

No. 20-1997

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

JOHN WATERS, individually and for others similarly situated,

Plaintiff-Appellee,

v.

DAY & ZIMMERMANN NPS, INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the District of
Massachusetts, No. 19-cv-11585-NMG (Hon. Nathaniel M. Gorton)

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF
DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL**

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The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

	Page
INTEREST OF THE <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
I. The Due Process Clause Bars A Court From Exercising Specific Personal Jurisdiction Over Plaintiffs’ Claims That Lack The Requisite Connection To The Forum.....	6
A. Specific Personal Jurisdiction Requires A Substantial Connection Between Each Plaintiff’s Claim And The Defendant’s Forum Contacts	7
B. <i>BMS</i> Confirms That Specific Personal Jurisdiction Must Exist For Each Plaintiff’s Claim	9
C. The Supreme Court’s Reasoning In <i>BMS</i> Applies Equally To FLSA Collective Actions.....	11
D. The Due Process Clause Of The Fourteenth Amendment Applies In This Case	14
E. The Arguments Against Applying <i>BMS</i> To FLSA Collective Actions Are Unpersuasive.....	18
II. Permitting A Court To Exercise Specific Personal Jurisdiction Over Plaintiffs’ Claims With No Connection To The Forum Would Harm Businesses And The Judicial System	27
A. Requiring Only The Named Plaintiffs To Establish Specific Jurisdiction Would Encourage Abusive Forum Shopping.....	27
B. Requiring Only The Named Plaintiffs To Establish Specific Jurisdiction Would Make It Exceedingly Difficult For Businesses To Predict Where They Could Be Sued.....	31
CONCLUSION	33

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Aiuto v. Publix Super Mkts., Inc.</i> , No. 1:19-CV-04803-LMM, 2020 WL 2039946 (N.D. Ga. Apr. 9, 2020).....	18, 19
<i>Anjum v. J.C. Penney Co.</i> , No. 13-0460, 2014 WL 5090018 (E.D.N.Y. Oct. 9, 2014)	12
<i>BNSF Ry. v. Tyrrell</i> , 137 S. Ct. 1549 (2017).....	7, 24, 28
<i>Bristol-Myers Squibb Co. v. Superior Court</i> , 137 S. Ct. 1773 (2017).....	<i>passim</i>
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985).....	8
<i>Camp v. Bimbo Food Bakeries USA, Inc.</i> , No. 18-CV-378-SM, 2020 WL 1692532 (D.N.H. Apr. 7, 2020)	18
<i>Campbell v. City of Los Angeles</i> , 903 F.3d 1090 (9th Cir. 2018).....	11, 12, 20
<i>Canaday v. Anthem Cos.</i> , 439 F. Supp. 3d 1042 (W.D. Tenn. 2020).....	18
<i>Chavez v. Stellar Mgmt. Grp. VII, LLC</i> , No. 19-cv-01353-JCS, 2020 WL 4505482 (N.D. Cal. Aug. 5, 2020).....	14, 21
<i>Chavira v. OS Rest. Servs., LLC</i> , No. 18-CV-10029-ADB, 2019 WL 4769101 (D. Mass. Sept. 30, 2019).....	12, 18
<i>Daimler AG v. Bauman</i> , 571 U.S. 117 (2014).....	7, 15, 28, 29
<i>Devlin v. Scardelletti</i> , 536 U.S. 1 (2002).....	25

TABLE OF AUTHORITIES
(continued)

Cases (continued)	Page(s)
<i>Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.</i> , 561 U.S. 477 (2010).....	21
<i>Freeman v. Quicken Loans, Inc.</i> , 566 U.S. 624 (2012).....	23
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972).....	21
<i>Genesis Healthcare Corp. v. Symczyk</i> , 569 U.S. 66 (2013).....	25
<i>Halle v. W. Penn Allegheny Health Sys. Inc.</i> , 842 F.3d 215 (3d Cir. 2016)	25
<i>Hammond v. Floor & Decor Outlets of Am., Inc.</i> , No. 3:19-cv-01099, 2020 WL 2473717 (M.D. Tenn. May 13, 2020).....	14, 18
<i>Hertz Corp. v. Friend</i> , 559 U.S. 77 (2010).....	31
<i>Hoffmann-La Roche, Inc. v. Sperling</i> , 493 U.S. 165 (1989).....	11, 25
<i>Int’l Shoe Co. v. Washington</i> , 326 U.S. 310 (1945).....	7
<i>J. McIntyre Mach. Ltd. v. Nicastro</i> , 564 U.S. 873 (2011).....	31
<i>Johnson Creative Arts, Inc. v. Wool Masters, Inc.</i> , 743 F.2d 947 (1st Cir. 1984)	16
<i>Maclin v. Reliable Reports of Tex., Inc.</i> , 314 F. Supp. 3d 845 (N.D. Ohio 2018).....	29, 30

TABLE OF AUTHORITIES
(continued)

Cases (continued)	Page(s)
<i>Mason v. Lumber Liquidators, Inc.</i> , No. 17-CV-4780 (MKB), 2019 WL 2088609 (E.D.N.Y. May 13, 2019).....	22
<i>Meo v. Lane Bryant, Inc.</i> , No. CV-18-6360JMAAKT, 2019 WL 5157024 (E.D.N.Y. Sept. 30, 2019)	18
<i>Mineo v. Port Auth. of N.Y. & N.J.</i> , 779 F.2d 939 (3d Cir. 1985)	12
<i>Molock v. Whole Foods Mkt. Grp., Inc.</i> , 952 F.3d 293 (D.C. Cir. 2020)	19, 20, 24, 26
<i>Mussat v. IQVIA, Inc.</i> , 953 F.3d 441 (7th Cir. 2020).....	19, 24, 25, 26
<i>Pennoyer v. Neff</i> , 95 U.S. 714 (1877).....	20
<i>Pettenato v. Beacon Health Options, Inc.</i> , 425 F. Supp. 3d 264 (S.D.N.Y. 2019).....	18, 23
<i>Prickett v. DeKalb Cty.</i> , 349 F.3d 1294 (11th Cir. 2003).....	25, 26
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	21
<i>Roy v. FedEx Ground Package Sys., Inc.</i> , 353 F. Supp. 3d 43 (D. Mass. 2018)	18
<i>Swales v. KLLM Transp. Servs., LLC</i> , No. 19-60847, 2021 WL 98229 (5th Cir. Jan. 12, 2021).....	27

