV13, 2019 WL 6528594 (N.D.W. Va. Dec. 4, 2019); Garcia v. Peterson, 319 F. Supp. 3d 863 (S.D. Tex. 2018); *Swamy*, 2017 WL 5196780; Chavez v. Stellar Mgmt. Grp. VII, LLC, 19-cv-01353, 2020 WL 4505482 (N.D. Cal. Aug. 5, 2020); Sloan v. Gen. Motors LLC, 287 F. Supp. 3d 840 (N.D. Cal. 2018); Seiffert v. Qwest Corp., No. CV-18-70-GF, 2018 WL 6590836 (D. Mont. Dec. 14, 2018); Thomas v. Kellogg Co., No. C13-5136, 2017 WL 5256634 (W.D. Wash. Oct. 17, 2017).

The Middle District of Tennessee in the Sixth Circuit, and the Western District of Arkansas in the Eighth Circuit declined to extend *BMS* to collective actions. *See generally* Hammond v. Floor & Decor Outlets of Am., Inc., No. 19-cv-01099, 2020 WL 2473717 (M.D. Tenn. May 13, 2020); Turner v. Concentrix Servs., Inc., No. 18-cv-1072, 2020 WL 544705 (W.D. Ark. Feb. 3, 2020). In 2021, however, the Courts of Appeals for the Sixth and Eighth Circuits went the other way, finding that the exercise of specific personal jurisdiction over the claims of nonresident plaintiffs is not proper in FLSA collective actions. *See* Canaday v. Anthem Cos., 9 F.4th 392 (6th Cir. 2021), *petition for cert. filed*, No. 21-1098 (U.S. Feb. 2, 2022); Vallone v. CJS Sols. Grp., LLC, 9 F.4th 861 (8th Cir. 2021).

113. *Compare* Chavira v. OS Rest. Servs., LLC, No. 18-cv-10029, 2019 WL 4769101, at *6 (D. Mass. Sept. 30, 2019) (finding *BMS* applies to FLSA collective action cases), *and* Roy v. FedEx Ground Package Sys., Inc., 353 F. Supp. 3d 43, 55 (D. Mass. 2018) (holding *BMS* applies to FLSA claims), *with* Waters v. Day & Zimmermann NPS, Inc., 464 F. Supp. 3d 455, 460–61 (D. Mass. 2020) (finding *BMS* does not apply to FLSA claims), *aff'd*, 23 F.4th 84 (1st Cir. 2022), *petition for cert. filed*, No. 21-1192 (U.S. Feb. 25, 2022).

114. This includes the Southern District of New York in the Second Circuit; the Eastern District of Pennsylvania in the Third Circuit; the Northern District of Texas in the Fifth Circuit; the Northern District of Illinois in the Seventh Circuit; the District of Minnesota in the Eighth Circuit; the Western District of Washington in the Ninth Circuit; the District of New Mexico in the Tenth Circuit; and the Northern and Southern Districts of Ohio, as well as the Western and Middle Districts of Tennessee in the Sixth Circuit. *See generally Pettenato*, 425 F. Supp. 3d 264; Hickman v. TL Transp., LLC, 317 F. Supp. 3d 890 (E.D. Pa. 2018); Vallone v. CJS Sols. Grp., LLC, 437 F. Supp. 3d 687 (D. Minn. 2020), *aff'd*, 9 F.4th 861 (8th Cir. 2021); McNutt v. Swift Transp. Co. of Ariz., LLC, No. C18-5668, 2020 WL 3819239 (W.D. Wash. July 7, 2020); Rafferty v. Denny's, Inc., No. 18-cv-2409, 2019 WL 2924998 (N.D. Ohio July 8, 2019); Hutt v. Greenix Pest Control, LLC, No. 20-cv-1108, 2020 WL 6892013 (S.D. Ohio Nov. 24, 2020); Turner v. Utiliquest, LLC, No. 18-cv-00294, 2019 WL 7461197 (M.D. Tenn. July 16, 2019); Canaday v. Anthem Cos., 441 F. Supp. 3d 644 (W.D. Tenn.), *report and recommendation adopted*, 439 F. Supp. 3d 1042 (W.D. Tenn. 2020), *aff'd*, 9 F.4th 392 (6th Cir. 2021), *petition for cert. filed*, No. 21-1098 (U.S. Feb. 2, 2022); Martinez v. Tyson Foods, Inc., 533 F. Supp. 3d 386 (N.D. Tex. 2021); Parker v. IAS Logistics DFW, LLC, No. 20 C 5103, 2021 WL 4125106 (N.D. Ill. Sept. 9, 2021); Bone v. XTO Energy, Inc., No. 20-CV-00697, 2021 WL 4307130 (D.N.M. Sept. 22, 2021).

plaintiffs.[115] This divided landscape, cutting across courts within the same judicial districts and circuits, highlights the need for further guidance from Congress and the Supreme Court to define the scope of specific personal jurisdiction in collective actions.[116]

A. The Swamy *Line*

Broadly, the First Circuit and the district courts that follow *Swamy* point to four main reasons for interpreting *BMS*'s holding narrowly: (1) contrary to mass tort actions, collective actions entail a single suit; (2) their two-step certification process favors a jurisdictional analysis grounded on the original plaintiff; (3) collective actions do not pose the same forum shopping or federalism concerns as state mass torts; and (4) even if courts could find similarities between mass actions and collective actions, Congress clearly intended to empower employees nationwide to join against unfair labor practices.[117]

1. Specific Jurisdiction at the Level of the Suit

In *BMS*, the Supreme Court stated that for a court to exercise specific jurisdiction over a defendant, "'the *suit*' must 'aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'"[118] District courts in Colorado, Georgia, and Virginia have distinguished collective actions from mass tort actions by narrowing the specific

115. *See generally Canaday*, 9 F.4th 392; *Vallone*, 9 F.4th 861.

116. For instance, in the Second Circuit, the Eastern and Southern Districts of New York have reached opposite conclusions. *Compare Mason*, 2019 WL 2088609, at *6 (declining to apply *BMS* to FLSA collective actions), *with Pettenato*, 425 F. Supp. 3d at 278–79 (applying *BMS* to FLSA collective actions). The Western District of Washington in the Ninth Circuit is equally divided. *Compare Thomas*, 2017 WL 5256634, at *1 (noting that, even though the defendant waived any objection to lack of personal jurisdiction, *BMS* may not even apply), *with McNutt*, 2020 WL 3819239, at *8–9 (extending *BMS* to FLSA collective actions). Finally, the Southern and Northern Districts of Texas in the Fifth Circuit are also split. *Compare Garcia*, 319 F. Supp. 3d at 880 ("The court . . . declines to extend the *Bristol-Myers*' requirement to analyze personal jurisdiction with regards to each individual plaintiff to the FLSA collective action jurisdictional analysis."), *with* Greinstein v. Fieldcore Servs. Sols., LLC, No. 18-CV-208-Z, 2020 WL 6821005, at *4 (N.D. Tex. Nov. 20, 2020) ("The [c]ourt finds the straight-forward application of *BMS* means this Court cannot exercise personal jurisdiction over potential out-of-state plaintiffs' claims.").

