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## The FLSA's *Bristol-Myers Squibb* Problem

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## THE FLSA'S *BRISTOL-MYERS SQUIBB* PROBLEM

Adam Drake\*

*Three years after Bristol-Myers Squibb Co. v. Superior Court, in which the U.S. Supreme Court held that a California state court lacked personal jurisdiction over the claims of out-of-state plaintiffs, the ultimate scope of the holding remains unclear. Having reasoned that permitting jurisdiction over out-of-state plaintiffs' claims would infringe on the sovereignty of those plaintiffs' home states, the Court left open the question whether its holding applies to out-of-state plaintiffs in federal causes of action.*

*Predictably, defendants have subsequently argued that the Court's decision in Bristol-Myers Squibb applies to federal causes of action and bars federal courts from exerting jurisdiction over the claims of out-of-state plaintiffs that arose from conduct that occurred solely in their home states. This has led to a stark divide in federal district courts about whether Bristol-Myers Squibb applies in the context of collective actions under the Fair Labor Standards Act of 1938 (FLSA), a federal "super statute" for workers' rights. The FLSA permits similarly situated plaintiffs to join their claims and proceed collectively against a common employer-defendant. As of the publication of this Note, at least eighteen district courts have held that Bristol-Myers Squibb applies to FLSA collective actions—meaning that courts cannot assert jurisdiction over out-of-state plaintiffs' claims because they do not arise out of or relate to employer-defendants' contacts with the forum state. In contrast, nineteen district courts have held that out-of-state plaintiffs may join a FLSA collective action and have found that Bristol-Myers Squibb does not apply to FLSA collective actions.*

*This Note explores and attempts to resolve this divide—specifically by examining whether FLSA collective actions are meaningfully distinguishable from state mass tort actions, like that in Bristol-Myers Squibb. Ultimately, this Note concludes that FLSA collective actions cannot escape Bristol-Myers Squibb's reach. Given this conclusion, this Note urges Congress to amend the FLSA to provide for nationwide service of process to both circumvent Bristol-Myers Squibb and reestablish FLSA collective actions as an invaluable safeguard for workers.*

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#### INTRODUCTION

In *Bristol-Myers Squibb Co. v. Superior Court*,<sup>1</sup> the U.S. Supreme Court dismissed certain plaintiffs' claims brought in a mass tort products liability action against the pharmaceutical company Bristol-Myers Squibb (BMS) for lack of personal jurisdiction. The Court held that California state courts lacked jurisdiction to hear the nonresident plaintiffs' claims because they did not arise out of or relate to BMS's contacts with California.<sup>2</sup>

In the years since *Bristol-Myers Squibb*, defendants have wielded the decision to get nonresident claims dismissed in both Federal Rule of Civil Procedure (FRCP) 23 class actions and Fair Labor Standards Act of 1938<sup>3</sup> (FLSA) collective actions.<sup>4</sup> These attempts have spurred lower courts to confront whether *Bristol-Myers Squibb* applies in contexts other than mass tort actions. Scholarship on this issue has centered on the open question of whether *Bristol-Myers Squibb* extends to class actions under FRCP 23 and the resulting split among the district courts.<sup>5</sup> But also unresolved is *Bristol-Myers Squibb*'s applicability in federal courts for causes of action arising under federal law.<sup>6</sup> As such, the impact of *Bristol-Myers Squibb* on collective actions—a means of aggregation under the FLSA, a New Deal era federal “super statute” for workers' rights—remains uncertain.<sup>7</sup>

If in fact *Bristol-Myers Squibb* precludes courts from asserting jurisdiction over out-of-state FLSA plaintiffs' claims, this would fundamentally alter collective actions under the FLSA and make it more difficult for plaintiffs to proceed collectively under the FLSA when similarly situated plaintiffs are located across multiple states. Applying *Bristol-Myers Squibb* would add an additional procedural hurdle for FLSA plaintiffs to clear before courts could address the merits of their claims.<sup>8</sup> Further, nationwide collective actions would either be splintered into piecemeal actions involving only in-state

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1. 137 S. Ct. 1773 (2017).

2. *Id.* at 1780–81.

3. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219).

4. *See, e.g.,* Weirbach v. Cellular Connection, LLC, 478 F. Supp. 3d 544, 549–552 (E.D. Pa. 2020); Pettenato v. Beacon Health Options, Inc., 425 F. Supp. 3d 264, 275 (S.D.N.Y. 2019).

5. *See, e.g.,* Daniel Wilf-Townsend, *Did Bristol-Myers Squibb Kill the Nationwide Class Action?*, 129 YALE L.J.F. 205, 212–14 (2019) (presenting a quantitative analysis of courts that have addressed the applicability of *Bristol-Myers Squibb* in the context of class actions); Justin A. Stone, Note, *Totally Class-Less?: Examining Bristol-Myers's Applicability to Class Actions*, 87 FORDHAM L. REV. 807, 841 (2018) (arguing that FRCP 23's requirements provide adequate due process protections to prevent *Bristol-Myers Squibb*'s applicability to class actions).

6. *Bristol-Myers Squibb*, 137 S. Ct. at 1784 (“[W]e leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.”).

7. *See infra* Part II.

8. *See infra* Part II.B.3.

plaintiffs or relegated to the one or two states with general jurisdiction over employer-defendants.<sup>9</sup> There is a serious risk that applying *Bristol-Myers Squibb* will diminish the efficacy of using FLSA collective actions as a tool to hold employers accountable for violating workers' rights. No appellate court has addressed this discrete—yet critically important—issue, and the district courts are starkly divided.<sup>10</sup> As this divide persists, courts and litigants will continue to invest substantial resources adjudicating the question of jurisdiction before ever reaching the merits in FLSA collective action cases.

Thus, this Note focuses on that divide, presents a survey of the district court decisions that have ruled on *Bristol-Myers Squibb*'s applicability to FLSA collective actions, and answers the question of whether *Bristol-Myers Squibb* prevents courts from exercising jurisdiction over out-of-state members of an FLSA collective action. Part I of this Note provides relevant background on personal jurisdiction, the *Bristol-Myers Squibb* decision itself, and the resulting uncertainty in lower courts as to *Bristol-Myers Squibb*'s effects beyond mass tort actions. Part I of this Note also summarizes the history of the FLSA, how FLSA collective actions function, and the relevant distinctions between FRCP 23 “opt-out” class actions and FLSA “opt-in” collective actions. Part II of this Note then draws from the decisions of the thirty-seven district courts that have decided on *Bristol-Myers Squibb*'s applicability to FLSA collective actions to present the central arguments of both sides of the debate. Part III of this Note ultimately concludes that FLSA collective actions cannot escape the reach of *Bristol-Myers Squibb* and argues that Congress, in line with the FLSA's purpose, should amend the statute to provide for nationwide service of process to restore nonresident plaintiffs' ability to participate in FLSA collective actions.

## I. PERSONAL JURISDICTION, *BRISTOL-MYERS SQUIBB*, AND THE FLSA

This part provides background information on personal jurisdiction and the FLSA. Part I.A discusses the modern personal jurisdiction doctrine and its foundation before specifically addressing personal jurisdiction in federal courts and the *Bristol-Myers Squibb* decision itself. Part I.B then examines the enactment of the FLSA, its purpose, and how collective actions under the statute function in federal court.

### A. A Court's Power: Modern Personal Jurisdiction and Its Origins

Personal jurisdiction—a concept most lawyers and law students are familiar with—refers to a court's power to enter a valid judgment against a defendant.<sup>11</sup> The Due Process Clause of the Fourteenth Amendment<sup>12</sup> limits

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

10. See *infra* Part II.

11. 16 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE—CIVIL* § 108.01 (2020).

12. U.S. CONST. amend. XIV, § 1.

a state's exercise of personal jurisdiction over an out-of-state defendant.<sup>13</sup> Beyond the Fourteenth Amendment, statutes known as "long-arm" statutes also enable states to further restrict their courts' exercise of personal jurisdiction.<sup>14</sup>

Personal jurisdiction is further broken down into general personal jurisdiction and specific personal jurisdiction. If a state court can legally exercise general, or all-purpose, jurisdiction over a party, that party may be sued in that state for any claim.<sup>15</sup> When a state lacks general jurisdiction, specific jurisdiction becomes the only remaining avenue by which a state may exercise power over that party.<sup>16</sup> Specific jurisdiction requires that a plaintiff's specific claims arise from the defendant's contacts with the forum state.<sup>17</sup> Defendants may waive any challenge to personal jurisdiction either explicitly, by consenting to jurisdiction, or implicitly, by appearing in court without objecting to a court's personal jurisdiction.<sup>18</sup> Plaintiffs waive any objection to personal jurisdiction simply by bringing suit.<sup>19</sup>

Most first-year law students begin learning about personal jurisdiction in their civil procedure course with a discussion of the Supreme Court's famous decision in *Pennoyer v. Neff*.<sup>20</sup> There, the Court held that "no State can exercise direct jurisdiction and authority over persons or property without its territory."<sup>21</sup> Accordingly, a state that impermissibly exercises personal jurisdiction over an out-of-state defendant would violate that defendant's Fourteenth Amendment right to due process.<sup>22</sup> The rule articulated in *Pennoyer* generally required that, absent consent, personal jurisdiction could only be established through personally serving a defendant with process within the state's borders.<sup>23</sup> That rule endured during an era in which "state autonomy was jealously guarded, parties were primarily individual persons, and personal mobility was low."<sup>24</sup> Yet, the rise in interstate commerce and

13. See generally *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

14. See Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1592–93 (1992) (explaining the function of state long-arm statutes in state and federal courts).

15. See *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014).

16. See *id.*

17. See *id.*

18. See FED. R. CIV. P. 12(h)(1)(B); see also 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1067.3 (4th ed. 2020) (explaining that personal jurisdiction may be "based on the defendant's consent" or alternatively, on the "defendant's waiver of the personal jurisdiction defense").

19. See *Adam v. Saenger*, 303 U.S. 59, 67 (1938) ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court . . ."); see also Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1466 (2019) ("[T]he plaintiff consents to the personal jurisdiction of the court whose jurisdiction the plaintiff invoked.").

20. 95 U.S. 714 (1878).

21. *Id.* at 722.

22. *Id.* at 733.

23. *Id.*

24. Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. L. REV. 1, 15 (2018); see also *Shaffer v. Heitner*, 433 U.S. 186, 202 (1977) ("The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in States where they were

travel led the Court, in *International Shoe Co. v. Washington*,<sup>25</sup> to focus the personal jurisdiction analysis on the defendant's contacts with the forum state.