TABLE OF AUTHORITIES
(continued)

Cases (continued)	Page(s)
<i>Swamy v. Title Source, Inc.</i> , No. C 17-01175 WHA, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017).....	22
<i>Szewczyk v. United Parcel Serv., Inc.</i> , No. 19-1109, 2019 WL 5423036 (E.D. Pa. Oct. 22, 2019).....	18
<i>Thomas v. Kellogg Co.</i> , No. C13-5136RBL, 2017 WL 5256634 (W.D. Wash. Oct. 17, 2017)	30
<i>Turner v. Concentrix Servs., Inc.</i> , No. 1:18-CV-1072, 2020 WL 544705 (W.D. Ark. Feb. 3, 2020)	18, 22
<i>Vallone v. CJS Sols. Grp., LLC</i> , 437 F. Supp. 3d 687 (D. Minn. 2020).....	18
<i>Walden v. Fiore</i> , 571 U.S. 277 (2014).....	<i>passim</i>
<i>White v. Steak N Shake Inc.</i> , No. 4:20 CV 323 CDP, 2020 WL 1703938 (E.D. Mo. Apr. 8, 2020).....	13, 18
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980).....	<i>passim</i>
 Constitutional Provisions, Statutes, and Rules	
U.S. Constitution:	
Amendment IV	16
Amendment V	23
Amendment XIV	<i>passim</i>
 Sherman Act, 15 U.S.C. § 1 <i>et seq.</i> :	
Section 22	23

TABLE OF AUTHORITIES
(continued)

Statutes and Rules (continued)	Page(s)
RICO Act, 18 U.S.C. § 1961 <i>et seq.</i> :	
Section 1965(a).....	23
Anti-Terrorism Act, 18 U.S.C. § 2331 <i>et seq.</i> :	
Section 2334(a).....	23
Fair Labor Standards Act, 29 U.S.C. § 201 <i>et seq.</i>	<i>passim</i>
Section 216(b).....	<i>passim</i>
Section 256	11
ERISA, 29 U.S.C. § 1001 <i>et seq.</i> :	
Section 1132(e)(2).....	23
Federal Rules of Appellate Procedure:	
Rule 29(a)(4)(E).....	1
Federal Rules of Civil Procedure:	
Rule 4(k).....	4, 15, 16, 23
Rule 4(k)(1)(A).....	15, 16
Rule 23	25, 26, 27
 Other Authorities	
Carol Rice Andrews, <i>The Personal Jurisdiction Problem</i> <i>Overlooked in the National Debate About “Class Action</i> <i>Fairness,”</i> 58 SMU L. Rev. 1313 (2005).....	31
Henry J. Friendly, <i>Federal Jurisdiction: A General View</i> (1973)	22
Linda J. Silberman, <i>The End of Another Era: Reflections on</i> <i>Daimler and Its Implications for Judicial Jurisdiction in the</i> <i>United States,</i> 19 Lewis & Clark L. Rev. 675 (2015)	29
U.S. Chamber Inst. for Legal Reform, <i>BMS Battlegrounds:</i> <i>Practical Advice for Litigating Personal Jurisdiction After</i> <i>Bristol-Myers</i> (June 2018)	27

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including personal-jurisdiction issues. The Chamber files this brief to address the important personal-jurisdiction issue in this case.¹

Many of the Chamber's members employ individuals in States other than their place of incorporation and principal place of business, the two places where they would be subject to general personal jurisdiction. Also, the Chamber's members have been sued in collective actions, including actions under the Fair Labor Standards Act (FLSA), in States where they are not subject to general personal jurisdiction.

¹ No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. See Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

The Chamber's members have a strong interest in ensuring that all plaintiffs, not just the original named plaintiffs, are required to establish the prerequisites for specific personal jurisdiction in FLSA collective actions. Otherwise, those companies will be forced to defend against claims that lack the requisite connection to the forum States, claims for which the companies could not reasonably have expected to be sued in those States. That would encourage abusive forum shopping and would impose substantial harm on businesses and on the judicial system.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case raises an important question of first impression among the federal courts of appeals: Whether, in a collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, the Due Process Clause permits a court to exercise specific personal jurisdiction over the defendant with respect to the claims of all plaintiffs who opt into the action, even though some plaintiffs' claims lack a sufficient connection to the forum.

The answer to that question is straightforward: When a defendant is not subject to general personal jurisdiction in the forum, the court

may allow the collective action to proceed only if the defendant is subject to specific personal jurisdiction in the forum with respect to *all* plaintiffs' claims. If some plaintiffs cannot show the necessary connection between their claims and the defendant's activities in the forum – and therefore could not maintain their claims as individual actions in the forum – the collective action may not encompass those claims.

That rule follows from decades of Supreme Court precedent establishing that specific personal jurisdiction depends on a plaintiff-by-plaintiff assessment. To satisfy due process, a court faced with an action with multiple plaintiffs must find that the defendant has the necessary connection to the forum for *each plaintiff's* claim.