117. *See, e.g.*, *Aiuto*, 2020 WL 2039946, at *5 (pointing out these four reasons based on *Swamy*).

118. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780 (2017) (alterations in original) (quoting Daimler AG v. Bauman, 571 U.S. 117, 127 (2014)).

personal jurisdiction analysis to the level of the named parties in the original suit who are acting in a representative capacity.[119] The First Circuit in *Waters v. Day & Zimmermann NPS, Inc.* has further explained that once the named plaintiffs of a collective action have properly served the defendant under Rule 4(k), the Fourteenth Amendment does not apply to federal law claims anymore, and a federal district court is authorized to exercise specific personal jurisdiction regarding the claims of nonresident, opt-in plaintiffs under the Fifth Amendment.[120] That is, in collective actions "the named plaintiff . . . is the only party responsible for serving the summons[] and thus the only party subject to Rule 4."[121]

Contrary to *BMS*, where plaintiffs consolidated eight initial suits into one large mass action, FLSA collective actions comprise one single suit from the start.[122] This distinction is important, these courts have concluded, because only the original suit between a named plaintiff and defendant counts for purposes of assessing specific personal jurisdiction.[123] That other plaintiffs must opt in later in collective actions "does not change the dynamics of the suit which

119. Warren v. MBI Energy Servs., Inc., No. 19-cv-00800, 2020 WL 937420, at *6 (D. Colo. Feb. 25, 2020), *report adopted in part*, No. 19-cv-00800, 2020 WL 5640617 (D. Colo. Sept. 22, 2020); *Aiuto*, 2020 WL 2039946, at *5; O'Quinn v. TransCanada USA Servs., Inc., 469 F. Supp. 3d 591, 613–14 (S.D.W. Va. 2020); Hager v. Omnicare, Inc., No. 19-cv-00484, 2020 WL 5806627, at *6 (S.D.W. Va. Sept. 29, 2020); Hunt v. Interactive Med. Specialists, Inc., No. 19CV13, 2019 WL 6528594, at *3 (N.D.W. Va. Dec. 4, 2019).

120. Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 96 (1st Cir. 2022), *petition for cert. filed*, No. 21-1192 (U.S. Feb. 25, 2022). According to the Court of Appeals for the First Circuit, even if the FLSA does not explicitly authorize nationwide service of process, "[t]he Fifth Amendment does not bar an out-of-state plaintiff from suing to enforce their rights under a federal statute in federal court if the defendant maintained the 'requisite "minimum contacts" with the United States.'" *Id.* at 92 (quoting United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085 (1st Cir. 1992)).

121. *Id.* at 99.

122. *See, e.g.*, *id.* at 96–97 ("[T]he FLSA and its legislative history show that Congress created the collective action mechanism to enable all affected employees working for a single employer to bring suit in a single, collective action . . . .").

123. *Hunt*, 2019 WL 6528594, at *3 ("*Bristol-Myers Squibb*'s holding does not extend to collective actions under the FLSA because, 'unlike *Bristol-Myers Squibb*, there is only one suit: the suit between Plaintiff and [the] Defendant[s]. While Plaintiff may end up representing other class members, this is different than a mass action where independent suits with independent parties in interest are joined for trial.'" (alterations in original) (quoting Morgan v. U.S. Xpress, Inc., No. 17-cv-00085, 2018 WL 3580775, at *5 (W.D. Va. July 25, 2018))); *see also Warren*, 2020 WL 937420, at *6; *Aiuto*, 2020 WL 2039946, at *5.

remains between the plaintiff and defendant."[124] Thus, these courts reason that as long as the initial suit before the court "arises out of and relates to" the defendant's contact with the forum, the exercise of specific personal jurisdiction is permissible.[125] This approach is consistent with pre-*BMS* practices, which have traditionally allowed jurisdiction over the defendant regarding out-of-state plaintiffs if the exercise of personal jurisdiction is proper in relation to the original plaintiff.[126]

2. Jurisdiction at the Conditional Certification Stage

District courts in Colorado, Florida, Georgia, and Montana have emphasized that, given the two-step certification process in collective actions, applying *BMS*'s limiting jurisdictional analysis does not make sense.[127] These courts have concluded that requiring district courts to exclude out-of-state plaintiffs at the conditional certification stage would "put[] the proverbial cart before the horse."[128] At such an early stage, plaintiffs need only meet the burden of establishing that the "putative class members were together the victims of a single decision,

124. *Hager*, 2020 WL 5806627, at *6 (quoting Waters v. Day & Zimmermann NPS, Inc., 464 F. Supp. 3d 455, 460 (D. Mass. 2020), *aff'd*, 23 F.4th 84 (1st Cir. 2022), *petition for cert. filed*, No. 21-1098 (U.S. Feb. 25, 2022)).

125. *Aiuto*, 2020 WL 2039946, at *5 ("In stark contrast to the mass tort action in *Bristol-Meyers* [sic], the suit before the [c]ourt today does arise out of and relate to Defendant's contacts with Georgia."); O'Quinn v. TransCanada USA Servs., Inc., 469 F. Supp. 3d 591, 614 (S.D.W. Va. 2020) ("So long as the named plaintiff in an FLSA action was injured in the forum state by the defendant's conduct then the 'suit' arises out of or relates to the defendant's contacts with the forum.").

126. *See, e.g.*, Senne v. Kan. City Royals Baseball Corp., 105 F. Supp. 3d 981, 1021–22 (N.D. Cal. 2015) (analyzing specific jurisdiction in the context of a hybrid class and collective action only as to the named plaintiffs). The Sixth Circuit Court of Appeals, however, considers that extending *BMS* to collective actions "does not seem likely to disrupt the way FLSA collective actions traditionally have been filed, at least as measured by the fact patterns in U.S. Supreme Court decisions." Canaday v. Anthem Cos., 9 F.4th 392, 397 (6th Cir. 2021), *petition for cert. filed*, No. 21-1098 (U.S. Feb. 2, 2022).

127. *See Warren*, 2020 WL 937420, at *3; *Aiuto*, 2020 WL 2039946, at *2; Seiffert v. Qwest Corp., No. CV-18-70-GF, 2018 WL 6590836, at *4 (D. Mont. Dec. 14, 2018); Gibbs v. MLK Express Servs., LLC, No. 18-cv-434-FtM-38, 2019 WL 1980123, at *16 (M.D. Fla. Mar. 28, 2019), *report and recommendation adopted in part, rejected in part*, No. 18-cv-434-FtM-38, 2019 WL 2635746 (M.D. Fla. June 27, 2019).