In *International Shoe*, the Court provided the foundation for the modern personal jurisdiction doctrine. The Court explained that when a state exercises personal jurisdiction over a defendant “due process requires only that . . . [the 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.’”<sup>26</sup> It followed that a defendant corporation’s “continuous” and “substantial” corporate operations within a state would “justify suit against [the corporation] on causes of action arising from dealings entirely distinct from those activities.”<sup>27</sup> Moreover, the Court assumed that a defendant corporation could always be sued in its “home” state or “principal place of business” irrespective of where a claim arose.<sup>28</sup> Taken together, these ideas formed the basis of general personal jurisdiction doctrine.<sup>29</sup> Similarly setting the stage for the modern doctrine of specific jurisdiction, the Court explained that a defendant may also be subject to suit in a particular forum if the defendant’s contacts with that forum, even if not continuous or substantial, gave rise to the plaintiff’s claim.<sup>30</sup>

#### 1. When the Defendant Is at Home: Modern General Jurisdiction Doctrine

The Supreme Court has both narrowed and clarified the doctrine of general jurisdiction since *International Shoe*. In a unanimous decision in 2011, *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>31</sup> the Supreme Court held that a North Carolina trial court could not exercise general personal jurisdiction over Goodyear’s foreign subsidiaries. There, two children died in a car accident in Paris, France.<sup>32</sup> The children’s parents sued Goodyear in North Carolina state court and alleged that a defective tire manufactured by Goodyear’s foreign subsidiary caused the accident.<sup>33</sup> The state court justified its exercise of general jurisdiction over Goodyear based on its subsidiaries placing tires in the “stream of commerce”—which necessarily

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not subject to *in personam* actions under *Pennoyer*, required further moderation of the territorial limits on jurisdictional power.”).

25. 326 U.S. 310 (1945).

26. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

27. *Id.* at 318.

28. *Id.* at 317 (“An ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.” (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930))).

29. 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, 11–12 (2018) (discussing *International Shoe* and its role as the jumping-off point for the modern doctrines of personal jurisdiction).

30. *Int’l Shoe*, 326 U.S. at 318 (reasoning that even some “single or occasional acts” in the state, “because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit”).

31. 564 U.S. 915 (2011).

32. *See id.* at 918.

33. *See id.*

included North Carolina—even though only a small percentage of the tires were actually being sold in that state.<sup>34</sup> The Supreme Court held that this approach violated Goodyear's right to due process and took the opportunity to readdress the doctrine of general jurisdiction.<sup>35</sup> Consistent with *International Shoe*, Justice Ruth Bader Ginsburg, writing for the majority, explained due process demands that courts exercise general jurisdiction only when a company's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."<sup>36</sup> Justice Ginsburg, however, explained that the "paradigm forum" for general jurisdiction is where "the corporation is fairly regarded as at home," and a corporation is at home in its "place of incorporation and principal place of business."<sup>37</sup>

Just three years later, in *Daimler AG v. Bauman*,<sup>38</sup> the Supreme Court reaffirmed this approach to general personal jurisdiction. There, with Justice Ginsburg again writing for the majority, the Court announced the modern doctrine that persists today: a state may exercise general personal jurisdiction over a corporation only if the corporation (1) is incorporated in the forum state or (2) has established its principal place of business in the forum state.<sup>39</sup> In so holding, the Court replaced the traditional examination of the defendant's contacts with the forum state and replaced that analysis with the clear-cut "at home test."<sup>40</sup> Since *Daimler*, no state has successfully exercised general jurisdiction over a corporate defendant that was not incorporated in the state or that did not have its principal place of business in the state.<sup>41</sup>

## 2. When the Defendant Is Away from Home: Modern Specific Jurisdiction Before and After *Bristol-Myers Squibb*

The Court has similarly refined the doctrine of specific jurisdiction since *International Shoe*. For a court to assert specific jurisdiction over a defendant, the modern doctrine requires a plaintiff to show that (1) the defendant purposefully availed itself of the forum state, (2) the plaintiff's claims arise out of or relate to the defendant's contacts with the forum state,

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34. *Id.* at 920.

35. *See id.* at 923 (describing the *International Shoe* decision as the "canonical opinion in" personal jurisdiction).

36. *Id.* at 924 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

37. *Id.* (quoting Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

38. 571 U.S. 117 (2014).

39. *Id.* at 137. The Court explained that the foundation of the "at home" analysis for the exercise of general jurisdiction is consistent with *Pennoyer*, which remains good law. *See id.* at 131–33.

40. *See id.* The Court did leave open the possibility that there may be rare instances in which another basis for general jurisdiction could exist outside of the two fora the Court identified. *See id.* at 137.

41. For further discussion of the Court's *Daimler* decision and its ramifications, see generally Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101 (2015).



and (3) it would be reasonable for the forum state to exercise jurisdiction.<sup>42</sup> The second of these factors, the so-called “relatedness requirement,” was the focus of the Supreme Court’s decision in *Bristol-Myers Squibb*.

There, in a mass tort action, a group of eighty-six California residents and 592 nonresidents from thirty-three other states filed eight separate mass action suits against BMS in California state court.<sup>43</sup> Plaintiffs alleged that ingesting Plavix—a pharmaceutical drug BMS sold in California but developed, manufactured, and created a marketing strategy for outside of the state—had damaged their health.<sup>44</sup> BMS’s revenue from selling Plavix in California “constituted 1.1 percent of the company’s total nationwide sales revenue of all of its products.”<sup>45</sup> The company maintained five research and laboratory facilities in California, which collectively employed approximately 164 people.<sup>46</sup> BMS also had a small office in Sacramento, California, for state-level lobbying and employed approximately 250 sales representatives throughout the state.<sup>47</sup>

BMS moved to quash the non-California plaintiffs’ service of summons on the ground that the California state court lacked personal jurisdiction.<sup>48</sup> A California superior court denied the motion and reasoned that, because of its extensive contacts with the state, California courts could properly exercise general jurisdiction over BMS.<sup>49</sup> In the wake of *Daimler*, however, the California Court of Appeal held that the state court lacked general jurisdiction but nonetheless possessed specific jurisdiction over BMS as to the non-California residents’ claims.<sup>50</sup>

The Supreme Court of California affirmed that decision and reasoned that the greater a defendant’s contacts with the forum state, the less direct the connection must be between those contacts and the nonresidents’ claims.<sup>51</sup> Applying this “sliding scale approach to specific jurisdiction,” the California Supreme Court held that BMS’s contacts with California were so “extensive” that they provided an adequate basis for specific jurisdiction due to the similarity between the nonresident and resident claims.<sup>52</sup> Specifically, the court noted that the nonresident and resident claims arose out of the use of the same product, the same “misleading marketing,” and the same product promotion.<sup>53</sup>

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42. See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1785–86 (2017) (Sotomayor, J., dissenting) (following the three-prong personal jurisdiction analysis); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–79 (1985).

43. *Id.* at 1778.

44. *Id.*

45. *Bristol-Myers Squibb Co. v. Superior Ct.*, 377 P.3d 874, 878 (Cal. 2016), *rev’d*, 137 S. Ct. 1773.

46. *Id.*

47. *Id.*

48. *Bristol-Myers Squibb*, 137 S. Ct. at 1778.

49. *Id.*

50. The California Court of Appeal initially affirmed the exercise of general jurisdiction but amended its position after *Daimler*. *Id.* at 1774.

51. *Bristol-Myers Squibb*, 377 P.3d at 888.

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

53. *Id.* at 1779.

On certiorari, the U.S. Supreme Court rejected the state court's "sliding scale" approach. Writing for the majority, Justice Alito explained that mere similarity between resident and nonresident claims provides an insufficient basis for personal jurisdiction<sup>54</sup> and emphasized that the key inquiry was whether the suit arose out of or related to BMS's contacts with California.<sup>55</sup> The Court found that the nonresident plaintiffs' suits neither arose out of nor related to BMS's activities in California because the nonresident plaintiffs were not prescribed, did not ingest, and "were not injured by Plavix in California."<sup>56</sup> Moreover, BMS, the Court observed, did not develop Plavix in California.<sup>57</sup> As such, the nonresident claims lacked an independent connection, or "nexus," to California, and haling BMS into state court to answer for those claims violated BMS's Fourteenth Amendment due process rights.<sup>58</sup> In so holding, the Court tightened the doctrine of specific jurisdiction such that lower courts now must assess each plaintiff's claims individually when analyzing specific jurisdiction in mass tort actions.

The Court acknowledged that its holding would splinter the nonresident plaintiffs' suits into separate mass actions in their respective states,<sup>59</sup> but it noted that, alternatively, the plaintiffs could have brought the same action in a state with general jurisdiction over BMS.<sup>60</sup> The plaintiffs clearly disfavored this alternative but, as the Court explained, their interest in litigating in California was only one of the "variety of interests" considered in a personal jurisdiction analysis.<sup>61</sup> The "primary concern" is "the burden on the defendant."<sup>62</sup> Analyzing that burden "requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question."<sup>63</sup> The Court further explained that personal jurisdiction is, in part, "a consequence of territorial limitations on the power of the respective States"<sup>64</sup>

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54. *See id.* at 1781.

55. *Id.* at 1780 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014)).

56. *Id.* at 1781. Notably, the three dissenting California Supreme Court justices shared this view. *See Bristol-Myers Squibb*, 377 P.3d at 898 (Werdegar, J., dissenting) ("The claims of real parties in interest, nonresidents injured by their use of Plavix they purchased and used in other states, in no sense arise from BMS's marketing and sales of Plavix in California, or from any of BMS's other activities in this state.").

57. *Bristol-Myers Squibb*, 137 S. Ct. at 1778.

58. *See id.* at 1780–81.

59. *See id.* at 1783.

60. *See id.*

61. *Id.* at 1780. Weighing these interests is a characteristic of the reasonableness prong of the personal jurisdiction analysis. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). However, the *Bristol-Myers Squibb* majority did not explicitly analyze its decision according to the three prongs. By contrast, Justice Sotomayor's dissent used the three-prong analysis and directly addressed the reasonableness prong. *Bristol-Myers Squibb*, 137 S. Ct. at 1786–87 (Sotomayor, J., dissenting) ("[T]here is no serious doubt that the exercise of jurisdiction over the nonresidents' claims is reasonable.").

62. *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

63. *Id.*

64. *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

because “[t]he sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States.”<sup>65</sup> These federalism concerns, in turn, are central to the *Bristol-Myers Squibb* decision.

The Court projected a sense of consistency by stating that its decision was a straightforward application of “settled principles regarding specific jurisdiction.”<sup>66</sup> In the years since *Bristol-Myers Squibb*, however, the lower courts’ application of the *Bristol-Myers Squibb* decision outside of mass tort actions has been anything but consistent. Justice Sotomayor, the sole dissenting Justice in *Bristol-Myers Squibb*, noted that the majority did not address whether its decision would bar nonresident plaintiffs without a connection to the forum state from joining a FRCP 23 class action.<sup>67</sup> Predictably, this has led to a widely debated split among the lower courts about how *Bristol-Myers Squibb* applies, if at all, to class actions.<sup>68</sup> Particularly relevant to this Note is that the majority also left open the question of whether its holding extends to federal courts exercising specific personal jurisdiction under the Fifth Amendment.<sup>69</sup>

### 3. Personal Jurisdiction in Federal Court and FRCP 4(k)

The discussion of personal jurisdiction so far has centered on the power of state courts to exercise jurisdiction over a defendant. Yet, just as the Fourteenth Amendment’s Due Process Clause guides personal jurisdiction in state courts, the Fifth Amendment Due Process Clause sets the boundaries for personal jurisdiction in federal courts.<sup>70</sup> The Supreme Court, however, has not clearly defined those boundaries.<sup>71</sup> Circuit courts confronting the issue have concluded that the Fifth Amendment functions identically to the Fourteenth Amendment for purposes of personal jurisdiction.<sup>72</sup> The only

65. *Id.* (second and third alterations in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 293).