The Supreme Court applied that principle to reject an expansive exercise of specific jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) (*BMS*). The Court held that, for a mass-tort action to proceed in state court, the court must have personal jurisdiction over the defendant with respect to *all* plaintiffs' claims. *Id.* at 1778-81. The defendant lacked sufficient contacts to the forum to be subject to general personal jurisdiction. *Id.* at 1778. Further, the non-resident plaintiffs' claims lacked the necessary connection to the forum

to support specific personal jurisdiction, and the mere fact that the non-resident plaintiffs raised similar claims to the resident plaintiffs was not enough to satisfy due process. *Id.* at 1781.

That analysis resolves this case. The only difference between this case and *BMS* is that *BMS* was a mass-tort action and this case is an FLSA collective action. But the same due-process principles apply. Like the nonresident plaintiffs in *BMS*, the nonresident plaintiffs in this case could not bring FLSA claims against the defendant in the forum by filing their own individual complaints, and they therefore may not bring them in the forum by instead opting in as party plaintiffs to a collective action complaint.

The reasoning of *BMS* applies here, even though this is a case in federal court that involves a federal cause of action. Under Federal Rule of Civil Procedure 4(k), federal courts follow the personal-jurisdiction rules of the States in which they sit unless Congress has specified to the contrary. The FLSA does not specify to the contrary, and so the Due Process Clause of the Fourteenth Amendment, and *BMS*, apply.

Some federal district courts, like the court in this case, have held that *BMS* does not apply to FLSA collective actions. But their analyses are unpersuasive.

First, those courts have concluded that plaintiffs in an FLSA collective action other than the named plaintiffs are not considered “parties” for personal-jurisdiction purposes. Those courts are mistaken. All plaintiffs in an FLSA collective action are on equal footing with the original named plaintiffs once they opt in.

Second, some courts have reasoned that excusing the plaintiffs not named in the complaint from establishing personal jurisdiction would make FLSA collective actions more efficient. But supposed efficiency gains cannot override defendants’ due-process rights.

Third, a few courts have refused to apply *BMS* on the belief that it would preclude nationwide FLSA collective actions. But plaintiffs *can* file nationwide FLSA collective actions where defendants are subject to general jurisdiction.

Finally, the Seventh Circuit has declined to apply *BMS* in the class-action context. But FLSA collective actions are fundamentally different from class actions, in ways that make the application of *BMS*

even more clear. (In any event, the Seventh Circuit is mistaken about class actions.)

The rule reflected in the decision below, if left uncorrected, would cause substantial harm to businesses and to the judicial system. It would enable plaintiffs to make an end-run around the Due Process Clause by bringing nationwide collective actions anywhere they could find one plaintiff with the requisite connection to the forum. That maneuver, in turn, would eliminate the predictability that due process affords corporate defendants to allow them to structure their primary conduct. It also would allow the forum State to decide claims over which it has little legitimate interest, to the detriment of other States' interests. This Court therefore should reverse the decision of the district court.

ARGUMENT

I. The Due Process Clause Bars A Court From Exercising Specific Personal Jurisdiction Over Plaintiffs' Claims That Lack The Requisite Connection To The Forum

The Supreme Court's precedents, including *BMS*, establish that specific personal jurisdiction must be assessed on a plaintiff-by-plaintiff, claim-by-claim basis. That principle applies to FLSA collective actions just as it applied to the mass-tort action in *BMS*. The district court

erred in denying Day & Zimmermann’s motion to dismiss the claims of the nonresident plaintiffs.

A. Specific Personal Jurisdiction Requires A Substantial Connection Between Each Plaintiff’s Claim And The Defendant’s Forum Contacts

Whether an exercise of personal jurisdiction comports with the “traditional notions of fair play and substantial justice” underlying the Due Process Clause generally depends on whether the defendant has certain minimum contacts with the forum State. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Those contacts can support two types of personal jurisdiction. First, a court may assert general, or “all-purpose,” personal jurisdiction in States where a company is “essentially at home” – because the State is either the company’s place of incorporation or its principal place of business. *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)). Second, a court may assert specific, or “conduct-linked,” personal jurisdiction in a State where the lawsuit arises out of, or relates to, the defendant’s activities in the State. *Daimler AG*, 571 U.S. at 122, 127.

This case concerns specific jurisdiction. To exercise specific jurisdiction over a defendant, a court must conclude that the defendant’s “suit-related conduct” creates a substantial connection with the forum State. *Walden v. Fiore*, 571 U.S. 277, 284 (2014). That is, the court must find a substantial relationship between the forum, the defendant, and the particular plaintiff’s claim, so that it is “reasonable” to call the defendant into that court to defend against that claim. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

That limitation on personal jurisdiction reflects the fairness concerns animating the Due Process Clause. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 472 (1985). It provides a “degree of predictability” to defendants, especially corporate defendants, so that they can “structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” *World-Wide Volkswagen*, 444 U.S. at 297. The Due Process Clause also protects important federalism interests, by preventing States from

reaching beyond their borders to adjudicate claims over which they “may have little legitimate interest.” *BMS*, 137 S. Ct. at 1780-81.²

B. *BMS* Confirms That Specific Personal Jurisdiction Must Exist For Each Plaintiff’s Claim

The Supreme Court applied those settled principles in a case involving multiple plaintiffs and reaffirmed that the court must find specific personal jurisdiction with respect to each plaintiff’s claim.

In *BMS*, 86 California residents and 592 plaintiffs from other States sued BMS in California, alleging injuries from taking the drug Plavix. 137 S. Ct. at 1778. The nonresident plaintiffs did not claim any connections with California. *Id.* at 1781. Nonetheless, the California Supreme Court upheld the state court’s assertion of specific jurisdiction over the nonresidents’ claims, on the theory that the nonresidents’ claims were “similar in several ways” to the claims of the California residents (for which there was specific jurisdiction). *Id.* at 1778-79.