128. Warren v. MBI Energy Servs., Inc., No. 19-cv-00800, 2020 WL 5640617, at *2 (D. Colo. Sept. 22, 2020).

policy, or plan."[129] These courts have reasoned that FLSA collective actions require that employees can notify all possibly affected workers by providing them with accurate and timely notice of the suit, so they can decide whether they want to opt in.[130] This issuance of notice, the courts reason, does not offend defendants' due process concerns.[131]

Moreover, applying a *BMS* jurisdictional analysis at the conditional certification stage would increase a plaintiff's burden in what is supposed to be a lenient evidentiary stage.[132] Additionally, from a practical perspective, applying *BMS* would cause potential delays if the court must analyze jurisdiction each time there is a new opt-in plaintiff.[133] Thus, according to these courts, maintaining the jurisdictional scope regarding the named plaintiff makes the most sense because the main issue at the conditional certification level is simply whether the putative collective can receive notice of the action.[134] In *Waters*, the First Circuit explained that the FLSA's requirement that plaintiffs are "similarly situated" is even less stringent than permissive party joinder requirements under Federal Rule of Civil Procedure 20 (Rule 20).[135] Thus, given that plaintiffs joined under Rule 20 are not subject to Rule 4(k) requirements, additional opt-in

129. *Id.* (quoting Norwood v. WBS, Inc., No. 15-cv-00622, 2016 WL 7666525, at *1 (D. Colo. Sept. 29, 2016)). Courts reason that "if the court denies a Rule 12(b)(2) motion [at this stage], it can later revisit the jurisdictional issue when a fuller record is presented because [following a defendant's jurisdictional challenge,] the plaintiff 'bears the burden of demonstrating personal jurisdiction at every stage.'" *Hager*, 2020 WL 5806627, at *2 (quoting Sneha Media & Ent., LLC v. Associated Broad. Co. P Ltd., 911 F.3d 192, 196–97 (4th Cir. 2018)).

130. *O'Quinn*, 469 F. Supp. 3d at 605. *But see* Weirbach v. Cellular Connection, LLC, 478 F. Supp. 3d 544, 549 (E.D. Pa. 2020) ("[T]he [c]ourt cannot conditionally certify individuals over whose claims it does not have personal jurisdiction. . . . Courts should only authorize notice to individuals who might be in the collective.").

131. *See, e.g.*, *Warren*, 2020 WL 5640617, at *3.

132. *Id.* at *1, *3.

133. Warren v. MBI Energy Servs., Inc., No. 19-cv-00800, 2020 WL 937420, at *7 (D. Colo. Feb. 25, 2020), *report adopted in part*, No. 19-cv-00800, 2020 WL 5640617 (D. Colo. Sept. 22, 2020); *see* Seiffert v. Qwest Corp., No. CV-18-70-GF, 2018 WL 6590836, at *4 (D. Mont. Dec. 14, 2018) ("The issue of whether a district court possesses personal jurisdiction cannot be premised upon the residence of each opt-in plaintiff. No FLSA collective action case ever could reach the certification issue if the district court had to evaluate whether it possessed personal jurisdiction over each new opt-in plaintiff.").

134. *Warren*, 2020 WL 5640617, at *3; Swamy v. Title Source, Inc., No. C 17-01175, 2017 WL 5196780, at *3 (N.D. Cal. Nov. 10, 2017).

135. Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 96 (1st Cir. 2022), *petition for cert. filed*, No. 21-1192 (U.S. Feb. 25, 2022).

plaintiffs in collective actions should be equally exempt of such requirements.[136]

3. Federalism and Forum Shopping

If forum shopping by nonresident plaintiffs was a concern in *BMS*, these district courts conclude that is not an issue in FLSA collective actions.[137] Congress specifically designed collective actions to allow multiple "similarly situated" employees to join in a single suit.[138] Likewise, because collective actions are proper in federal court based on federal question subject-matter jurisdiction, the anxieties over state sovereignty voiced in *BMS* are not applicable.[139] Unlike the state tort claims at issue in *BMS*, FLSA collective actions involve federal claims created by Congress specifically to address unfair employment practices across the nation.[140]

4. Congressional Intent

In *Swamy*, the Northern District of California cautioned that extending *BMS*'s holding to collective actions "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."[141] The First Circuit Court

136. *See id.* ("We are not aware of, and [defendant] has not cited, a case in which a court held that Rule 4 applies to plaintiffs joined under Rule 20.").

137. *Warren*, 2020 WL 937420, at *6; *see* Aiuto v. Publix Super Mkts., Inc., No. 19-CV-04803, 2020 WL 2039946, at *5 (N.D. Ga. Apr. 9, 2020) ("In stark contrast to the mass tort action in *Bristol-Meyers* [sic], the suit before the [c]ourt today does arise out of and relate to Defendant's contacts with Georgia. To that end, the forum-shopping concerns that animated *Bristol-Meyers* [sic] are not present in an FLSA collective action." (citation omitted)), *motion to certify appeal denied*, No. 19-CV-04803, 2020 WL 10054617 (N.D. Ga. May 14, 2020).

138. *E.g.*, *Warren*, 2020 WL 937420, at *6–7.

139. O'Quinn v. TransCanada USA Servs., Inc., 469 F. Supp. 3d 591, 614 (S.D.W. Va. 2020) ("The anxiety surrounding federalism expressed in *BMS* is inapplicable to a FLSA action, based on federal question jurisdiction and thus the constitutional limitations imposed by the Fifth Amendment."); *see also* Hager v. Omnicare, Inc., No. 19-cv-00484, 2020 WL 5806627, at *6 (S.D.W. Va. Sept. 29, 2020). In *BMS*, the Court stated that the limitations imposed on personal jurisdiction are a result of the territorial sovereignty of each state. 137 S. Ct. 1773, 1780 (2017).

140. *E.g.*, Swamy v. Title Source, Inc., No. C 17-01175, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017).

141. *Id.*; *see also, e.g.*, *O'Quinn*, 469 F. Supp. 3d at 614.

of Appeals and the district courts that follow *Swamy* note that Congress expressly created collective actions to allow employees to enforce their labor rights.[142] These courts reason that nowhere in the FLSA statute did Congress limit collective claims to in-state plaintiffs.[143] According to these courts, Congress's purpose in authorizing collective actions was precisely to avoid multiple lawsuits by many employees harmed in a similar manner by the same employer.[144] Extending *BMS* to collective actions, therefore, "would contravene the explicit intent of Congress in enacting the FLSA."[145] The fact that an FLSA action might share some similarities with mass actions, the courts note, does not trump congressional intent.[146]

142. *See, e.g.*, Waters v. Day & Zimmermann NPS, Inc., 23 F.4th 84, 96–97 (1st Cir. 2022) ("[T]he FLSA and its legislative history show that Congress created the collective action mechanism to enable all affected employees working for a single employer to bring suit in a single, collective action. The FLSA's purpose was to allow efficient enforcement of wage and hour laws against large, multi-state employers . . . ."), *petition for cert. filed*, No. 21-1192 (U.S. Feb. 25, 2022); *Swamy*, 2017 WL 5196780, at *2 ("This 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."); *Warren*, 2020 WL 937420, at *7; *see also* 29 U.S.C. § 216(b) (allowing employees to sue individually or on behalf of "other employees similarly situated" against their employers for unfair labor practices under the FLSA).

143. *See* 29 U.S.C. § 216(b); *Swamy*, 2017 WL 5196780, at *2; Seiffert v. Qwest Corp., No. CV-18-70-GF, 2018 WL 6590836, at *2–3 (D. Mont. Dec. 14, 2018); Aiuto v. Publix Super Mkts., Inc., No. 19-CV-04803, 2020 WL 2039946, at *5 (N.D. Ga. Apr. 9, 2020) ("Nothing in the plain language of the statute limits its application to 'similarly situated' in-state plaintiffs."), *motion to certify appeal denied*, No. 19-CV-04803, 2020 WL 10054617 (N.D. Ga. May 14, 2020).