66. *See id.* at 1781. *But see generally* Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499 (2018) (explaining that the *Bristol-Myers Squibb* decision left several questions unanswered and may have been inconsistent with Supreme Court precedent).

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

68. *Compare* *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 443 (7th Cir. 2020) (“[W]e hold that the principles announced in *Bristol-Myers* do not apply to the case of a nationwide class action filed in federal court under a federal statute.”), *cert. denied*, No. 20-510, 2021 WL 78484 (U.S. Jan. 11, 2021) (mem.), *with In re Dental Supplies Antitrust Litig.*, No. 16 Civ. 696, 2017 WL 4217115, at \*38 (E.D.N.Y. Sept. 20, 2017) (“Due process to assert personal jurisdiction requires that there be a direct ‘connection between the forum and the specific claims,’ and here, plaintiffs’ submissions fail to make that connection.” (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1780)).

69. *See Bristol-Myers Squibb*, 137 S. Ct. at 1784.

70. *See* U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

71. *See Bristol-Myers Squibb*, 137 S. Ct. at 1784; *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (plurality opinion); *Omni Cap. Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987); *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 113 n.\* (1987) (plurality opinion).

72. *See, e.g.,* *Livnat v. Palestinian Auth.*, 851 F.3d 45, 55 (D.C. Cir. 2017); *see also* A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979, 996 (2019).

difference in the personal jurisdiction analysis is whether the defendant has sufficient “minimum contacts” with the forum state, under the Fourteenth Amendment, or the United States as a whole, under the Fifth Amendment.<sup>73</sup>

Nonetheless, federal courts typically may not exercise jurisdiction to this extent because FRCP 4(k), which is more restrictive than the Fifth Amendment, constrains them.<sup>74</sup> Specifically, FRCP 4(k)(1)(A) provides that “[s]erving 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.”<sup>75</sup> Put simply, federal courts may not exercise personal jurisdiction over a party if the state courts in the forum state could not do the same. FRCP 4(k)(1)(A) thus projects the personal jurisdiction limits for state courts imposed by the Fourteenth Amendment onto federal courts.<sup>76</sup>

However, FRCP 4 does contain some exceptions.<sup>77</sup> Most notably, FRCP 4(k)(1)(C) authorizes a federal court to exercise jurisdiction over a defendant when authorized by federal statute.<sup>78</sup> Congress has done so by providing for broader, often nationwide, service of process for a limited set of federal statutes.<sup>79</sup> Under FRCP 4(k)(1)(C), Congress’s provision for nationwide service of process in a particular statute establishes an adequate basis for federal courts to reach beyond the limits imposed on state courts and exercise jurisdiction in line with congressional intent. Thus, when Congress does not provide for broader service of process, federal courts must apply Fourteenth Amendment due process limitations on personal jurisdiction under FRCP 4(k)(1)(A).<sup>80</sup> This then requires a federal court to assess whether the relevant state long-arm statute is satisfied. If that statute is coextensive with the Fourteenth Amendment Due Process Clause, that inquiry mirrors the

73. See, e.g., *Livnat*, 851 F.3d at 55 (“Under the Fourteenth Amendment . . . the relevant contacts are state-specific. Under the Fifth Amendment . . . contacts with the United States as a whole are relevant.”); *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997) (“A court must therefore examine a defendant’s aggregate contacts with the nation as a whole rather than his contacts with the forum state in conducting the Fifth Amendment analysis.”); see also Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509, 523–30 (2019).

74. See generally FED. R. CIV. P. 4(k).

75. *Id.* r. 4(k)(1)(A).

76. See *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (citing FED. R. CIV. P. 4(k)(1)(A)).

77. Exceptions include the so-called “bulge jurisdiction” exception under FRCP 4(k)(1)(B), which allows federal courts to exercise jurisdiction over parties who are within one hundred miles of the district court, and FRCP 4(k)(2), which establishes jurisdiction, for federal law claims, over defendants who are not subject to personal jurisdiction in any state. See FED. R. CIV. P. 4(k)(1)(B), (k)(2).

78. See *id.* r. 4(k)(1)(C) (“Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . when authorized by a federal a statute.”); see also *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 442 (1946) (“Congress could provide for service of process anywhere in the United States.”).

79. See, e.g., 18 U.S.C. § 1965; 15 U.S.C. §§ 22, 78aa; 29 U.S.C. § 1132(e)(2); FED. R. BANKR. P. 7004(d).

80. See, e.g., *Mandeville v. Crowley*, 695 F. App’x 357, 359 (10th Cir. 2017).

minimum contacts analysis established in *International Shoe* and its progeny.<sup>81</sup>

Some scholars have argued that FRCP 4(k)'s limitations on federal court jurisdiction are unnecessarily restrictive for plaintiffs.<sup>82</sup> For example, Professor Stephen E. Sachs has proposed a statutory fix to relieve federal courts of their dependence on state boundaries for jurisdiction and, in turn, allow for nationwide personal jurisdiction in federal courts.<sup>83</sup> Under Professor Sachs's proposal, venue rules would likely be the primary limitation restricting where a plaintiff may sue in federal court.<sup>84</sup> Alternatively, Professor Patrick J. Borchers has proposed expanding FRCP 4(k)(2),<sup>85</sup> which presently allows for national personal jurisdiction when another forum is not available in federal question cases, to include diversity and alienage cases.<sup>86</sup> Both proposals would open the federal court doors much wider for plaintiffs, especially those bringing claims under federal statutes that are silent as to service of process.

### B. *The FLSA: A Worker's Tool for Redress*

One such silent federal statute is the FLSA. This section provides a brief history of the FLSA and discusses how a collective action under the FLSA proceeds in federal court. It then highlights the differences between FLSA collective actions and FRCP 23 class actions, paying particular attention to the opt-in requirement under the FLSA and the opt-out requirement under FRCP 23 for plaintiffs.

#### 1. The Fight for Fair Wages: A Brief History of the FLSA

In the early twentieth century, the potential for states to enact minimum wage laws seemed bleak after two Supreme Court decisions held such legislation to be unconstitutional.<sup>87</sup> However, the Court, and specifically Justice Owen J. Roberts, famously reversed course in 1937 and held that minimum wage laws were in fact compatible with due process.<sup>88</sup> The Court's reversal opened the door for Congress to fulfill President Franklin D.

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81. *See id.* at 360.

82. *See* Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 762 (2019) ("There is little doubt that the elimination of corporate-activities-based jurisdiction is a significant hindrance to plaintiffs and a huge boon to corporate defendants.").

83. *See generally* Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301 (2014).

84. *See id.* at 1321–22.

85. *See generally* Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413 (2017).

86. FED. R. CIV. P. 4(k)(2).

87. *See* *Morehead v. New York*, 298 U.S. 587, 617–18 (1936) (invalidating New York's minimum wage legislation); *Adkins v. Child's Hosp.*, 261 U.S. 525, 561–62 (1923) (invalidating the District of Columbia's minimum wage legislation for women), *overruled in part* by *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

88. *See* John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 47 (1969) (discussing the debate).

Roosevelt's campaign promise to protect workers and establish a federal minimum wage.<sup>89</sup> To do so, Roosevelt proposed the FLSA in 1937, and after a year of congressional squabble,<sup>90</sup> he signed it into law on June 25, 1938.<sup>91</sup> In 1941, a unanimous Supreme Court upheld the FLSA's constitutionality<sup>92</sup> in *United States v. Darby*.<sup>93</sup> Congress relied on its Commerce Clause powers as the constitutional basis for the FLSA and reasoned that detrimental labor conditions negatively affected interstate commerce.<sup>94</sup> Hence, the goal of the FLSA was the eradication of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."<sup>95</sup> Although other labor laws existed at the time, Congress intended the FLSA to be the "the most comprehensive and pervasive federal statute in this area."<sup>96</sup> Congress sought to protect workers from poverty by prohibiting employers from paying low wages or exploiting child labor to compete with one another in the market.<sup>97</sup> As initially enacted, the FLSA banned child labor, set the minimum wage at twenty-five cents per hour, and established a maximum forty-four-hour work week.<sup>98</sup>

Nonetheless, the FLSA, as originally enacted, was full of exemptions.<sup>99</sup> The exemptions were so numerous that Congressman Martin Dies filed a "satirical amendment calling on the Labor Department to report back to Congress within 90 days after the bill's passage on whether any worker was covered by the act."<sup>100</sup> Subsequent amendments to the FLSA have eliminated some of these exemptions and thus expanded the number of workers the FLSA covers.<sup>101</sup> Some exemptions still persist, though: for example, persons classified as executive, administrative, or professional

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89. See Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV., June 1978, at 22, 23–24.

90. For a full discussion of the FLSA's legislative history, see generally John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464 (1939).

91. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219).

92. *United States v. Darby*, 312 U.S. 100, 125 (1941) ("[I]t is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment.").

93. 312 U.S. 100 (1941).

94. See U.S. CONST. art. I, § 8 ("Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States . . ."); see also Robert N. Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. MIA. L. REV. 607, 608–09 (1972).

95. See 29 U.S.C. § 202(a).

96. JOSEPH E. KALET, PRIMER ON WAGE & HOUR LAWS v (2d ed. 1990).

97. See Kati L. Griffith, *The Fair Labor Standards Act: Everything Old Is New Again*, 104 CORNELL L. REV. 557, 587–88 (2019).

98. See Grossman, *supra* note 89.

99. See William P. Quigley, "A Fair Day's Pay for a Fair Day's Work": Time to Raise and Index the Minimum Wage, 27 ST. MARY'S L.J. 513, 531–32 (1996).