² In *Ford Motor Company v. Montana Eighth Judicial District Court*, No. 19-368 (U.S. argued Oct. 7, 2020), and *Ford Motor Company v. Bandemer*, No. 19-369 (U.S. argued Oct. 7, 2020), the Supreme Court is considering what minimum contacts are necessary to support personal jurisdiction under the Fourteenth Amendment’s Due Process Clause. This case presents a different issue – whether each plaintiff in an FLSA collective action must establish those minimum contacts with respect to his or her claims.

The U.S. Supreme Court reversed, finding no “adequate link between the State and the nonresidents’ claims.” *BMS*, 137 S. Ct. at 1781. The fact that “*other* plaintiffs” (the resident 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.” *Id.* The defendant must have a sufficient relationship to the forum with respect to *each* plaintiff’s claim; the fact that the defendant has the necessary relationship with respect to *some* plaintiffs’ claims is not sufficient. *Id.* That is true even when the claims raised by the resident and non-resident plaintiffs are similar. *Id.*

In rejecting the California Supreme Court’s theory of tack-on jurisdiction, the Supreme Court relied on the fairness, predictability, and federalism interests underlying its specific-jurisdiction decisions. The Court’s “primary concern” in assessing the California court’s exercise of specific jurisdiction was “the burden on the defendant,” which included both “the practical problems resulting from litigating in the forum” and “the more abstract matter of” requiring a defendant to “submit[] to the coercive power of a State” lacking any legitimate interest in the dispute.

BMS, 137 S. Ct. at 1780. Without the necessary link to the forum for each plaintiff’s claim, the Court explained, it would be unfair to require the defendant to appear in the forum to answer that claim. *Id.* The Supreme Court summarized: “What is needed – and what is missing here – is a connection between the forum and the *specific claims at issue.*” *Id.* at 1781 (emphasis added).

C. The Supreme Court’s Reasoning In *BMS* Applies Equally To FLSA Collective Actions

An FLSA collective action is “a kind of mass action,” *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1105 (9th Cir. 2018), where named plaintiffs seek to bring claims under the FLSA on behalf of themselves and other “similarly situated” employees, 29 U.S.C. § 216(b). If the court conditionally certifies the action as a collective action, those other employees must affirmatively opt into the action, at which point they “become . . . party plaintiff[s]” to the action. *Id.* In other words, by opting in, the plaintiffs “assert[] claims in their own right.” *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

The FLSA further provides that each opt-in plaintiff is an “individual claimant,” whose lawsuit is considered to have been “filed” on the day that plaintiff opts into the collective action. 29 U.S.C. § 256; *see*

Campbell, 903 F.3d at 1105 (plaintiffs in an FLSA collective action “act as a collective of *individual* plaintiffs with *individual* cases”). That underscores that each opt-in plaintiff brings a separate claim against the defendant, just like each plaintiff in a mass action does. Accordingly, the FLSA’s opt-in provision “is properly viewed as a rule of joinder.” *Anjum v. J.C. Penney Co.*, No. 13-0460, 2014 WL 5090018, at *8 (E.D.N.Y. Oct. 9, 2014); see *Mineo v. Port Auth. of N.Y. & N.J.*, 779 F.2d 939, 941 n.5 (3d Cir. 1985) (FLSA’s opt-in provision is a form of “permissive joinder”).

To assert personal jurisdiction over all the plaintiffs’ claims, the court must find the requisite connection between the defendant and the forum for the claims of “each plaintiff.” *Chavira v. OS Rest. Servs., LLC*, No. 18-CV-10029-ADB, 2019 WL 4769101, at *6 (D. Mass. Sept. 30, 2019); see *BMS*, 137 S. Ct. at 1781. The fact that *some* plaintiffs resident in the forum can establish specific personal jurisdiction over the defendant with respect to their claims does not allow them to bootstrap jurisdiction for the claims of *other* plaintiffs. See *BMS*, 137 S. Ct. at 1781; *Walden*, 571 U.S. at 286.

The Court's concern in *BMS* was that the defendant corporation could not reasonably expect, based on its activities within the forum, that it would be subject to suit there for claims by nonresident plaintiffs that are unconnected to the forum. *BMS*, 137 S. Ct. at 1780; see *World-Wide Volkswagen*, 444 U.S. at 297. That concern applies "with equal force to FLSA . . . actions that involve nonresident claims against non-forum defendants." *White v. Steak N Shake Inc.*, No. 4:20 CV 323 CDP, 2020 WL 1703938, at *4 (E.D. Mo. Apr. 8, 2020). Many businesses have employees in different States, and it makes no sense to say that because a business has a few employees in one State, *all* of its employees can bring claims against it in that State.

Further, that rule would disregard the interests of other States. Allowing a State to assert jurisdiction over the claims of a putative nationwide collective action, based on a single named plaintiff's connection to the forum, would permit the forum State to decide claims as to which it has insufficient legitimate interest, infringing on the authority of other States. See *BMS*, 137 S. Ct. at 1780.

If the rule were otherwise, plaintiffs could make an end-run around *BMS* by finding a single plaintiff from the forum state of their

choice. *BMS* involved 678 plaintiffs from 34 different States asserting similar tort claims against BMS in California. 137 S. Ct. at 1778. This case involves just 3 Massachusetts plaintiffs and 109 plaintiffs from other States, all of whom seek to bring claims in federal court in Massachusetts against a Delaware defendant with its principal place of business in Pennsylvania. *See* ADD1, ADD19.