144. *Aiuto*, 2020 WL 2039946, at *5.

145. Waters v. Day & Zimmermann NPS, Inc., 464 F. Supp. 3d 455, 461 (D. Mass. 2020), *aff'd*, 23 F.4th 84 (1st Cir. 2022), *petition for cert. filed*, No. 21-1192 (U.S. Feb. 25, 2022). In § 202(a) of Title 29 of the *United States Code*, Congress describes the declaratory policy of the FLSA as follows:

> The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several [s]tates; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

29 U.S.C. § 202(a).

146. *Waters*, 464 F. Supp. 3d at 461.

B. The Maclin *Line*

The Sixth and Eighth Circuits, and the district courts originally following *Maclin*, take a broad reading of the *BMS* opinion, grounding their reasoning in two main principles: the need for uniformity and the importance of textualism.[147]

1. Uniformity

District courts in New York and Ohio stress that "[t]he constitutional requirements of due process do[] not wax and wane when the complaint is individual or on behalf of a class."[148] According to the Sixth Circuit in *Canaday v. Anthem Cos.*, because FLSA collective actions are like mass actions, each individual opt-in plaintiff must comply with all due process requirements.[149] The courts conclude that the fact that *BMS* dealt with Fourteenth Amendment due process constraints on specific personal jurisdiction does not invalidate its holding in the context of FLSA collective actions.[150]

These courts argue that although personal jurisdiction in federal question cases falls under the Fifth Amendment's Due Process Clause, which only requires that defendants have minimum contacts with the United States as a whole, if the federal statute does not authorize nationwide service of process, the jurisdictional analysis is the same as in state court.[151] Because the FLSA does not authorize nationwide

147. *See generally* Maclin v. Reliable Reps. of Tex., Inc., 314 F. Supp. 3d 845, 850–51 (N.D. Ohio 2018) (finding *BMS* extends to FLSA collective actions not only because the Fifth Amendment's Due Process Clause would not affect FLSA actions differently from the Fourteenth Amendment's Due Process Clause but also because nonresident plaintiffs can still file suit under the FLSA against defendants in their home states); Canaday v. Anthem Cos., 9 F.4th 392 (6th Cir. 2021), *petition for cert. filed*, No. 21-1098 (U.S. Feb. 2, 2022); Vallone v. CJS Sols. Grp., LLC, 9 F.4th 861 (8th Cir. 2021).

148. Rafferty v. Denny's, Inc., No. 18-cv-2409, 2019 WL 2924998, at *7 (N.D. Ohio July 8, 2019)2017 WL 4217115; *see, e.g.*, Pettenato v. Beacon Health Options, Inc., 425 F. Supp. 3d 264, 278–79 (S.D.N.Y. 2019).

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

150. *See Maclin*, 314 F. Supp. 3d at 850–51 ("Still, the [c]ourt cannot envisage that the Fifth Amendment Due Process Clause would have any more or less effect on the outcome respecting FLSA claims than the Fourteenth Amendment Due Process Clause, and this district court will not limit the holding in *Bristol–Myers* to mass tort claims or state courts.").

151. *See Canaday*, 9 F.4th at 398–99; *Vallone*, 9 F.4th at 865; Weirbach v. Cellular Connection, LLC, 478 F. Supp. 3d 544, 549–50 (E.D. Pa. 2020); McNutt v. Swift Transp. Co. of Ariz., LLC, No. C18-5668,

service of process, these courts reason, *BMS*'s state-court due process analysis equally applies to collective actions filed in federal court.[152] Due process is an "instrument of interstate federalism," and, after *BMS*, the general principle is to "require[] a connection between the forum and the specific claims" brought by the plaintiffs.[153] Proponents of this view consider that, similar to the *BMS* plaintiffs, putative out-of-state members are not barred from filing a national FLSA action; they simply must file the action in a state that has general jurisdiction over the employer.[154]

2. Textualism

District courts extending *BMS* to collective actions have held that a judge's "obligation to follow the law cannot be overshadowed by 'even the most compelling' policy arguments."[155] To find specific personal jurisdiction, *BMS* requires courts to examine if all nonresident plaintiffs' relationships with a defendant involve contacts or conduct within the forum state.[156] Because this requirement is binding and valid Supreme Court precedent, these courts reason, all courts must follow it regardless of serious policy concerns.[157] If Congress feels so

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2020 WL 3819239, at *8 (W.D. Wash. July 7, 2020); Alisoglu v. Cent. States Thermo King of Okla., Inc., No. 12-cv-10230, 2012 WL 1666426, at *3 (E.D. Mich. May 11, 2012) (citing Omni Cap. Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 108 (1987)).

152. *See, e.g.*, *Pettenato*, 425 F. Supp. 3d at 278 ("Because the FLSA does not provide for nationwide service of process, and because [defendant] has not consented to this [c]ourt's jurisdiction over it with respect to the claims of the out-of-state plaintiffs, the [c]ourt looks to [state] law and the Due Process Clause to determine whether there is a sufficient nexus between those employees' claims . . . and defendants' activity in [the state].").

153. *Rafferty*, 2019 WL 2924998, at *7 (quoting Mussat v. IQVIA Inc., No. 17 C 8841, 2018 WL 5311903, at *5 (N.D. Ill. Oct. 26, 2018), *rev'd*, 953 F.3d 441 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1126 (2021)).

154. *Canaday*, 9 F.4th at 400–01; *Pettenato*, 425 F. Supp. 3d at 280; *Maclin*, 314 F. Supp. 3d at 851.

155. *Pettenato*, 425 F. Supp. 3d at 280 (quoting Chavira v. OS Rest. Servs., LLC, No. 18-cv-10029, 2019 WL 4769101, at *6 (D. Mass. Sept. 30, 2019)).

156. *See, e.g.*, *Vallone*, 9 F.4th at 865 ("Each failure to pay wages . . . is a separate violation that gives rise to a distinct claim. Personal jurisdiction [in collective actions] must be determined on a claim-by-claim basis." (citation omitted)).

157. Canaday v. Anthem Cos., 441 F. Supp. 3d 644, 652 (W.D. Tenn.) ("Like many of the judges and magistrate judges to address this issue, I have concerns about the practical implications of applying *Bristol-Myers* to FLSA collective actions. However, these policy concerns do not obviate my duty and obligation to follow what appears to be binding Supreme Court precedent."), *report and recommendation*

inclined, it can always amend the FLSA to authorize nationwide service of process as it has done with other statutes.[158] But in the meantime, these courts hold that "plaintiffs wishing to take advantage of the collective action procedures of the FLSA must sue their employers either where specific personal jurisdiction can be obtained or where that employer is at home."[159]

3. Similarity of Collective Actions and Mass Actions

Courts that extend *BMS* to collective actions frame the issue of party status differently than the *Swamy* courts.[160] For these courts, every individual plaintiff that opts in to the collective action has a full party status.[161] This framing, the Sixth Circuit and the Western District of

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adopted, 439 F. Supp. 3d 1042 (W.D. Tenn. 2020), *aff'd*, 9 F.4th 392 (6th Cir. 2021), *petition for cert. filed*, No. 21-1098 (U.S. Feb. 2, 2022); *see also* McNutt v. Swift Transp. Co. of Ariz., LLC, No. C18-5668, 2020 WL 3819239, at *9 (W.D. Wash. July 7, 2020).