100. SAR A. LEVITAN & RICHARD S. BELOUS, MORE THAN SUBSISTENCE: MINIMUM WAGES FOR THE WORKING POOR 41 (1979).

101. See Luke Norris, *The Workers' Constitution*, 87 FORDHAM L. REV. 1459, 1508–09 (2019) (discussing major amendments to the FLSA and the statute's reach).

employees are exempted from minimum wage protections.<sup>102</sup> Today, the U.S. Department of Labor estimates that the FLSA and similar wage and hour laws protect over 143 million U.S. workers.<sup>103</sup> Employees have indeed utilized these protections and filed 6780 lawsuits alleging FLSA violations in 2019 alone.<sup>104</sup>

## 2. Strength in Numbers: Proceeding Collectively Under the FLSA

The FLSA also permits “similarly situated” employees to aggregate their claims and bring a collective action against an employer.<sup>105</sup> Generally, plaintiffs allege one or more of the following in a FLSA collective action: “(1) misclassifying non-exempt employees as exempt; (2) making improper deductions from exempt employees’ salaries; (3) failing to pay non-exempt employees for all hours worked . . .; and/or (4) failure to pay or miscalculating overtime for non-exempt employees.”<sup>106</sup> Proceeding collectively empowers employees to pursue claims that would otherwise be too economically burdensome to pursue separately<sup>107</sup> by allowing them to pool their resources and lower their individual costs.<sup>108</sup>

The procedure for bringing a FLSA collective action is outlined in 29 U.S.C. § 216(b). Like an FRCP 23 class action, § 216(b) allows one or more named plaintiffs to sue on behalf of themselves and other “similarly situated” potential (i.e., putative) plaintiffs.<sup>109</sup> The FLSA does not, however, define “similarly situated,” and the Supreme Court has not defined it either.<sup>110</sup>

Federal courts usually conduct a two-stage inquiry to determine whether the plaintiffs are “similarly situated” and thus if certification is appropriate.<sup>111</sup> The first phase of an FLSA collective action suit is referred to either as the “notice stage,” “conditional certification,” or “preliminary

102. 29 U.S.C. § 213; *see also* Quigley, *supra* note 99, at 536.

103. *See* Wage & Hour Div., *Resources for Workers*, U.S. DEP’T OF LAB., <http://www.dol.gov/whd/workers.htm> [<https://perma.cc/Z7RL-385K>] (last visited Jan. 27, 2021).

104. Michael Trimarchi, *Top Class Action Settlement Values Rise in 2019, Law Firm Says*, BLOOMBERG TAX (Jan. 13, 2020, 4:04 PM), <https://news.bloombergtax.com/payroll/top-class-action-settlement-values-rise-in-2019-law-firm-says> [<https://perma.cc/26SD-RPQ7>].

105. *See* 29 U.S.C. § 216(b).

106. *An Overview of the FLSA “Collective Action,”* BRICKER & ELCKER: ATTY’S AT L. (Jan. 3, 2012), <https://www.bricker.com/insights-resources/publications/an-overview-of-the-flsa-collective-action> [<https://perma.cc/H4TB-V86X>].

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

108. *See* 1 JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS § 2:16 (17th ed. 2020) (“The purpose of a collective action under the FLSA is to allow plaintiffs to minimize individual expense in pursuing wage rights through pooled resources . . .”).

109. *See* 29 U.S.C. § 216(b).

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

111. *See* Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006). *But see* Swales v. KLLM Transp. Servs., LLC, 985 F.3d 430, 443 (5th Cir. 2021) (holding that courts should “rigorously enforce” the FLSA’s similarity requirement “at the outset of the litigation”).

certification.”<sup>112</sup> This phase occurs early in the litigation after plaintiffs have moved for conditional certification of the collective.<sup>113</sup> While there is no statutory rule, at this stage, courts usually apply a lenient standard to evaluate whether the plaintiffs are in fact similarly situated.<sup>114</sup> Courts typically apply one of two formulations of plaintiffs’ burden of proof<sup>115</sup>: either (1) plaintiffs must make “substantial allegations” that provide some factual basis for concluding the plaintiffs are similarly situated<sup>116</sup> or (2) a court will inquire whether the plaintiff made a “modest factual showing.”<sup>117</sup> Both standards are lenient, but the “modest factual showing” standard is slightly more demanding.<sup>118</sup>

If plaintiffs prevail at this stage and the collective is conditionally certified, as is the norm, the court has discretion to facilitate notifying putative collective members of the lawsuit.<sup>119</sup> Such notice should provide information about the lawsuit, advise the potential plaintiffs of the consequences of opting in or declining to do so, and explain that the court has not expressed an opinion as to the merits of the case at this stage.<sup>120</sup> In contrast to FRCP 23, which provides that putative class members are included in the suit unless they affirmatively opt out,<sup>121</sup> § 216(b) requires potential FLSA collective action plaintiffs to affirmatively opt in to the lawsuit to be bound by the judgment.<sup>122</sup> Thus, court-facilitated notice gives potential plaintiffs the information and opportunity necessary to opt in to the collective action.

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112. WAGE & HOUR COLLECTIVE AND CLASS LITIGATION § 4.01 (Noah A. Finkel et al. eds.), LexisNexis (database updated 2021).

113. See, e.g., *Arceo v. Orta*, 296 F. Supp. 3d 818, 820–21 (N.D. Tex. 2017).

114. See *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995) (describing the conditional certification standard as “fairly lenient . . . typically result[ing] in ‘conditional certification’ of a representative class” (footnote omitted)), *abrogated in part by* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

115. See generally WAGE & HOUR COLLECTIVE AND CLASS LITIGATION, *supra* note 112.

116. See, e.g., *Renfro v. Spartan Comput. Servs., Inc.*, 243 F.R.D. 431, 432 (D. Kan. 2007).

117. See, e.g., *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010); see also WAGE & HOUR COLLECTIVE AND CLASS LITIGATION, *supra* note 112, § 4.01.

118. See WAGE & HOUR COLLECTIVE AND CLASS LITIGATION, *supra* note 112, § 4.01.

119. See *Lynch v. United Servs. Auto. Ass’n*, 491 F. Supp. 2d 357, 367 (S.D.N.Y. 2007) (“[C]ourt-supervised notice . . . avoids ‘multiplicity of duplicative suits;’ it allows the court to set deadlines to advance the disposition of an action; it furthers the ‘wisdom and necessity for early judicial intervention’ in multi-party actions; and it protects plaintiffs’ claims from expiring under the statute of limitations.” (quoting *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171–72 (1989))).

120. See *Stillman v. Staples, Inc.*, No. Civ. 07–849, 2008 WL 1843998, at \*4–5 (D.N.J. Apr. 22, 2008).

121. FED. R. CIV. P. 23(b)(3). See also generally 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 (2016) (discussing the procedural differences between FLSA collective actions and FRCP 23 class actions).

122. See 29 U.S.C. § 216(b) (“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.”).



After the notice stage and additional discovery, the defendant usually moves for decertification and triggers what some courts refer to as the “merits stage.”<sup>123</sup> At this stage, courts again address whether the plaintiffs are similarly situated. However, now, plaintiffs must satisfy a more rigorous standard than at the notice stage. Plaintiffs must show they are “‘similarly situated’ . . . based on the record produced through discovery.”<sup>124</sup> If plaintiffs clear this hurdle, the court denies the motion to decertify and plaintiffs proceed to trial in a representative or collective action.<sup>125</sup> Conversely, if the postdiscovery record is insufficient to show that plaintiffs are similarly situated, then the collective may be divided into subgroups or decertified. If the collective is decertified, the claims of the opt-in plaintiffs are dismissed without prejudice.<sup>126</sup>

## II. AN OPEN QUESTION: *BRISTOL-MYERS SQUIBB*’S APPLICABILITY TO FLSA COLLECTIVE ACTIONS

In the years since *Bristol-Myers Squibb*, FLSA employer-defendants have argued that *Bristol-Myers Squibb* requires courts to dismiss nonresident plaintiffs’ claims at the conditional certification stage of an FLSA collective action—notwithstanding the uncertainty about whether *Bristol-Myers Squibb* extends to federal courts through the Fifth Amendment. This has led to a nearly even split between the thirty-seven district courts that have addressed the issue so far. To date, at least nineteen district courts have held that *Bristol-Myers Squibb* does not apply to FLSA collective actions.<sup>127</sup> On the other side of the debate, at least eighteen district courts have held that *Bristol-Myers Squibb* does extend to FLSA collective actions.<sup>128</sup> The divide persists even between district courts in the same circuit.<sup>129</sup> Appellate courts have not yet provided guidance on this issue.

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123. See, e.g., *Resendiz-Ramirez v. P&H Forestry, LLC*, 515 F. Supp. 2d 937, 940 (W.D. Ark. 2007) (describing the two stages of the FLSA certification inquiry as the “notice stage” and the “merits stage”).

124. *Scott v. Aetna Servs.*, 210 F.R.D. 261, 264 (D. Conn. 2002) (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213–14 (5th Cir. 1995)).

125. See, e.g., *Zavala v. Wal-Mart Stores, Inc.*, 691 F.3d 527, 534 (3d Cir. 2012).

126. See *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995), *abrogated in part* by *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

127. See Appendix.

128. See Appendix.

129. Compare *Turner v. Concentrix Servs., Inc.*, No. 18-cv-1072, 2020 WL 544705, at \*3 (W.D. Ark. Feb. 3, 2020) (“[T]he Court finds that *Bristol-Myers* does not divest the Court’s personal jurisdiction over Plaintiff Tiara Turner’s ‘similarly situated’ collective action under the FLSA, regardless of where the opt-in plaintiffs may have suffered the alleged injury.”), with *Vallone v. CJS Sols. Grp., LLC*, 437 F. Supp. 3d 687, 691 (D. Minn. 2020) (“Only if [plaintiffs’] claims ‘arise out of or relate to’ HCI’s contacts with Minnesota can the Court constitutionally exercise jurisdiction over HCI.” (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017))), *appeal docketed*, No. 20-2874 (8th Cir. Sept. 9, 2020).

As the first appellate courts begin to weigh in on *Bristol-Myers Squibb*'s applicability to FRCP 23 class actions,<sup>130</sup> whether *Bristol-Myers Squibb* applies to FLSA collective actions appears similarly ripe for review. As such, this part describes the principal lines of reasoning district courts have employed to determine *Bristol-Myers Squibb*'s applicability to FLSA collective actions and highlights some exemplar decisions.<sup>131</sup> It bears mentioning that as these lines of reasoning have developed over the last three years, courts have increasingly invoked more than one as justification for their decisions.<sup>132</sup> Part II.A analyzes the lines of reasoning that district courts have relied on to find that *Bristol-Myers Squibb* is inapplicable to FLSA collective actions. Part II.B then discusses the lines of reasoning that district courts have employed to justify applying *Bristol-Myers Squibb* to FLSA collective actions.

#### A. Where *Bristol-Myers Squibb* Does Not Apply to FLSA Collective Actions

This section focuses on district court decisions that have found *Bristol-Myers Squibb* inapplicable to FLSA collective actions. Part II.A.1 examines district court decisions that have held that applying *Bristol-Myers Squibb* to FLSA collective actions runs counter to congressional intent. Next, Part II.A.2 discusses district court decisions that have applied the “level of the suit” analysis to hold *Bristol-Myers Squibb* inapplicable. Finally, Part II.A.3 considers district court decisions that have distinguished FLSA collective actions from *Bristol-Myers Squibb* on the ground that the federalism concerns central to *Bristol-Myers Squibb* are not present in the context of FLSA collective actions.