In both cases, some plaintiffs are residents of the forum State who can establish personal jurisdiction over the defendant for their claims, and others are nonresidents who cannot establish the necessary connection. This Court should not let the nonresident plaintiffs in this case proceed with their claims when the Supreme Court prohibited the nonresident plaintiffs from doing so in *BMS*.

D. The Due Process Clause Of The Fourteenth Amendment Applies In This Case

Some courts have attempted to distinguish *BMS* on the ground that the Court's Fourteenth Amendment due-process analysis does not apply in federal court. *See Chavez v. Stellar Mgmt. Grp. VII, LLC*, No. 19-cv-01353-JCS, 2020 WL 4505482, at *7-8 (N.D. Cal. Aug. 5, 2020); *Hammond v. Floor & Decor Outlets of Am., Inc.*, No. 3:19-cv-01099, 2020 WL 2473717, at *13 (M.D. Tenn. May 13, 2020). But unless Con-

gress provides for nationwide service of process – which it has not done for the FLSA – the Fourteenth Amendment’s Due Process Clause applies.

1. The Due Process Clause of the Fourteenth Amendment limits the exercise of personal jurisdiction in this case because Federal Rule of Civil Procedure 4(k) incorporates state personal-jurisdiction rules and the Fourteenth Amendment limitations on them. As the Supreme Court has explained, “[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.” *Walden*, 571 U.S. at 283 (quoting *Daimler AG*, 571 U.S. at 125).

That is because Rule 4(k) directs federal courts to follow the personal-jurisdiction rules of the States in which they sit unless Congress separately has authorized service of process for a particular federal claim or defendant. Specifically, Rule 4(k)(1)(A) provides that service of process “establishes personal jurisdiction over [the] defendant” if the defendant “is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.” Fed. R. Civ. P. 4(k)(1)(A). Rule 4(k) voluntarily incorporates state personal-jurisdiction rules, which include the limitations imposed by the Due Process Clause of the

Fourteenth Amendment. *See Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984).

The Supreme Court has recognized that Rule 4(k) incorporates the Fourteenth Amendment due-process limitations on personal jurisdiction. In *Walden*, the Court considered a Fourth Amendment claim that individuals brought against a state police officer in federal court in Nevada. 571 U.S. at 281. Even though the case involved a federal claim brought in federal court, the Court applied the Due Process Clause of the Fourteenth Amendment to evaluate personal jurisdiction. The Court explained that, under Rule 4(k), “a federal district court’s authority to assert personal jurisdiction in most cases is linked to service of process” on a defendant that is subject to personal jurisdiction in the State where the federal court sits. *Id.* at 283 (citing Fed. R. Civ. P. 4(k)(1)(A)).

2. In this case, plaintiffs raise a claim under the FLSA. That federal statute does not provide its own service-of-process rule. *See* 29 U.S.C. § 201 *et seq.* Rule 4(k)(1)(A) therefore directs application of Massachusetts personal-jurisdiction rules, which are evaluated under the Due Process Clause of the Fourteenth Amendment. And under the

Fourteenth Amendment, a plaintiff asserting a violation of the FLSA must show that defendant's "suit-related conduct" creates a substantial connection with the forum State. *Walden*, 571 U.S. at 284. All but 3 of the plaintiffs cannot do so; they did not work for Day & Zimmermann in Massachusetts. *See* ADD19.

The fairness and federalism concerns embodied in the Court's Fourteenth Amendment due-process decisions (including *BMS*) fully apply here. That is true even though the FLSA is a federal statute; each State has an interest in enforcing labor standards within its territory. *See* 29 U.S.C. § 216(b) (FLSA claims may be brought in state court). If the district court adjudicates the claims of all of the plaintiffs, it will be "reach[ing] out beyond [its] limits," *World-Wide Volkswagen*, 444 U.S. at 292, to resolve matters over which many other States have legitimate interests. That could be permissible if Massachusetts has its own interest in resolving the claims because the claims arose out of the defendant's activities in the forum. But it does not.

E. The Arguments Against Applying *BMS* To FLSA Collective Actions Are Unpersuasive

No court of appeals has addressed the question whether *BMS* applies to FLSA collective actions.³ All of the district courts in this Circuit that have addressed the issue, other than the court in this case, have held that *BMS* applies to FLSA collective actions.⁴ Other district courts have disagreed on the answer.⁵ Further, the federal appellate judges

³ In addition to this case, the issue also is presented in *Canaday v. Anthem Cos.*, No. 20-5947 (6th Cir. docketed Aug. 19, 2020).

⁴ See *Camp v. Bimbo Food Bakeries USA, Inc.*, No. 18-CV-378-SM, 2020 WL 1692532, at *7 (D.N.H. Apr. 7, 2020); *Chavira*, 2019 WL 4769101, at *5; *Roy v. FedEx Ground Package Sys., Inc.*, 353 F. Supp. 3d 43, 52-53 (D. Mass. 2018).

⁵ Some courts have correctly held that all plaintiffs in an FLSA collective action must establish the prerequisites for specific personal jurisdiction. See, e.g., *White*, 2020 WL 1703938, at *2; *Vallone v. CJS Sols. Grp., LLC*, 437 F. Supp. 3d 687, 691 (D. Minn. 2020), *appeal docketed*, No. 28-2874 (8th Cir. Sept. 9, 2020); *Canaday v. Anthem Cos.*, 439 F. Supp. 3d 1042, 1048 (W.D. Tenn. 2020), *appeal docketed*, No. 20-5947 (6th Cir. Aug. 19, 2020); *Pettenato v. Beacon Health Options, Inc.*, 425 F. Supp. 3d 264, 280 (S.D.N.Y. 2019); *Szewczyk v. United Parcel Serv., Inc.*, No. 19-1109, 2019 WL 5423036, at *8 (E.D. Pa. Oct. 22, 2019).