158. *Pettenato*, 425 F. Supp. 3d at 280; *Canaday*, 9 F.4th at 395–96, 398–99 ("While the FLSA shows no reticence in setting nationwide labor standards, it does not establish nationwide service of process."); *see, e.g.*, 15 U.S.C. § 22 ("Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant[] but also in any district wherein it may be found or transacts business . . . ."); 18 U.S.C. § 1965(a) ("Any civil action or proceeding under [the Racketeer Influenced and Corrupt Organizations Act] against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs."); 18 U.S.C. § 2334(a) ("Any civil action under [the Anti-Terrorism Act] against any person may be instituted in the district court of the United States for any district where any plaintiff resides or where any defendant resides or is served, or has an agent."); 29 U.S.C. § 1132(e)(2) ("Where an action under [the Employee Retirement Income Security Act] is brought in a district court of the United States, it 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 . . . .").

159. *Pettenato*, 425 F. Supp. 3d at 280; *see* Weirbach v. Cellular Connection, LLC, 478 F. Supp. 3d 544, 551 (E.D. Pa. 2020). The Sixth Circuit Court of Appeals explained:

> Even then, employees may file a nationwide collective action under the FLSA so long as they do so in a forum that may exercise general jurisdiction over the employer—namely its principal place of business or its place of incorporation. It is not obvious, at any rate, that state-based collective actions are necessarily inefficient. Congress apparently did not think so.

Canaday, 9 F.4th at 400–01.

160. *Canaday*, 9 F.4th at 397 ("The key link is party status. In an FLSA collective action, as in the mass action under California law, each opt-in plaintiff becomes a real party in interest, who must meet her burden for obtaining relief and satisfy the other requirements of party status."); *see McNutt*, 2020 WL 3819239, at *8.

161. *McNutt*, 2020 WL 3819239, at *8; *see Weirbach*, 478 F. Supp. 3d at 551. The Eastern District of Pennsylvania noted:

> Some district courts that have declined to extend *BMS* to FLSA collective actions have pointed to the analysis in *BMS* that focused at the "level of the suit." Those

Washington have argued, "requires the conclusion that FLSA opt-in plaintiffs are analogous to the mass tort plaintiffs in [*BMS*]."[162]

Although the Sixth and Seventh Circuits have declined to extend *BMS* to Rule 23 class actions, district courts following *Maclin* consider FLSA collective actions "fundamentally different."[163] Their different treatment of plaintiffs, the courts note, highlights the similarities between mass and collective actions and the ultimate applicability of *BMS* to collective actions.[164] Contrary to the opt-out mechanism of class actions, collective actions under § 216(b) require that plaintiffs affirmatively opt in to the suit.[165] Furthermore, Congress expressly added the opt-in feature to FLSA collective actions to ban representative actions after the PPA.[166] Following this reasoning, a collective action is just an aggregation of "individual plaintiffs with individual cases."[167] Thus, "it is properly viewed as a rule of joinder

> courts draw a distinction between an FLSA case, in which there is one suit, and a mass action where there are many individual suits. But in *BMS*, there were not hundreds of individual suits. There were eight, because the plaintiffs amalgamated themselves in a few complaints. Many, if not all, of those suits included at least one California resident as a plaintiff. Thus, if one looked at the level of the "suit" in those cases, they would have been proper. The issue, however, was whether individual party plaintiffs could maintain their claims against a common defendant . . . .

Id. (citations omitted).

162. *McNutt*, 2020 WL 3819239, at *8; *Canaday*, 9 F.4th at 397; *see also* Vallone v. CJS Sols. Grp., LLC, 437 F. Supp. 3d 687, 691 (D. Minn. 2020), *aff'd*, 9 F.4th 861 (8th Cir. 2021); Turner v. Utiliquest, LLC, No. 18-cv-00294, 2019 WL 7461197, at *3 (M.D. Tenn. July 16, 2019).

163. *Canaday*, 9 F.4th at 402–03 ("All in all, the representative nature of class actions may create an exception to the general rules of personal jurisdiction recognized in *Bristol-Myers* for 'mass actions' and applicable to collective actions under the FLSA. But that exception does not apply here."); *see* Mussat v. IQVIA, Inc., 953 F.3d 441, 443 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1126 (2021); Lyngaas v. Curaden AG, 992 F.3d 412, 418–19, 433 (6th Cir. 2021).

164. *Pettenato*, 425 F. Supp. 3d at 279. Courts also argue that Rule 23 class actions contain additional procedural safeguards against due process violations that are absent in FLSA collective actions. *Canaday*, 9 F.4th at 403.

165. *Canaday*, 9 F.4th at 402. The Sixth Circuit also noted that, contrary to class actions, plaintiffs in collective action have the right to retain their own separate counsel. *Id.* at 403.

166. *Id.* at 402; *Pettenato*, 425 F. Supp. 3d at 279.

167. *Pettenato*, 425 F. Supp. 3d at 279 (emphasis omitted) (quoting Campbell v. City of Los Angeles, 903 F.3d 1090, 1105 (9th Cir. 2018)). The different consequences of certification under Rule 23 and § 216(b) further illuminate the distinctions. "In a Rule 23 proceeding in which the class has been certified under Fed. R. Civ. P. 23(c)(1), the class is described and has independent legal status." Roy v. FedEx Ground Package Sys., Inc., 353 F. Supp. 3d 43, 58 (D. Mass. 2018) The only consequence of conditional certification in collective actions, however, is that similarly situated employees will be sent a

under which only the individual opt-in plaintiffs have legal status, not the aggregate class of aggrieved employees."[168] By extension, the courts hold, *BMS* must apply to all opt-in plaintiffs in collective actions, just as it applies to each plaintiff in a mass tort suit.[169]

Thus, the First Circuit and the trial courts that follow *Swamy* interpret *BMS*'s holding narrowly by pointing heavily at congressional intent, federal jurisdiction, and fairness, whereas the Sixth and Eighth Circuits and the district courts that follow *Maclin* read *BMS* broadly by focusing on the need of uniformity and textualism.[170] This fractured terrain underscores the need for further guidance from either Congress or the Supreme Court, or both, to delineate the limits of personal jurisdiction in collective actions. The following Section offers a deeper discussion of the potential negative consequences of extending *BMS* to collective actions and provides a recommendation on how to best approach this impasse.

III. PROPOSAL

The Supreme Court, Congress, or both should formulate a clear rule granting courts personal jurisdiction over nonresident employers in FLSA collective actions with respect to the claims of out-of-state plaintiffs, so long as the original plaintiffs' claims are proper. The reasons supporting this proposal are threefold: (1) limiting personal jurisdiction in FLSA collective actions undermines congressional policy regarding worker's rights; (2) judicial efficiency is greater if

court-approved notice of the action, and if they decide to become parties to the lawsuit they must file their own written consent with the court. *Id.* at 59. Thus, FLSA collective actions depend on the "active participation of opt-in plaintiffs." *Id.* (quoting Halle v. W. Penn Allegheny Health Sys. Inc., 842 F.3d 215, 224 (3d Cir. 2016)).