The typical refrain from courts addressing whether *Bristol-Myers Squibb* applies to FLSA collective actions begins by describing “one line of cases”<sup>133</sup> starting with *Swamy v. Title Source, Inc.*,<sup>134</sup> which held that “*Bristol-Myers*

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130. See, e.g., *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020), *cert. denied*, No. 20-510, 2021 WL 78484 (U.S. Jan. 11, 2021) (mem.). Faced with similar arguments as the Seventh Circuit, the D.C. Circuit declined to address whether *Bristol-Myers Squibb* applies to class actions and said that the decision would be purely advisory at the pleadings stage. See *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 295 (D.C. Cir. 2020), *reh'g en banc denied*, No. 18-7162, 2020 BL 173080 (D.C. Cir. May 7, 2020) (per curiam). The Fifth Circuit seemingly embraced the D.C. Circuit's approach when it explained that the personal jurisdiction defense was not “available” to the defendants at the pleadings stage. See *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 250 (5th Cir. 2020).

131. Professor Daniel Wilf-Townsend presented a similar survey of courts' decisions on *Bristol-Myers Squibb*'s applicability to FRCP 23 class actions but explained that his survey excluded decisions on *Bristol-Myers Squibb*'s applicability to FLSA collective actions. See Wilf-Townsend, *supra* note 5, at 227.

132. See, e.g., *Chavez v. Stellar Mgmt. Grp. VII, LLC*, No. 19-cv-01353, 2020 WL 4505482, at \*4–6 (N.D. Cal. Aug. 5, 2020).

133. E.g., *Pettenato v. Beacon Health Options, Inc.*, 425 F. Supp. 3d 264, 275 (S.D.N.Y. 2019) (quoting *Chavira v. OS Rest. Servs., LLC*, No. 18-cv-10029, 2019 WL 4769101, at \*4 (D. Mass. Sept. 30, 2019)).

134. No. C 17-01175, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017). Another rarely cited case addressed the issue pre-*Swamy* and found that *Bristol-Myers Squibb* did not extend to

does not apply to divest courts of personal jurisdiction in FLSA collective actions.”<sup>135</sup> In *Swamy*, the named plaintiff, an appraiser, brought a putative FLSA collective action alleging that he and other similarly situated employees were misclassified as exempt from overtime pay.<sup>136</sup> The complaint defined the collective as “all staff appraisers that worked for [Title Source, Inc.] at any time from three years prior to the date the Court authorizes notice to the present.”<sup>137</sup> In opposition to the plaintiff’s motion for conditional certification, defendant Title Source, Inc. argued that *Bristol-Myers Squibb* applies to FLSA collective actions and that the court lacked jurisdiction over the claims of putative collective members who did not reside in California.<sup>138</sup> The court found Title Source’s argument unpersuasive and held that the only requirement to exercise personal jurisdiction over the defendant was for the court to properly exercise personal jurisdiction over the named plaintiff’s claims, which was undisputed in the case.<sup>139</sup>

1. Using Congressional Intent to Exempt the FLSA from *Bristol-Myers Squibb*’s Reach

Principally, the *Swamy* court declined to apply *Bristol-Myers Squibb* to collective actions because it would “trespass on the expressed intent of Congress.”<sup>140</sup> The court reasoned that the FLSA was enacted for the purpose of combatting adverse employment practices nationwide.<sup>141</sup> Applying *Bristol-Myers Squibb*, the court explained, would contravene congressional intent and “splinter most nationwide collective actions,”<sup>142</sup> thereby “greatly diminish[ing] the efficacy of FLSA collective actions as a means to vindicate employees’ rights.”<sup>143</sup> The court further explained that *Bristol-Myers Squibb* does not mandate limiting FLSA collective actions only to in-state plaintiffs and thus, there was no reason to run afoul of congressional intent and extend *Bristol-Myers Squibb* FLSA collective actions.<sup>144</sup>

The *Swamy* court cited 29 U.S.C. §§ 202 and 207(a) to support its reasoning that Congress intended the FLSA, and specifically FLSA collective actions, to address adverse employment practices nationwide.<sup>145</sup>

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FLSA collective actions. See *Thomas v. Kellogg Co.*, No. C13-5136, 2017 WL 5256634, at \*1 (W.D. Wash. Oct. 17, 2017).

135. *Swamy*, 2017 WL 5196780, at \*2.

136. *Id.*

137. *Id.* at \*1.

138. *Id.*

139. See *id.* at \*2.

140. *Id.* (citing 29 U.S.C. §§ 202, 207(a)).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* Interestingly, the plaintiffs also argued that the defendant waived objections to personal jurisdiction or, in the alternative, consented to personal jurisdiction by signing the Joint Case Management Statement. See Plaintiff’s Reply in Support of Plaintiff’s Motion for Conditional Certification at 10–13, *Swamy*, 2017 WL 5196780 (No. C 17-01175), ECF No. 80. The court, however, did not address that argument.

145. *Swamy*, 2017 WL 5196780, at \*2.

The Supreme Court has explained that 29 U.S.C. § 202 sets out the FLSA's "basic objectives."<sup>146</sup> Section 202 provides, in relevant part, that the FLSA seeks to prohibit "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."<sup>147</sup> Section 207(a) requires employers to pay employees at least one-and-a-half times their normal rate for any time worked in excess of forty hours in one week.<sup>148</sup> This requirement covers "employees engage[d] in interstate commerce."<sup>149</sup> These provisions, along with the FLSA collective action procedures outlined in § 216(b), led the *Swamy* court to conclude that Congress in no way intended the FLSA to be limited to only in-state claims.<sup>150</sup>

Following *Swamy*, several other district courts have pointed to the text of the FLSA as evidence that Congress did not intend to restrict the reach of FLSA collective actions.<sup>151</sup> For example, in *Seiffert v. Qwest Corp.*,<sup>152</sup> plaintiffs brought a FLSA collective action on behalf of themselves and all others similarly situated.<sup>153</sup> Defendants promptly moved to dismiss the out-of-state putative plaintiffs by asserting *Bristol-Myers Squibb* applies to FLSA collective actions.<sup>154</sup> The court, however, agreed with the reasoning in *Swamy* and found that the circumstances of both cases were factually analogous.<sup>155</sup> The court added that "[n]othing in the plain language of the FLSA limits its application to in-state plaintiffs' claims."<sup>156</sup> Thus, the court held that, irrespective of where the plaintiffs suffered their injuries, *Bristol-Myers Squibb* did not divest the court's personal jurisdiction so long as the plaintiffs were similarly situated.<sup>157</sup>

Likewise, in *Meo v. Lane Bryant, Inc.*,<sup>158</sup> plaintiffs moved to conditionally certify a FLSA collective consisting of "[a]ll non-exempt hourly Store Managers employed by Lane Bryant at any retail store location throughout

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146. See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011).

147. 29 U.S.C. § 202(a).

148. See *id.* § 207(a); see also *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012).

149. 29 U.S.C. § 207(a).

150. See *Swamy*, 2017 WL 5196780, at \*2.

151. See, e.g., *Cooley v. Air Methods Corp.*, No. CV-19-00850, 2020 U.S. Dist. LEXIS 177139, at \*9 (D. Ariz. Sept. 25, 2020); *Aiuto v. Publix Super Mkts., Inc.*, No. 19-CV-04803, 2020 WL 2039946, at \*5 (N.D. Ga. Apr. 9, 2020); *Turner v. Concentrix Servs., Inc.*, No. 18-CV-1072, 2020 WL 544705, at \*2 (W.D. Ark. Feb. 3, 2020); *Warren v. MBI Energy Servs., Inc.*, No. 19-CV-00800, 2020 WL 937420, at \*7 (D. Colo. Feb. 25, 2020); *Mason v. Lumber Liquidators, Inc.*, No. 17-CV-4780, 2019 WL 2088609, at \*6 (E.D.N.Y. May 13, 2019), *aff'd*, 2019 WL 3940846 (E.D.N.Y. Aug. 19, 2019); *Seiffert v. Qwest Corp.*, No. CV-18-70, 2018 WL 6590836, at \*3 (D. Mont. Dec. 14, 2018).

152. No. CV-18-70, 2018 WL 6590836 (D. Mont. Dec. 14, 2018).

153. See *id.* at \*1.

154. See *id.*

155. See *id.* at \*2–3.

156. *Id.* at \*3 (citing 29 U.S.C. § 216(b)).

157. See *id.*

158. No. CV 18-6360, 2019 WL 5157024 (E.D.N.Y. Sept. 30, 2019).

the United States.”<sup>159</sup> Predictably, defendant Lane Bryant, Inc., opposed plaintiffs’ motion for conditional certification and claimed that the court could not exercise jurisdiction over out-of-state plaintiffs under *Bristol-Myers Squibb*.<sup>160</sup> In its analysis, the court looked to a factually analogous case within its own circuit,<sup>161</sup> *Mason v. Lumber Liquidators, Inc.*<sup>162</sup> In *Mason*, the magistrate judge granted plaintiffs’ motion for conditional certification of a FLSA collective, since “[u]nlike the mass-tort state law claims at issue in *Bristol-Myers*, [FLSA] collective action allegations . . . arise under a federal statute intended to address wage-and-hour practices nationwide.”<sup>163</sup> The *Meo* court followed and held that, “[a]s a remedial statute, Congress intended for nationwide FLSA collective actions.”<sup>164</sup> As is typical of courts following this line of reasoning, the court explained that applying *Bristol-Myers Squibb* to FLSA collective actions would therefore contravene Congress’s expressed intent by unnecessarily splintering nationwide collective actions.<sup>165</sup>

## 2. Analysis at the “Level of the Suit”

While the congressional intent line of reasoning is the most common justification when courts decline to extend *Bristol-Myers Squibb* to FLSA collective actions, district courts reaching the same result have also distinguished between FLSA collective actions, in which there is one suit between the named plaintiffs and the defendant, and mass actions, in which there are many individual suits. These district courts reason that the Supreme Court conducted its jurisdictional analysis in *Bristol-Myers Squibb* at the “level of the suit.”<sup>166</sup> Thus, these courts have explained that, as long as the court can properly exercise specific or general jurisdiction over a defendant for the named plaintiffs’ claims, a collective action can proceed with all similarly situated plaintiffs regardless of where the out-of-state plaintiffs’ injuries occurred. Courts also invoke a similar line of reasoning in the context of FRCP 23 class actions, explaining that as long as a court has

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159. *Id.* at \*2 (quoting Class & Collective Action Complaint ¶ 22, *Meo*, 2020 WL 5157024 (No. CV 18-06360)).

160. *See id.* at \*10.

161. *See id.* at \*11–12.

162. No. 17-CV-4780, 2019 WL 2088609 (E.D.N.Y. May 13, 2019), *aff’d*, 2019 WL 3940846 (E.D.N.Y. Aug. 19, 2019).

163. *Id.* at \*6 (first citing *Seiffert v. Qwest Corp.*, No. CV-18-70, 2018 WL 6590836, at \*2 (D. Mont. Dec. 14, 2018); and then citing *Swamy v. Title Source, Inc.*, No. 17-cv-01175, 2017 WL 5196780, at \*2 (N.D. Cal. Nov. 10, 2017)).

164. *Meo*, 2019 WL 5157024, at \*12.