Other courts have held that only the original named plaintiffs in an FLSA collective action must establish personal jurisdiction over the defendant. See, e.g., *Hammond*, 2020 WL 2473717, at *15; *Aiuto v. Publix Super Mkts., Inc.*, No. 1:19-CV-04803-LMM, 2020 WL 2039946, at *5 (N.D. Ga. Apr. 9, 2020); *Turner v. Concentrix Servs., Inc.*, No. 1:18-CV-1072, 2020 WL 544705, at *3 (W.D. Ark. Feb. 3, 2020); *Meo v. Lane Bryant, Inc.*, No. CV-18-6360JMAAKT, 2019 WL 5157024, at *12 (E.D.N.Y. Sept. 30, 2019).

that have addressed whether *BMS* applies in the context of federal class actions have disagreed.⁶

The courts that have declined to apply *BMS* to FLSA collective actions have offered a number of justifications for their approach. None is persuasive.

1. First, some courts, like the district court in this case, determined that opt-in plaintiffs need not establish specific personal jurisdiction with respect to their claims because they are differently situated from the original named plaintiffs. *See* ADD11-12. Those courts took the view that *BMS* “framed the specific jurisdiction analysis at the level of the suit,” which the courts understood to mean for the claims of the plaintiffs named in the caption of the lawsuit. *Aiuto v. Publix Super Mkts., Inc.*, No. 1:19-CV-04803-LMM, 2020 WL 2039946, at *5 (N.D. Ga. Apr. 9, 2020) (internal quotation marks omitted). Those courts therefore only required the original named plaintiffs in an FLSA collective action to establish personal jurisdiction over the defendant. *See, e.g., id.*

⁶ Compare *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445, 447 (7th Cir. 2020), *cert. denied*, No. 20-510, 2021 WL 78484 (U.S. Jan. 11, 2021), with *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 305-10 (D.C. Cir. 2020) (Silberman, J., dissenting).

That is wrong. An FLSA collective action is not merely a lawsuit between the original named plaintiff and the defendant. *All* of the plaintiffs are on the same footing – as “party plaintiff[s],” 29 U.S.C. § 216(b) – once they opt into an FLSA collective action. *See Campbell*, 903 F.3d at 1105 (the “result” of joining an FLSA collective action is that the opt-in plaintiffs gain “the same status in relation to the claims of the lawsuit as that held by the original named plaintiffs”). That surely includes for purposes the constitutional defense of personal jurisdiction, because without personal jurisdiction, any purported judgment is necessarily “void” and nonbinding on the defendant. *Pennoyer v. Neff*, 95 U.S. 714, 732 (1877); *see World-Wide Volkswagen*, 444 U.S. at 291.

The Supreme Court in *BMS* made clear that each plaintiff must establish personal jurisdiction over the defendant with respect to his or her particular claim. *See* 137 S. Ct. at 1781 (court must have personal jurisdiction for the “specific claims at issue”); *see also Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 306-07 (D.C. Cir. 2020) (Silberman, J., dissenting) (applying that rule in the class-action context). The Court therefore separately assessed whether the state court had per-

sonal jurisdiction over the claims of the nonresident plaintiffs as opposed to the plaintiffs from California. *BMS*, 137 S. Ct. at 1781-82.

2. Some district courts have declined to follow *BMS* in FLSA collective actions because they believed it would be more efficient if only the original named plaintiffs had to establish personal jurisdiction over the defendant. *See, e.g., Chavez*, 2020 WL 4505482, at *10. But the desire for efficiency cannot override constitutional rights. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010); *Ring v. Arizona*, 536 U.S. 584, 607 (2002). The Due Process Clause “is not intended to promote efficiency or accommodate all possible interests”; “it is intended to protect the particular interests of the person” whose rights are at stake. *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972). The due-process limitations on personal jurisdiction, in particular, “protect the liberty of the nonresident defendant – not the convenience of plaintiffs.” *Walden*, 571 U.S. at 284.

Moreover, that view fails to take into account defendants’ countervailing interests in defending the claims against them on the merits. Expanding a collective action requires the defendant to evaluate and defend against additional claims and significantly raises the potential

damages exposure. That reduces the likelihood that those claims will be adjudicated on the merits, no matter how dubious their merits. Defendants in collective actions already face tremendous pressure to capitulate to what Judge Friendly termed “blackmail settlements.” Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). That settlement pressure is substantially greater in a nationwide collective action.

3. Some courts have refused to apply *BMS* under the belief that Congress enacted the FLSA “specifically to address employment practices *nationwide*.” *Swamy v. Title Source, Inc.*, No. C 17-01175 WHA, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017) (emphasis added); *see, e.g., Turner v. Concentrix Servs., Inc.*, No. 1:18-CV-1072, 2020 WL 544705, at *3 (W.D. Ark. Feb. 3, 2020); *Mason v. Lumber Liquidators, Inc.*, No. 17-CV-4780 (MKB), 2019 WL 2088609, at *6 (E.D.N.Y. May 13, 2019). The courts took the position that applying *BMS* “would splinter most nationwide collective actions,” thereby “trespass[ing] on the expressed intent of Congress.” *Swamy*, 2017 WL 5196780, at *2.

But Congress did not provide that all plaintiffs may bring their FLSA claims in nationwide class actions, without regard to other juris-

dictional limitations. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012) (“No legislation pursues its purposes at all costs.” (brackets and internal quotation marks omitted)). In particular, Congress did not provide a nationwide-service-of-process rule, which would displace Rule 4(k) and the incorporated Fourteenth Amendment limits on personal jurisdiction.⁷ Nothing in the FLSA evidences an intent to change existing jurisdictional rules to permit nationwide class actions at all costs.