168. Anjum v. J.C. Penney Co., No. 13 CV 0460, 2014 WL 5090018, at *8 (E.D.N.Y. Oct. 9, 2014); *see* Weirbach v. Cellular Connection, LLC, 478 F. Supp. 3d 544, 551 (E.D. Pa. 2020).

169. *Canaday*, 9 F.4th at 403 ("[C]ollective actions permit individualized claims and individualized defenses, 'in which aggrieved workers act as a collective of *individual* plaintiffs with *individual* cases.'" (quoting *Campbell*, 903 F.3d at 1105)).

170. *See supra* Parts II.A, II.B.

collective actions take place in a single suit; and (3) a suit including all available opt-in plaintiffs promotes uniformity and predictability.[171]

A. Worker's Rights

Limiting personal jurisdiction to claims of in-state plaintiffs would considerably undermine the legislative purposes of FLSA collective actions.[172] Congress specifically enacted the FLSA to prevent "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[173] Federal regulations echo this mandate: "The minimum wage and overtime pay requirements of the [FLSA] are among the nation's most important worker protections."[174] Moreover, Congress envisioned the FLSA as part "of its power to regulate commerce *among* the several [s]tates" and not only localized in-state employer

171. *See infra* Parts III.A., III.B., III.C. Leading scholarship on this issue has largely adopted the *Maclin*-line argument that "[*BMS*] *necessarily* applies to FLSA collective actions, barring courts from asserting jurisdiction over out-of-state plaintiffs' claims . . . ." Adam Drake, Note, *The FLSA's* Bristol-Myers Squibb *Problem*, 89 FORDHAM L. REV. 1511, 1548 (2021) (emphasis added). Adam Drake, for instance, contends that because plaintiffs in both FLSA collective actions and mass tort actions like *BMS* have independent party status and follow "functionally indistinguishable" joinder procedures, there can be no "meaningful distinction" between plaintiffs in mass torts and § 216(b) collective actions. *Id.* at 1539–41. Though Drake recognizes that "restricting FLSA collective actions in this way appears to countermand Congress's original intent by restricting FLSA collective actions to in-state plaintiffs," Drake still urges Congress—as the seemingly sole actor capable of saving collective actions from *BMS*'s reach—to amend § 216 and provide for a nationwide service of process. *Id.* at 1544, 1548. Although the value of legislative action to provide clear jurisdictional guidance cannot be denied, its necessity cannot be known. In fact, limiting the solution to Congress may concede too much. The Supreme Court's 2021 ruling in *Ford* suggests that specific personal jurisdiction is best analyzed on a case-by-case basis. *See generally* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021). Moreover, Drake's view obliterates the fact that § 216 is not merely a joinder device or a procedural tool (like Rule 20) but a substantive statute that serves broad and important policy objectives. Drake, *supra*, at 1541 (describing § 216(b) as a "rule of joinder"). When Congress created the opt-in requirement to FLSA collective actions in 1947, it carefully considered the burdens and benefits of representative litigation to both employers and employees; yet the inclusion of out-of-state plaintiffs to those collective actions was never at issue. *See* Lopez, *supra* note 61, at 283. Merely extending *BMS* to collective actions because the joinder procedures are similar misses this point. This Note, therefore, favors taking a broader approach that can include actions by both Congress and the Supreme Court.

172. *See* Swamy v. Title Source, Inc., No. C 17-01175, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017).

173. 29 U.S.C. § 202(a).

174. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,122 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541).

matters.[175] Because an employer's unlawful conduct with regard to a single worker is often insufficient to produce a financially viable lawsuit, FLSA collective actions are central to the effective protection of workers' employment rights.[176] Further, FLSA litigation plays an "increasingly important role in enforcing state and federal wage protections for low-income workers."[177] Without this mechanism of aggregation, a private employment action may de facto leave employees without access to the FLSA as a remedy or form of redress to hold employers liable for labor violations.[178] Therefore, the Supreme Court has also construed the FLSA "'liberally to apply to the furthest reaches consistent with congressional direction,' [because] broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency."[179]

Since the enactment of the PPA in 1947, which required that employees opt in to the suit by consenting in writing, Congress considerably limited the scope and reach of collective actions.[180] As such, even before the *BMS* opinion raised novel issues about personal jurisdiction limits for collective actions, only between fifteen and thirty percent of all potential plaintiff-employees opted in to a collective action, and even lower participation rates were not uncommon.[181] Issues such as high turnover in low-wage jobs and frequent changes of address among low-wage workers, for instance,

175. 29 U.S.C. § 202(b) (emphasis added).

176. Lonny Hoffman & Christian J. Ward, *The Limits of Comprehensive Peace: The Example of the FLSA*, 38 BERKELEY J. EMP. & LAB. L. 265, 269 (2017); Brittany Cangelosi, Note, *Wage War: Arbitration and Class Action Waivers at the Expense of Wage and Hour Claims*, 48 HOFSTRA L. REV. 483, 486, 491, 507 (2019).

177. Jhaveri-Weeks & Webbert, *supra* note 62, at 233.

178. Cangelosi, *supra* note 176, at 486.

179. Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 296 (1985) (quoting Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959)).

180. *See* Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 AM. U. L. REV. 515, 518 (2009).

181. *Id.* at 518, 544. The "unattractiveness" of FLSA collective actions has produced an "explosion" of hybrid lawsuits that either include both FLSA and Rule 23 wage claims, or completely forego the FLSA claims. *Id.* at 544; *see also* Hoffman & Ward, *supra* note 176, at 269–70 ("[A] procedural system that requires potential class members to opt in will always have a lower—usually, much lower—participation rate. . . . The practical effect . . . is that it is much harder to privately enforce violations of the FLSA." (footnotes omitted)).

have prevented reaching a large number of employees.[182] Moreover, recent case law suggests that collective action plaintiffs cannot provide notice to those employees that signed an arbitration agreement.[183] Given this already constraining landscape, adding an additional personal jurisdiction limitation would further restrict the size of a potential collective action, making it more unattractive and less effective to protect aggrieved employees.[184]

B. Judicial Efficiency

In *Hoffmann-La Roche Inc. v. Sperling*, the Supreme Court observed that collective actions allow "plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources [because the] judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same

182. Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1326 (2008). In the janitorial industry, for instance, the annual turnover rate in 2008 was approximately 250%, and a janitor's average tenure was less than five months. *Id.* Additionally, many potential plaintiffs throw mailed lawsuit notices away or decide not to join the suit out of fear or retaliation. *Id.* at 1327–28. Moreover, because the statute of limitations under the FLSA does not stay an employee's claim until that employee consents to "opt in," many employees lose their right to recover if they receive a late notice and often receive a significantly reduced backpay award. *Id.* at 1330. Often discovery costs and disputes are also higher than in class actions "because employees who opt into an FLSA representative action are in an anomalous position under the discovery rules. They are not one of the original named plaintiffs who brought the lawsuit. But they are also not unnamed class members. They are something in between [a hybrid called] 'party plaintiff[s].'" *Id.* at 1334 (second alteration in original).