165. *See id.*

166. *See, e.g.*, *Hager v. Omnicare, Inc.*, No. 19-cv-00484, 2020 WL 5806627, at \*6 (S.D.W. Va. Sept. 29, 2020); *O’Quinn v. TransCanada USA Servs., Inc.*, 469 F. Supp. 3d 591, 613 (S.D.W. Va. 2020); *see also* *Hammond v. Floor & Decor Outlets of Am., Inc.*, No. 19-cv-01099, 2020 WL 2473717, at \*14 (M.D. Tenn. May 13, 2020) (explaining that the relevant question is “whether the named plaintiff . . . in ‘the suit’ can exercise personal jurisdiction over the defendant”).

jurisdiction over the named plaintiffs' claims, the jurisdiction requirement for a putative class action is satisfied.<sup>167</sup>

The first decision to employ the "level of the suit" line of reasoning in the FLSA context was *Hunt v. Interactive Medical Specialists, Inc.*<sup>168</sup> There, the court determined that the defendants waived any objections to personal jurisdiction by failing to raise them in their responsive pleading to the complaint, but the court nonetheless engaged in a specific personal jurisdiction analysis.<sup>169</sup> Principally, the court relied on *Morgan v. U.S. Xpress, Inc.*,<sup>170</sup> which addressed whether *Bristol-Myers Squibb* applies to FRCP 23 class actions. Quoting *Morgan*, the *Hunt* court distinguished FLSA collective actions from the mass tort action in *Bristol-Myers Squibb*; it reasoned that "unlike *Bristol-Myers Squibb*, there is only one suit: the suit between Plaintiff and [the] Defendant[s]."<sup>171</sup> Indeed, the only suit before the court in *Hunt* was between the only named plaintiff, Ann Hunt, and the defendant, Interactive Medical Specialists, Inc., because no other plaintiffs had been notified or opted in at that point.<sup>172</sup> And, as the *Morgan* and *Hunt* courts explained, the Supreme Court's analysis in *Bristol-Myers Squibb* was framed at the level of the suit.<sup>173</sup> Accordingly, the *Hunt* court held that Interactive Medical was subject to its jurisdiction because the named plaintiff's claim undisputedly arose out of or related to Interactive Medical's contacts with the forum state.<sup>174</sup>

Six months later, in *Waters v. Day & Zimmermann NPS, Inc.*,<sup>175</sup> another district court followed similar reasoning when it held that *Bristol-Myers Squibb* was inapplicable to FLSA collective actions. There, out-of-state plaintiffs affirmatively opted in to the suit before the collective was conditionally certified.<sup>176</sup> Defendant Day & Zimmerman moved to dismiss the claims of out-of-state plaintiffs for lack of personal jurisdiction and to prevent others from joining the suit.<sup>177</sup> The court agreed with the other district courts that have held that *Bristol-Myers Squibb* was inapplicable to FLSA collective actions.<sup>178</sup> In so holding, the *Waters* court, similar to the *Hunt* court, explained that the Supreme Court conducted its analysis in *Bristol-Myers Squibb* at the level of the suit.<sup>179</sup> The court focused on the

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167. See, e.g., *Fitzhenry-Russell v. Dr. Pepper Snapple Grp.*, No. 17-cv-00564, 2017 WL 4224723, at \*5 (N.D. Cal. Sept. 22, 2017).

168. No. 19CV13, 2019 WL 6528594 (N.D.W. Va. Dec. 4, 2019).

169. See *id.* at \*2-3.

170. No. 17-cv-00085, 2018 WL 3580775 (W.D. Va. July 25, 2018).

171. *Hunt*, 2019 WL 6528594, at \*3 (alteration in original) (quoting *Morgan*, 2018 WL 3580775, at \*5).

172. See *id.*

173. See *id.* (quoting *Morgan*, 2018 WL 3580775, at \*5).

174. See *id.*

175. 464 F. Supp. 3d 455 (D. Mass. 2020), *appeal certified*, No. 19-11585, 2020 WL 4754984 (D. Mass. Aug. 14, 2020), and *appeal docketed*, No. 20-1997 (1st Cir. Oct. 28, 2020).

176. See *id.* at 457.

177. See *id.*

178. See *id.* at 460 ("This Court finds synergy with those Courts that have held *Bristol-Myers Squibb* to be inapplicable in the FLSA context.")

179. See *id.*

Supreme Court's requirement in *Bristol-Myers Squibb* that “the suit must aris[e] out of or relat[e] to the defendant’s contacts with the forum.”<sup>180</sup> The *Waters* court reasoned that the suit at issue was between the named plaintiff and the defendant.<sup>181</sup> Thus, because the parties did not dispute that the named plaintiff’s claim arose out of or related to Day & Zimmerman’s forum-state contacts, the court denied the motion to dismiss.<sup>182</sup> The fact that out-of-state plaintiffs had already opted in to the collective action did not affect the court’s analysis.<sup>183</sup>

### 3. No Federalism Concerns to See Here

The *Waters* court, however, did not conclude its analysis with its discussion of the level of the suit. The court further explained that the fact that a FLSA collective action “may be, in some ways, similar to a mass-tort claim does not necessarily lead to the conclusion that [*Bristol-Myers Squibb*] is applicable.”<sup>184</sup> Indeed, one of the primary ways courts have distinguished state mass tort actions, like the one in *Bristol-Myers Squibb*, from FLSA collective actions is through the lens of federalism. District courts have reasoned that the federalism concerns central to the *Bristol-Myers Squibb* decision are absent in FLSA collective actions.<sup>185</sup> Without those concerns, these courts have held that *Bristol-Myers Squibb* is inapplicable in the context of FLSA collective actions.

One of the more thorough discussions of the federalism line of reasoning came in *O’Quinn v. TransCanada USA Services, Inc.*<sup>186</sup> In that case, the plaintiff moved for conditional certification of a multistate collective of all similarly situated “inspectors”—project and construction managers who ensured construction projects adhered to TransCanada’s specifications.<sup>187</sup> Defendant TransCanada moved to dismiss the out-of-state opt-in plaintiffs’ claims for lack of personal jurisdiction.<sup>188</sup> The court explained that the state’s long-arm statute, which in West Virginia is coextensive with the

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180. *Id.* (alteration in original) (emphasis added) (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017)).

181. *See id.* at 461 (“In this putative FLSA collective action, the suit is between Waters and Day & Zimmermann.”).

182. *See id.*

183. *See id.* at 460 (“That other members of a putative class in the FLSA action must opt-in does not change the dynamics of the suit which remains between the plaintiff and defendant.”).

184. *Id.* at 461.

185. *See, e.g.*, *Hager v. Omnicare, Inc.*, No. 19-cv-00484, 2020 WL 5806627, at \*6 (S.D.W. Va. Sept. 29, 2020); *Chavez v. Stellar Mgmt. Grp. VII, LLC*, No. 19-cv-01353, 2020 WL 4505482, at \*8 (N.D. Cal. Aug. 5, 2020); *O’Quinn v. TransCanada USA Servs., Inc.*, 469 F. Supp. 3d 591, 614 (S.D.W. Va. 2020); *Aiuto v. Publix Super Mkts., Inc.*, No. 19-CV-04803, 2020 WL 2039946, at \*5 (N.D. Ga. Apr. 9, 2020).

186. 469 F. Supp. 3d 591 (S.D.W. Va. 2020).

187. *See id.* at 598–99.

188. *See id.*

Fourteenth Amendment, governed its personal jurisdiction inquiry.<sup>189</sup> The court then discussed the level of the suit line of reasoning.<sup>190</sup>

However, the *O'Quinn* court notably added that “the Supreme Court’s focus in *BMS* on concerns regarding federalism and state sovereignty [also] support declining to extend its holding to FLSA actions.”<sup>191</sup> The court explained that *Bristol-Myers Squibb* addressed a state court’s coercive power to render a valid judgment against an out-of-state defendant and the Fourteenth Amendment’s limitations on that power.<sup>192</sup> The Fourteenth Amendment’s restrictions on jurisdiction, the court noted, are not in place merely to protect a defendant from litigation in a distant or inconvenient forum.<sup>193</sup> Rather, it explained, those limitations are “a consequence of territorial limitations on the power of respective States.”<sup>194</sup> The court distinguished FLSA cases from cases arising under state law and observed that “[w]hen a federal court adjudicates a federal question claim, it exercises the sovereign power of the United States and no federalism problem is presented.”<sup>195</sup> Therefore, the court explained, “[t]he anxiety surrounding federalism expressed in *BMS* is inapplicable to a FLSA action, based on federal question jurisdiction.”<sup>196</sup>

Similarly, in *Chavez v. Stellar Management Group VII, LLC*,<sup>197</sup> the court found that the federalism concerns motivating the Supreme Court in *Bristol-Myers Squibb* did not apply to FLSA collective actions.<sup>198</sup> Interestingly, although the courts came to the same conclusion, the *Chavez* court did not reference the *O'Quinn* decision. Instead, the *Chavez* court followed *Sloan v. General Motors LLC*,<sup>199</sup> which held that *Bristol-Myers Squibb* does not apply to federal courts in the context of a FRCP 23 class action. In *Sloan*, the court explained that “where a federal court presides over litigation involving a federal question, the due process analysis does not incorporate the interstate sovereignty concerns that animated *Bristol-Myers* and which may be ‘decisive’ in a state court’s analysis.”<sup>200</sup> The *Chavez* court agreed. And, as in *Sloan*, the court exercised personal jurisdiction over the out-of-state plaintiffs’ claims.<sup>201</sup>

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189. *See id.* at 611.

190. *See id.* at 614 (“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.”).

191. *Id.* at 614 (citing *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017)).

192. *See id.*

193. *Id.* (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017)).

194. *Id.* (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017)).

195. *Id.* (alteration in original) (quoting 4 WRIGHT ET AL., *supra* note 18, § 1068.1).

196. *Id.*

197. No. 19-cv-01353, 2020 WL 4505482 (N.D. Cal. Aug. 5, 2020).

198. *Id.* at \*8.

199. 287 F. Supp. 3d 840 (N.D. Cal. 2018).

200. *Id.* at 859 (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780–81 (2017)).

201. *See Chavez*, 2020 WL 4505482, at \*9–10. Specifically, the court exercised pendent personal jurisdiction over the out-of-state claims. *See id.* The Ninth Circuit leaves the exercise



*B. Where Bristol-Myers Squibb Applies to FLSA Collective Actions*

The cases described in Part II.A conditionally certified plaintiffs' proposed collectives and, in turn, allowed them to send notice to potential similarly situated out-of-state plaintiffs. This gave plaintiffs the opportunity to certify a multistate, or potentially nationwide, collective at the merits stage. Cases holding the opposite—that *Bristol-Myers Squibb* divests courts of personal jurisdiction over a defendant for the claims of nonresident plaintiffs—prevent out-of-state plaintiffs from ever joining collectives. This part considers the lines of reasoning courts have relied on to find that *Bristol-Myers Squibb* applies to FLSA collective actions. Part II.B.1 discusses decisions that have found mass tort actions, like that in *Bristol-Myers Squibb*, indistinguishable from FLSA collective actions. Next, Part II.B.2 examines district court decisions that have emphasized that Congress did not provide for nationwide service of process in the FLSA. Finally, Part II.B.3 notes that some courts that have applied *Bristol-Myers Squibb* to FLSA collective actions have done so reluctantly.