Anyway, plaintiffs *can* file a nationwide FLSA collective action anywhere the defendant is subject to general personal jurisdiction. *See BMS*, 137 S. Ct. at 1783 (“Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS.”); *see also, e.g., Pettenato v. Beacon Health Options, Inc.*, 425 F. Supp. 3d 264, 280 (S.D.N.Y. 2019) (“Applying [*BMS*] to FLSA collective actions will *not* prevent a nationwide FLSA collective of plaintiffs from joining together

⁷ Congress has provided for nationwide service of process in other federal statutes. *See, e.g.*, 15 U.S.C. § 22 (Sherman Act); 18 U.S.C. § 1965(a) (RICO Act); *id.* § 2334(a) (Anti-Terrorism Act); 29 U.S.C. § 1132(e)(2) (ERISA). The Supreme Court has repeatedly declined to address, in cases where federal personal-jurisdiction rules apply, whether the Fifth Amendment imposes the same restrictions as the Fourteenth Amendment on the exercise of personal jurisdiction. *E.g., BMS*, 137 S. Ct. at 1784.

in a consolidated action in a state that has general jurisdiction over [the defendant].” (internal quotation marks omitted)).

That outcome is sensible, because a defendant would expect to face suit in its home State by plaintiffs from any State for any type of claim. Indeed, that is the essence of general personal jurisdiction. *See, e.g., BNSF Ry.*, 137 S. Ct. at 1558-59. And as a practical matter, where employees across multiple States seek to sue their employer for a single common practice that allegedly violated the FLSA, it makes the most sense to hear those claims in the employer’s home State, the likely location of the relevant witnesses and documents.

4. In the federal class-action context, the Seventh Circuit has held that only the named plaintiffs must establish personal jurisdiction over the defendant. *See Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447-48 (7th Cir. 2010), *cert. denied*, No. 20-510, 2021 WL 78484 (U.S. Jan. 11, 2021). In contrast, when the D.C. Circuit faced the issue, the one judge who reached it disagreed with the Seventh Circuit’s view. *Molock*, 952 F.3d at 305-10 (Silberman, J., dissenting).⁸

⁸ The D.C. Circuit majority determined that it should wait to decide the issue until the class-certification stage, rather than decide it at the motion-to-dismiss stage. *See Molock*, 952 F.3d at 298-99.

This Court need not decide any issue related to class actions, because “Rule 23 actions are fundamentally different from collective actions under the FLSA” in several key respects. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013). Importantly, in an FLSA collective action, all plaintiffs must affirmatively choose to “become parties to [the] collective action.” *Id.* at 75; see *Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 224 (3d Cir. 2016) (“[T]he existence of a collective action depends upon the affirmative participation of [the] plaintiffs.”). When they do, they “become . . . party plaintiff[s],” 29 U.S.C. § 216(b), and “have the same status in relation to the claims of the lawsuit as do the named plaintiffs,” *Prickett v. DeKalb Cty.*, 349 F.3d 1294, 1297 (11th Cir. 2003); see *Hoffmann-La Roche, Inc.*, 493 U.S. at 173 (an FLSA collective action is not a “representative action[]”).

The Seventh Circuit’s main reason for not applying *BMS* to class actions was that the absent class members “are not full parties to the case for many purposes.” *Mussat*, 953 F.3d at 447. That reason is flawed because absent class members are undoubtedly full parties for the most important purpose of a class action, producing a binding, preclusive judgment. *Devlin v. Scardelletti*, 536 U.S. 1, 10-11 (2002). If

absent class members are considered parties for protecting their own interests that are affected by a binding judgment, surely they should be considered parties for purposes of personal jurisdiction, a constitutional prerequisite to a binding judgment protecting a defendant's interests in not being haled into an unfair forum. But in any event, that reasoning plainly does not apply to collective actions under the FLSA, where the statute expressly deems all plaintiffs who have opted in "party plaintiff[s]," 29 U.S.C. § 216(b), with the "same status" as the original named plaintiffs, *Prickett*, 349 F.3d at 1297.

The Seventh Circuit also refused to apply *BMS* because it reasoned that Federal Rule of Civil Procedure 23 somehow protects defendants' due-process rights. *See Mussat*, 953 F.3d at 447. That is incorrect. Rule 23 ensures that the class members' claims are sufficiently similar for class adjudication; it does nothing to ensure that there is a sufficient relationship between the defendant, the forum, and the particular claim. *See Molock*, 952 F.3d at 307-08 (Silberman, J., dissenting). But it does not matter here, because Rule 23 does not govern FLSA collective actions. Instead, in an FLSA collective action, the original named plaintiff must show only that other employees are "similarly

situated.” 29 U.S.C. § 216(b). The FLSA does not include all the procedural protections of Rule 23 designed to safeguard due process. *See, e.g., Swales v. KLLM Transp. Servs., LLC*, No. 19-60847, 2021 WL 98229, at *6 (5th Cir. Jan. 12, 2021).

Analogies to class actions therefore provide no basis for excusing FLSA collective-action plaintiffs from complying with the due-process limitations set out in *BMS*.

II. Permitting A Court To Exercise Specific Personal Jurisdiction Over Plaintiffs’ Claims With No Connection To The Forum Would Harm Businesses And The Judicial System

If only the original named plaintiffs in an FLSA collective action were required to establish specific personal jurisdiction, that would impose serious, unjustified burdens on the business community and the courts. These burdens provide an additional, compelling reason to reverse the decision below.