183. In *Bigger v. Facebook, Inc.*, the Seventh Circuit held:

> [W]hen a defendant opposing the issuance of notice alleges that proposed recipients entered arbitration agreements waiving the right to participate in the action, a court may authorize notice to those individuals unless (1) no plaintiff contests the existence or validity of the alleged arbitration agreements, or (2) after the court allows discovery on the alleged agreements' existence and validity, the defendant establishes by a preponderance of the evidence the existence of a valid arbitration agreement for each employee it seeks to exclude from receiving notice.

947 F.3d 1043, 1047 (7th Cir. 2020). *See generally* Recent Cases, Bigger v. Facebook, Inc., *947 F.3d 1043 (7th Cir. 2020)*, 133 HARV. L. REV. 2601 (2020) (discussing *Bigger*).

184. Wage and hour violations are still a major problem in many cities. *See* Cangelosi, *supra* note 176, at 485–86. For instance, a 2014 multi-city study of Chicago, New York, and Los Angeles revealed that two-thirds of low-income workers suffered at least one wage theft violation each week. *Id.* at 485. For example, Scholars estimated that in 2012 wage-theft victims recovered nearly one billion dollars. *Id.* at 492.

alleged discriminatory activity."[185] This assertion echoes James Rahl's 1942 statement during the initial implementation of the FLSA that: "[t]o require each employee to sue individually might well congest court calendars immeasurably and produce long delays in the gaining of rightful recoveries."[186] Under this longstanding rationale, courts have traditionally allowed jurisdiction over the defendant regarding out-of-state plaintiffs if proper in relation to the original plaintiff.[187]

Separating collective litigation because of personal jurisdiction presents disadvantages for plaintiffs, defendants, and the judicial system.[188] As suggested above, for individual plaintiffs, the total lawsuit costs would likely outweigh any personal recovery, making it virtually impossible for low-income employees to recover lost wages or overtime.[189] For defendants, independent litigation also carries risks, such as the possibility of facing the same issues in multiple separate lawsuits with disparate judgments all over the country.[190] Moreover, fracturing litigation into multiple suits will also contribute to overburdening the court system with duplicative work.[191]

Alternatively, allowing out-of-state opt-in employees to sue the same employer in the same court at the same time as in-state

185. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989); Becker & Strauss, *supra* note 182, at 1323. In *Genesis Healthcare Corp. v. Symczyk*, the Supreme Court also noted that Rule 23 class actions are "fundamentally different" from FLSA collective actions. 569 U.S. 66, 74 (2013).

186. James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 ILL. L. REV. 119, 123 (1942); Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1785 (2017).

187. Judge Bernice Bouie Donald's dissent in *Canaday* forcefully stated that "[i]n the first 79 years since the enactment of the FLSA, the answer to th[e] question [of whether federal courts have specific jurisdiction over the claims of nonresident plaintiffs] was simple: 'Yes.'" Canaday v. Anthem Cos., 9 F.4th 392, 404 (6th Cir. 2021) (Donald, J., dissenting), *petition for cert. filed*, No. 21-1098 (U.S. Feb. 2, 2022).

188. *See* Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 3–4 (2018).

189. Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1429 (2018); *see supra* note 187 and accompanying text; Sainz, *supra* note 3, at 10 ("By denying courts the authority to exercise personal jurisdiction over out-of[-]state corporations with continuous and systematic contacts with a state simply because they are not incorporated or headquartered there denies plaintiffs their right to seek redress in a court of law.").

190. *See* Dodson, *supra* note 188, at 3 ("The first successful judgment against a defendant could be used to establish liability against that defendant in future cases brought by different plaintiffs through the doctrine of issue preclusion.").

191. *Id.* at 3–4.

employees has numerous advantages.[192] Collective actions comprising all interested employees in a single action, and in which the court has proper jurisdiction regarding the claims of resident plaintiffs, allows both plaintiffs and defendants to "pool their resources and share information to make their litigation efforts more efficient and effective. The lawsuits can be heard in a single court before a single judge and jury, saving the judicial system, the witnesses, and the parties millions of dollars and a great deal of time."[193] These aspects of collective actions have traditionally been allowed under the FLSA statute, and they have afforded parties the opportunity to reduce costs, reach mass resolutions, and ensure compliance with labor laws.[194]

C. Uniformity and Predictability

Predictability is central to the functioning of the judicial system.[195] Parties and attorneys need clear and predictable rules to develop sound litigation strategies and make informed decisions.[196] A clear rule by Congress and the Supreme Court stating that specific personal jurisdiction in collective actions only takes into consideration the claims of original plaintiffs would benefit all parties. First, ironically, it would eliminate forum shopping.[197] Second, it is in line with a larger trend towards the federalization of aggregate litigation.[198]

1. Forum Shopping

Most states have enacted wage and hour laws through statutes or through common law.[199] Because state wage and hour laws do not have a default group-action mechanism, such group actions follow "Rule 23 of the [FRCP] or, if filed in state court, the state's applicable version

192. *Id.* at 4.
193. *Id.*
194. *Id.* at 8.
195. Boris W. Gautier, *Reluctance or Apathy? Examining Georgia's Continuing Adherence to a Strict Mutuality Issue Preclusion Doctrine*, 37 GA. ST. U. L. REV. 541, 591 (2021).
196. *Id.*
197. *See supra* Part II.A.3.
198. *See infra* Part III.C.2.
199. Alexander, *supra* note 180, at 516.

of Rule 23."[200] State laws are often more favorable to employees, and they have the advantage of not containing opt-in restrictions parallel to § 216.[201]

Plaintiff-employees can avoid pleading an FLSA claim and instead rely solely upon state wage claims to circumvent the opt-in requirement in several ways.[202] Plaintiffs can, for example, maintain a state-law-only suit in federal court by using the Class Action Fairness Act (CAFA), which permits original jurisdiction over certain state law claims.[203] Alternatively, plaintiffs can plead a single federal claim—such as overtime or minimum wage violations—in combination with parallel state law claims using supplemental jurisdiction.[204] In each case, plaintiffs claiming employment violations under state laws that are parallel to the FLSA can also maintain a Rule 23 opt-out class.[205]

Moreover, if a plaintiff is unable to litigate FLSA in a collective action comprising all aggrieved employees, the plaintiff might try to bring suit to enforce both FLSA and state wage claims in a single "hybrid" action.[206] Since 2000, courts have largely permitted plaintiffs to litigate these hybrid actions, which include state law claims brought on an opt-out representative basis through class action provisions as well as claims under the FLSA's opt-in collective action procedures.[207] As mentioned above, the FLSA opt-in mechanism makes it harder for

200. *Id.* at 517.

201. Becker & Strauss, *supra* note 182, at 1341.

202. Alexander, *supra* note 180, at 547; *see* Becker & Strauss, *supra* note 182, at 1341 ("Precisely because of the limitations created by [§] 16(b), representatives of aggrieved employees often join claims under the FLSA with claims under parallel state wage-and-hour laws.").