The line of cases holding that *Bristol-Myers Squibb* applies to FLSA collective actions and divests courts of personal jurisdiction over defendants for the claims of out-of-state plaintiffs derives from *Maclin v. Reliable Reports of Texas, Inc.*<sup>202</sup> There, plaintiffs brought an FLSA collective action on behalf of “[a]ll current and former property [i]nspectors employed by Reliable Reports” and alleged that Reliable Reports had failed to pay overtime wages due.<sup>203</sup> The *Maclin* court declined to follow *Swamy*, explaining that *Swamy* has no precedential effect.<sup>204</sup> The court further explained that due process under the Fifth Amendment should have the same effect on FLSA collective actions as due process under the Fourteenth Amendment.<sup>205</sup> Thus, the court held that *Bristol-Myers Squibb* was not limited to mass tort claims or to state courts.<sup>206</sup> Nonetheless, the court noted that plaintiffs could bring one nationwide FLSA collective action in a state with general jurisdiction over defendant Reliable Reports or separate suits in their resident states.<sup>207</sup>

1. Similar Circumstances Demand Similar Outcomes

Courts holding that *Bristol-Myers Squibb* applies to FLSA collective actions have found that while FRCP 23 class actions may be distinguishable from the mass tort action in *Bristol-Myers Squibb*, FLSA collective actions are not. Specifically, these courts have reasoned that FLSA opt-in plaintiffs

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of pendent personal jurisdiction to the discretion of district courts when (1) there is no independent basis for jurisdiction and (2) the claims arise out of a common nucleus of operative facts with the claims over which the court *does* possess personal jurisdiction. *See* *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004).

202. 314 F. Supp. 3d 845 (N.D. Ohio 2018).

203. *See id.* at 847–48.

204. *Id.* at 850.

205. *Id.* at 850–51.

206. *Id.* at 851.

207. *See id.*

are analogous to the mass tort plaintiffs in *Bristol-Myers Squibb*. Such close similarity, they hold, requires similar outcomes.<sup>208</sup> As such, courts following this line of reasoning have applied *Bristol-Myers Squibb* and dismissed out-of-state plaintiffs' claims.<sup>209</sup>

The first decision to follow this line of reasoning in the FLSA collective action context was *Roy v. FedEx Ground Package Systems, Inc.*<sup>210</sup> There, the two named plaintiffs, both delivery drivers for defendant FedEx in Massachusetts, brought an FLSA suit for unpaid overtime wages.<sup>211</sup> Plaintiffs moved to conditionally certify a nationwide FLSA collective and for the court to allow plaintiffs to notify similarly situated drivers throughout the country of their right to opt in to the collective.<sup>212</sup> FedEx conceded that the court had personal jurisdiction over it as to the two named plaintiffs' claims but argued that the named plaintiffs could not assert claims on behalf of nonresident putative collective members because, under *Bristol-Myers Squibb*, those claims did not arise out of or relate to FedEx's contacts with Massachusetts.<sup>213</sup>

In response, plaintiffs relied, in part, on cases holding that *Bristol-Myers Squibb* did not apply in the context of FRCP 23 class actions.<sup>214</sup> However, the *Roy* court distinguished FLSA collective actions from FRCP 23 class actions and explained that the two are "fundamentally different creature[s]."<sup>215</sup> The court explained that the principal difference between the two types of actions is the opt-in requirement for FLSA plaintiffs and the opt-out option for FRCP 23 class action plaintiffs.<sup>216</sup> The court held that § 216(b), which requires FLSA plaintiffs to opt in affirmatively to the suit, operates as a rule of joinder, whereby only the individual opt-in plaintiffs have legal status.<sup>217</sup> Section 216(b), the court held, does not truly authorize a class action.<sup>218</sup> Therefore, the court held that the "opt-in plaintiffs in a FLSA collective action are more analogous to the individual plaintiffs who

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208. See *Camp v. Bimbo Bakeries USA, Inc.*, No. 18-cv-378, 2020 WL 1692532, at \*7 (D.N.H. Apr. 7, 2020) ("[P]laintiffs in FLSA collective actions are more like the individual plaintiffs in *Bristol-Myers* than members of a Rule 23 class, and that close similarity requires similar outcomes.").

209. See, e.g., *Vallone v. CJS Sols. Grp., LLC*, 437 F. Supp. 3d 687, 692 (D. Minn. 2020), appeal docketed, No. 20-2874 (8th Cir. Sept. 9, 2020); *Chavira v. OS Rest. Servs., LLC*, No. 18-cv-10029, 2019 WL 4769101, at \*6 (D. Mass. Sept. 30, 2019); *Turner v. Utiliquist, LLC*, No. 18-cv-00294, 2019 WL 7461197, at \*3 (M.D. Tenn. July 16, 2019).

210. 353 F. Supp. 3d 43 (D. Mass. 2018).

211. See *id.* at 51.

212. See *id.*

213. See *id.* at 61–62.

214. See *id.* at 58. Although the court's survey of cases largely consisted of FRCP 23 class actions, the court did note that *Swamy* had found *Bristol-Myers Squibb* inapplicable in the context of FLSA collective actions. See *id.* at 56.

215. See *id.* at 59 (quoting *Lichy v. Centerline Commc'ns LLC*, No. 15-cv-13339, 2018 WL 1524534, at \*2 (D. Mass. Mar. 28, 2018)).

216. See *id.*; *Jhaveri-Weeks & Webbert*, *supra* note 121, at 235.

217. See *Roy*, 353 F. Supp. 3d at 59 (quoting *Anjum v. J.C. Penney Co.*, No. 13 CV 0460, 2014 WL 5090018, at \*8 (E.D.N.Y. Oct. 9, 2014)).

218. See *id.*

were joined as parties in *Bristol-Myers* and the named plaintiffs in putative class actions than to members of a Rule 23 certified class.”<sup>219</sup>

The *Roy* court further distinguished between FLSA collective actions and FRCP 23 class actions on the ground that class action plaintiffs must satisfy FRCP 23’s due process procedural safeguards that do not exist for FLSA collective actions.<sup>220</sup> Class certification under FRCP 23 requires plaintiffs to establish numerosity, commonality, typicality, adequacy of representation, and—for FRCP 23(b)(3) classes in particular—predominance and superiority.<sup>221</sup> In contrast, at the conditional certification stage of an FLSA collective action, plaintiffs must only show that they are similarly situated.<sup>222</sup> The court found the “similarly situated” standard to be less stringent than the FRCP 23 class action safeguards<sup>223</sup> and in turn, “the due process protections for defendants are dissimilar.”<sup>224</sup> Consequently, the court held that even if FRCP 23 class actions could escape *Bristol-Myers Squibb*’s reach, FLSA collective actions could not.<sup>225</sup> The court then applied *Bristol-Myers Squibb* and explained that each opt-in plaintiff had to establish that a nexus existed between Massachusetts and the plaintiff’s individual FLSA claims against FedEx.<sup>226</sup> Because the out-of-state drivers could not do so, the court denied the plaintiffs’ request to send notice to any driver outside of Massachusetts and held that it lacked jurisdiction over any claims of potential nonresident plaintiffs.<sup>227</sup>

In the wake of *Roy*, several other district courts have followed the line of reasoning that FLSA opt-in plaintiffs are more analogous to the mass tort plaintiffs in *Bristol-Myers Squibb* and distinguishable from FRCP 23 class actions. These decisions, like *Roy*, have emphasized the differences between opt-in FLSA plaintiffs and the opt-out requirement for FRCP 23 class actions.<sup>228</sup> Thus, even if other decisions within their own circuits have held that *Bristol-Myers Squibb* inapplicable to FRCP 23 class actions, those courts have found that the similarity between the mass tort plaintiffs in *Bristol-*

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219. *Id.* at 59–60 (citing *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1778, 1781 (2017)).

220. *See id.* at 60 (quoting *Knotts v. Nissan N. Am., Inc.*, 346 F. Supp. 3d 1310, 1333 (D. Minn. 2018)).

221. *See id.*; *see also In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 09-2047, 2017 WL 5971622, at \*14 (E.D. La. Nov. 30, 2017) (citing FED. R. CIV. P. 23(a), 23(b)).

222. *See Roy*, 353 F. Supp. 3d at 60 (citing 29 U.S.C. § 216(b)).

223. *See id.* (quoting *Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d 357, 359 (D. Me. 2010)).

224. *Id.* (citing *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 126 (D.D.C. 2018)).

225. *See id.* at 58.

226. *See id.* at 60–61.

227. *Id.* at 58, 62.

228. *See, e.g., Vallone v. CJS Sols. Grp., LLC*, 437 F. Supp. 3d 687, 692 (D. Minn. 2020) (“A FLSA collective action, which requires potential plaintiffs to opt in, is more analogous to the individual plaintiffs at issue in the *Bristol-Myers Squibb* litigation than to members of a certified Rule 23 class who must affirmatively opt out of the litigation.”), *appeal docketed*, No. 20-2874 (8th Cir. Sept. 9, 2020).

*Myers Squibb* and FLSA opt-in plaintiffs demands that *Bristol-Myers Squibb* apply.<sup>229</sup> The court in *Camp v. Bimbo Bakeries USA, Inc.*<sup>230</sup> described this line of reasoning succinctly: “[o]pt-in’ plaintiffs in FLSA collective actions are more like the individual plaintiffs in *Bristol-Myers* than members of a Rule 23 class, and that close similarity requires similar outcomes.”<sup>231</sup> Accordingly, these district courts have applied *Bristol-Myers Squibb* to FLSA collective actions and dismissed the claims of out-of-state plaintiffs.

## 2. A Glaring Omission: Congress Did Not Provide for Nationwide Service of Process

Some district courts have applied *Bristol-Myers Squibb* to FLSA collective actions because Congress did not explicitly provide for nationwide service of process in the FLSA.<sup>232</sup> These courts have reasoned that the omission is significant because it implies Congress did not intend for federal courts to exercise jurisdiction more broadly than a state court would.<sup>233</sup> As such, these courts apply the limitations imposed on the states, including those announced in *Bristol-Myers Squibb*, under the Fourteenth Amendment.<sup>234</sup>

Indeed, the *Roy* court began its analysis of the jurisdiction question by explaining that “because the FLSA does not authorize nationwide service of process,” a court presiding over an FLSA collective action must look to the forum state’s long-arm statute and the Due Process Clause of the Fourteenth Amendment for the applicable limits on the court’s exercise of personal jurisdiction.<sup>235</sup> Operating within this framework, the court found FLSA opt-in plaintiffs indistinguishable from the mass tort plaintiffs in *Bristol-Myers Squibb*.<sup>236</sup> Likewise, in *Chavira v. OS Restaurant Services, LLC*,<sup>237</sup> the court noted that the FLSA did not provide for nationwide service of process, so the appropriate inquiry was whether the exercise of personal jurisdiction over the

229. See *id.*; *Pettenato v. Beacon Health Options, Inc.*, 425 F. Supp. 3d 264, 279 (S.D.N.Y. 2019) (quoting 7B WRIGHT ET AL., *supra* note 18, § 1807); *Chavira v. OS Rest. Servs., LLC*, No. 18-cv-10029, 2019 WL 4769101, at \*6 (D. Mass. Sept. 30, 2019).