A. Requiring Only The Named Plaintiffs To Establish Specific Jurisdiction Would Encourage Abusive Forum Shopping

Not long ago, the plaintiffs’ bar relied heavily on expansive theories of general jurisdiction to bring nationwide or multi-state suits in plaintiff-friendly “magnet jurisdictions.” U.S. Chamber Inst. for Legal Reform, *BMS Battlegrounds: Practical Advice for Litigating Personal*

Jurisdiction After Bristol-Myers 3-5 (June 2018), <https://perma.cc/8QYZ-C48M>.

The Supreme Court responded to that abuse by limiting general personal jurisdiction to the places the defendant corporation can fairly be considered “at home.” *BNSF Ry.*, 137 S. Ct. at 1558. Even a “substantial, continuous, and systematic course of business” by the defendant in the forum State, the Court explained, is not enough to support general jurisdiction. *Daimler AG*, 571 U.S. at 138.

But if the district court’s approach here – permitting a nationwide collective action based on the claims of just 3 Massachusetts plaintiffs – were accepted, the plaintiffs’ bar would be able to make an end-run around those limits on general personal jurisdiction in any FLSA collective action. A collective action could be filed anywhere that even a single individual with the requisite forum connection is willing to sign up as a named plaintiff, even though the State has no “legitimate interest” in the vast majority of the plaintiffs’ claims. *BMS*, 137 S. Ct. at 1780.

Permitting such a suit to be brought on a specific jurisdiction theory – especially when nearly all of the plaintiffs are nonresidents and have claims based on out-of-state conduct – would in effect “reintroduce

general jurisdiction by another name” and on a massive scale. Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675, 687 (2015). Just as with expansive theories of general personal jurisdiction, the forum State’s assertion of authority in those circumstances would be “unacceptably grasping.” *Daimler AG*, 571 U.S. at 138-39.

And there is no logical stopping point. Out-of-state plaintiffs could outnumber the in-state named plaintiffs by 500:1, or even 5000:1, and still invoke specific jurisdiction. In *BMS*, the nonresident plaintiffs outnumbered the California plaintiffs 592 to 86. 137 S. Ct. at 1778. In the FLSA collective-action context, the ratio of out-of-state plaintiffs to in-state plaintiffs often is the same or larger.

This case illustrates the point: Here, the out-of-state plaintiffs outnumber the in-state plaintiffs 109 to 3 – an even more lopsided proportion than in *BMS*. ADD19. And that ratio is not unusual in FLSA collective-action cases. For example, in *Maclin v. Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845 (N.D. Ohio 2018), only 14 of the 438 total employees worked in the forum State – the same 3 percent proportion

as in this case. *Id.* at 847. Similarly, in *Thomas v. Kellogg Co.*, No. C13-5136RBL, 2017 WL 5256634 (W.D. Wash. Oct. 17, 2017), a lawsuit brought in Washington, only 37 of the 858 employees (4 percent) worked in that State. *Id.* at *1. Yet that court still exercised personal jurisdiction over all the employees' claims. *Id.*

This abusive forum shopping violates basic principles of federalism. Courts in the forum State can decide claims over which they have little legitimate interest, including claims based on conduct that occurred exclusively in other States. That substantially infringes on the authority of those other States to control conduct within their borders. As the Supreme Court has recognized, defendants should not have to “submit[] to the coercive power of a State” with “little legitimate interest in the claims in question.” *BMS*, 137 S. Ct. at 1780.

In sum, permitting nationwide collective actions to proceed even though most of the plaintiffs' claims lack the requisite connection to the forum would create a new way for plaintiffs' lawyers to forum shop, allowing them to file a limitless number of claims in a desired forum so long as one named plaintiff can establish specific personal jurisdiction over the defendant.

B. Requiring Only The Named Plaintiffs To Establish Specific Jurisdiction Would Make It Exceedingly Difficult For Businesses To Predict Where They Could Be Sued

Relatedly, the approach reflected in the district court’s order would make it nearly impossible for corporate defendants to predict where plaintiffs could bring high-stakes, multi-state FLSA collective actions based on a theory of specific personal jurisdiction. That in turn would inflict significant economic harm.

The due-process limitations on specific personal jurisdiction “give[] a degree of predictability to the legal system” so that “potential defendants” are able to “structure their primary conduct” by knowing where their conduct “will and will not render them liable to suit.” *World-Wide Volkswagen*, 444 U.S. at 297; see *J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion). That “[p]redictability is valuable to corporations making business and investment decisions.” *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

Under existing standards for specific personal jurisdiction, a company “knows that . . . its potential for suit [in a State] will be limited to suits concerning the activities that it initiates in the state.” Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National*

Debate About "Class Action Fairness," 58 SMU L. Rev. 1313, 1346 (2005). But if a court need not have specific jurisdiction over the claims of all plaintiffs, a company could be forced into a State's court to answer for claims entirely unrelated to that State.

Businesses that employ individuals in several States across the country would have no way of avoiding nationwide collective actions in any of those States. And they could be forced to litigate a massive number of claims in one State even though most, or even virtually all, of the claims arose from out-of-state conduct. *See World-Wide Volkswagen*, 444 U.S. 292. That result would eviscerate the predictability and fairness guaranteed by the Due Process Clause.

The harmful consequences of this unpredictability would not be limited to businesses. The costs of litigation surely would increase if businesses were forced to litigate high-stakes collective actions in unexpected forums. And some of that cost increase would invariably be borne by consumers in the form of higher prices.

Fortunately, there is an easy way to avoid these harmful consequences. The Supreme Court set out the governing rule in *BMS*. This Court should follow that guidance and hold that, in an FLSA collective

action, the court may adjudicate only those claims that could have been brought in the forum as individual actions.

CONCLUSION

The Court should reverse the decision of the district court.

Dated: January 27, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 6,480 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: January 27, 2021

/s/ Nicole A. Saharsky
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on January 27, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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