203. Alexander, *supra* note 180, at 547.

204. *Id.*

205. *Id.* at 547–48. Maintenance of such suits may go against Congress's intent. In 1966, when the modern, more liberal Rule 23 class action took form, § 216(b) regarding FLSA collective actions remained unchanged. Becker & Strauss, *supra* note 182, at 1321. The 1966 drafters explicitly stated that they did not intend to affect § 216(b) when changing Rule 23. *Id.* at 1321–22.

206. Hoffman & Ward, *supra* note 176, at 271; Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 274 (2008).

207. Hoffman & Ward, *supra* note 176, at 271. Other scholars argue that "[t]he modern relationship between the two procedures dates from approximately 1995 to the present—the era of the so-called 'two step' certification process for FLSA collective actions." Jhaveri-Weeks & Webbert, *supra* note 62, at 233; *see also* Becker & Strauss, *supra* note 182, at 1341–42.

plaintiffs to assemble a large collective, and often the suit has low participation rates compared to Rule 23 class actions.[208] As a result, this combination of opt-in and opt-out rules in hybrid class actions produces differing class sizes for FLSA and state law claims.[209] Multiple courts agree that the two procedures are compatible, and the different procedural mechanisms will not confuse potential class and collective members.[210] Yet some scholars consider that this mixture between simultaneous opt-in and opt-out actions under Rule 23 and the FLSA has the potential for creating contradictory classes by allowing plaintiffs to "cherry-pick" the benefits from both types of actions.[211] Unarguably, the extension of *BMS* to collective actions is producing new incentives to use class actions instead of collective actions to redress wage disputes. Extending personal jurisdiction to opt-in plaintiffs would create less conflict and competition between state and federal wage and hour laws.

2. Multidistrict Litigation and Federal Interest

The *BMS* opinion did not altogether disapprove of national aggregate litigation.[212] In fact, some scholars think that it "enthusiastically endorsed" one particular form of aggregate process, namely MDL.[213] Under the MDL Act, the fact that the court in which the cases are consolidated does not itself have specific personal jurisdiction over the defendant(s) does not matter because, formally, the transfer is supposed to be temporary.[214] As mentioned earlier, however, this consolidation is usually permanent because less than

208. Brunsden, *supra* note 206; *see supra* notes 181–184 and accompanying text.

209. Brunsden, *supra* note 206.

210. David Borgen & Laura L. Ho, *Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL'Y J. 129, 148 (2003).

211. Thomas H. Barnard & Amanda T. Quan, *Trying to Kill One Bird with Two Stones: The Use and Abuse of Class Actions and Collective Actions in Employment Litigation*, 31 HOFSTRA LAB. & EMP. L.J. 387, 404–05 (2014) ("The interplay between [class and collective actions] has the potential to create different, and potentially contradictory, classes within one single lawsuit. Plaintiffs attempting to bring state law wage claims under Rule 23 and collective actions under the FLSA are essentially trying to 'have their cake and eat it too.'").

212. Bradt & Rave, *supra* note 3, at 1254.

213. *Id.* at 1254, 1256 ("[*BMS*] is a milestone in the ascendancy of MDL as the centerpiece of nationwide dispute resolution in the federal courts.").

214. *Id.* at 1297.

three percent of all cases get remanded back to the trial courts.[215] As scholars have observed, "[f]unctionally, the MDL court *is* exercising a kind of nationwide personal jurisdiction" over the defendant.[216] These scholars note that this is consistent with a larger trend towards the federalization of mass litigation.[217] Extending personal jurisdiction to out-of-state plaintiffs under the FLSA collective action mechanism is compatible with this trend towards federalization.[218] Moreover, the Supreme Court's endorsement of MDL, using a type of de facto nationwide jurisdiction in federal courts, supports the argument that FLSA collective actions can include out-of-state plaintiffs injured by the same employer.[219]

D. Actions from Congress and the Supreme Court

Congress and the Supreme Court can easily put an end to the growing split among the courts by clarifying that personal jurisdiction extends to the claims of out-of-state plaintiffs in FLSA collective actions. First, Congress can include jurisdictional language in § 216(b) to authorize nationwide service of process as it has done in other statutes, such as the Employee Retirement Income Security Act of 1974 (ERISA).[220] Under ERISA, 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, and process may be served in any other district where a defendant resides or may be found."[221]

215. *Id.* at 1258, 1297; *see supra* note 72 and accompany text.

216. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1174 (2018).

217. Bradt & Rave, *supra* note 3, at 1258.

218. *See id.* at 1299–1306 (discussing how MDL promotes federalization of state law claims).

219. *See supra* note 36 and accompanying text.

220. 29 U.S.C. § 1132(e)(2). Examples of statutes granting nationwide service of process are: 15 U.S.C. § 22 (antitrust laws); 18 U.S.C. § 1965(a) (Racketeer Influenced and Corrupt Organizations Act); 18 U.S.C. § 2334(a) (Anti-Terrorism Act). Actions brought under such statutes have nationwide personal jurisdiction, as well as supplemental subject-matter jurisdiction, over state law claims joined in such actions. Ichel, *supra* note 11, at 39; *see also* Dodson, *supra* note 188, at 38 ("The broadest grant of personal jurisdiction to federal courts would be to allow nationwide personal jurisdiction to the extent permitted by the Constitution over all parties and claims in a multiclaim or multiparty lawsuit.").

221. 29 U.S.C. § 1132(e)(2).

Under the FLSA, an action should also be brought in any place where the defendant conducts any business.[222]

Second, the Supreme Court can also make clear that the *BMS* holding on mass tort actions does not extend to opt-in collective actions.[223] For instance, the Sixth and Seventh Circuits have already declined to extend *BMS* to class actions.[224] When the claims of in-state plaintiff-employees are jurisdictionally proper, and the employer also hires out-of-state employees with similar claims, the district courts should be able to consider all the claims of aggrieved employees at once. The Supreme Court's 2021 opinion in *Ford* confirms its willingness to make nuanced distinctions when applying personal jurisdiction tenets to particular cases.[225] The Court's fluid reading of causation in *Ford* seems to foreshadow a reasonable, context-specific basis of judicial review for collective action questions.[226] Those who deny this possibility foreclose a valuable alternative.

CONCLUSION

FLSA collective actions provide important worker protections.[227] After the Supreme Court's opinion in *BMS*, trial courts within the same judicial districts and circuits across the country are struggling to define the scope of specific personal jurisdiction in collective actions.[228] To

222. Antitrust laws provide:

> Any suit, action, or proceeding . . . may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22.

223. *See* Mussat v. IQVIA, Inc., 953 F.3d 441, 447 (7th Cir. 2020) ("We see no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue: the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so."), *cert. denied*, 141 S. Ct. 1126 (2021).

224. *See supra* note 163 and accompanying text.

225. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021) ("None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do.").

226. *See id.* (rejecting Ford's argument that specific jurisdiction arises only "because of the defendant's in-state conduct").

227. *See supra* Part I.B.1.

228. *See supra* Part II.

protect workers' rights, promote uniformity and judicial efficiency across the nation, deter forum shopping, and support federalism, the Supreme Court, Congress, or both should formulate a clear rule granting district courts personal jurisdiction over nonresident employers in FLSA collective actions with respect to the claims of out-of-state plaintiffs.