230. No. 18-cv-378, 2020 WL 1692532 (D.N.H. Apr. 7, 2020).

231. *Id.* at \*7.

232. See, e.g., *White v. Steak N Shake Inc.*, No. 20 CV 323, 2020 WL 1703938, at \*3 (E.D. Mo. Apr. 8, 2020).

233. See, e.g., *Fischer v. Fed. Express Corp.*, No. 19-cv-04924, 2020 WL 7640881, at \*8 (E.D. Pa. Dec. 23, 2020); *Wiggins v. Jedson Eng’g, Inc.*, No. 19-CV-00354, 2020 WL 6993858, at \*5 (E.D. Tenn. Aug. 27, 2020); *Weirbach v. Cellular Connection, LLC*, 478 F. Supp. 3d 544, 551–52 (E.D. Pa. 2020).

234. District courts that have held the opposite—that *Bristol-Myers Squibb* does not apply to FLSA collective actions—have also acknowledged that the FLSA does not provide for nationwide service of process; therefore the courts analyze jurisdiction under the forum state’s long-arm statute and thus, the Fourteenth Amendment. See, e.g., *Waters v. Day & Zimmermann NPS, Inc.*, 464 F. Supp. 3d 455, 460 (D. Mass. 2020), *appeal certified*, No. 19-11585, 2020 WL 4754984 (D. Mass. Aug. 14, 2020), *appeal docketed*, No. 20-1997 (1st Cir. Oct. 28, 2020). As discussed previously, however, those courts find that Congress’s intent was for the FLSA, and specifically FLSA collective actions, to reach nationwide even though the statute does not provide for nationwide service of process. See *supra* Part II.A.1.

235. *Roy v. FedEx Ground Package Sys., Inc.*, 353 F. Supp. 3d 53, 56 (D. Mass. 2018).

236. See *id.* at 55–58.

237. No. 18-cv-10029, 2019 WL 4769101 (D. Mass. Sept. 30, 2019).

out-of-state claims comported with the Massachusetts long-arm statute and the Due Process Clause of the Fourteenth Amendment.<sup>238</sup> There, the court explained that the plaintiff had to demonstrate “its claim directly ar[ose] out of or relate[d] to the defendant’s forum activities.”<sup>239</sup> In light of *Bristol-Myers Squibb*, the court held that the out-of-state plaintiffs could not satisfy that requirement.<sup>240</sup>

In *Weirbach v. Cellular Connection, LLC*,<sup>241</sup> another district court went further and examined the significance of Congress’s omission. Like in *Roy* and *Chavira*, the court began by explaining that, because the FLSA did not provide for broader service of process, the court could only exercise jurisdiction to the same extent a Pennsylvania state court could.<sup>242</sup> When discussing the issue of congressional intent, the court determined it was significant that Congress did not provide for nationwide service of process.<sup>243</sup> The court explained further that courts should infer that Congress’s omission was intentional.<sup>244</sup> Thus, because the FLSA does not include a provision for broader service of process, “Congress intended to limit where nationwide actions can be brought.”<sup>245</sup> The court therefore conditionally certified a class consisting only of in-state plaintiffs.<sup>246</sup>

### 3. Proceeding Reluctantly

Some district courts that have applied *Bristol-Myers Squibb* to FLSA collective actions and dismissed out-of-state plaintiffs’ claims have expressed apprehension about the result. The reluctance stems from the *Swamy* court’s warning that applying *Bristol-Myers Squibb* 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.”<sup>247</sup> For instance, after holding that *Bristol-Myers Squibb* was applicable, the *Chavira* court explained that it had serious concerns about the future of FLSA collective actions but was compelled to follow precedent.<sup>248</sup> In *McNutt v. Swift Transportation Co. of Arizona*,<sup>249</sup> the court raised the same concerns but nonetheless determined that applying *Bristol-Myers Squibb* was an inescapable outcome.<sup>250</sup> Moreover, the *Camp* court went as far as to quote the concerns raised in

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238. *See id.* at \*2–3.

239. *Id.* at \*3 (quoting *Plixer Int’l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 7 (1st Cir. 2018)).

240. *See id.* at \*6.

241. 478 F. Supp. 3d 544 (E.D. Pa. 2020).

242. *See id.* at 549–50.

243. *See id.* at 551–52.

244. *See id.*

245. *See id.*

246. *See id.* at 552.

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

248. *Chavira v. OS Rest. Servs., LLC*, No. 18-cv-10029, 2019 WL 4769101, at \*6 (D. Mass. Sept. 30, 2019).

249. No. C18-5668, 2020 WL 3819239 (W.D. Wa. July 7, 2020).

250. *See id.* at \*8–9.

*Swamy* and explain that it was reluctant to apply *Bristol-Myers Squibb*.<sup>251</sup> However, the court also determined the application of *Bristol-Myers Squibb* to be an unavoidable outcome.<sup>252</sup> Despite these serious concerns, other courts have noted that plaintiffs are free to bring a nationwide suit in a state that has general jurisdiction over the defendant.<sup>253</sup>

### III. THE UNAVOIDABLE RESULT: *BRISTOL-MYERS SQUIBB* APPLIES TO FLSA COLLECTIVE ACTIONS

Central to determining whether *Bristol-Myers Squibb* applies to collective actions are two questions: (1) whether FLSA collective actions are meaningfully distinguishable from mass tort actions like the one at issue in *Bristol-Myers Squibb* and, if not, (2) whether congressional intent demands that *Bristol-Myers Squibb* be held inapplicable to FLSA collective actions. After addressing the proper framework for analyzing jurisdiction for an FLSA collective action in Part III.A, this part addresses these two core questions. Part III.B argues that the plaintiffs in both *Bristol-Myers Squibb* and FLSA collective actions have independent party status and the procedures that join their claims are functionally indistinguishable. Then, Part III.C explains that FRCP 4(k)(1)(A) implicates the same federalism concerns that were central to the Court's decision in *Bristol-Myers Squibb* for federal courts adjudicating FLSA collective actions. Further, Part III.D explains that Congress did not intend for federal courts to exercise personal jurisdiction more broadly than state courts for FLSA collective actions. Ultimately, this part concludes that the application of *Bristol-Myers Squibb* to FLSA collective actions is unavoidable. Nonetheless, this outcome is undesirable, as evidenced by the apprehension expressed by some district courts that have applied *Bristol-Myers Squibb* to FLSA collective actions. Accordingly, Part III.E calls on Congress to amend the FLSA to provide for nationwide service of process.

#### A. FRCP 4(k) in Action

District courts on both sides of the debate have generally agreed on the framework within which to analyze jurisdiction in FLSA collective action cases: as FLSA cases arise under federal law, they are federal question cases; thus, the Fifth Amendment sets the maximum bounds of the court's jurisdiction.<sup>254</sup> Accordingly, determining whether a court's exercise of jurisdiction is proper under the Fifth Amendment would turn on whether the defendant has sufficient minimum contacts with the United States as a

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251. See *Camp v. Bimbo Bakeries USA, Inc.*, No. 18-cv-378, 2020 WL 1692532, at \*7 (D.N.H. Apr. 7, 2020).

252. See *id.*

253. See, e.g., *Weirbach v. Cellular Connection, LLC*, 478 F. Supp. 3d 544, 551–52 (E.D. Pa. 2020) (explaining that plaintiffs may file a nationwide collective action in a state where the defendant is “at home”).

254. See *Spencer*, *supra* note 72, at 980–82.

whole.<sup>255</sup> Nonetheless, a federal court cannot exercise personal jurisdiction over a defendant unless a statute authorizes service of process—which establishes the exercise of personal jurisdiction—on the defendant.<sup>256</sup> Most district courts addressing personal jurisdiction in FLSA cases have correctly recognized that the FLSA is silent on service of process and thus, FRCP 4(k) sets the territorial bounds of federal court personal jurisdiction.

FRCP 4(k)(1)(A), in turn, necessarily limits federal courts' jurisdictional reach over FLSA defendants to the same extent as a state court of the state in which the federal court sits.<sup>257</sup> Federal courts must look to the forum state's long-arm statute to determine the bounds of jurisdiction, which in many states is coextensive with the Fourteenth Amendment.<sup>258</sup> And, because many states' long-arm statutes are coextensive with the Fourteenth Amendment's Due Process Clause,<sup>259</sup> the personal jurisdiction inquiry for federal courts in FLSA cases effectively collapses into a jurisdictional analysis under that amendment. Accordingly, when courts analyze whether they may exercise personal jurisdiction over defendants as to out-of-state FLSA plaintiffs' claims, they necessarily must answer whether doing so would violate the Fourteenth Amendment. Given that the Supreme Court's personal jurisdiction analysis in *Bristol-Myers Squibb* was also conducted under the Fourteenth Amendment, FLSA collective actions can only escape *Bristol-Myers Squibb*'s reach if there is a meaningful distinction between the mass tort plaintiffs in *Bristol-Myers Squibb* and FLSA collective action plaintiffs.

*B. A Distinction Without a Meaningful Difference: Mass Tort Plaintiffs and FLSA Opt-In Plaintiffs*

However, a meaningful distinction between mass tort plaintiffs and FLSA opt-in plaintiffs simply does not exist. Both the FLSA collective action plaintiff and the mass tort plaintiff have legal party status. FLSA collective actions are de facto mass joinder actions brought under federal law, rather than state products liability law like in *Bristol-Myers Squibb*.<sup>260</sup> In other words, both mass tort actions and FLSA collective actions are procedural tools to aggregate similar claims. Mere similarity of claims, without a nexus between each claim and the defendant's contacts with the forum, provides an insufficient basis to assert personal jurisdiction.<sup>261</sup>

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255. See *supra* notes 72–74 and accompanying text.

256. See *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

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

258. See generally Dane Reed Ullian, Note, *Retroactive Application of State Long-Arm Statutes*, 65 FLA. L. REV. 1653 (2013).

259. See *id.* at 1660 n.40 (listing so-called “go to the limit” state long-arm statutes that are coextensive with the Fourteenth Amendment).

260. The Supreme Court has repeatedly described § 216(b) as a rule of “joinder.” See *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 168, 170–71 (1989) (explaining that a worker filing an opt-in form “fulfill[s] the statutory requirement of *joinder*” and that its decision on court-supervised notice was based on courts’ “managerial responsibility to oversee the *joinder* of additional parties” (emphasis added)).

261. See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1781 (2017).

To begin, both the opt-in plaintiffs in an FLSA collective action and the plaintiffs in a mass tort action have party status.<sup>262</sup> Indeed, § 216(b) of the FLSA grants opt-in plaintiffs legal party status, just like each of the mass tort plaintiffs in *Bristol-Myers Squibb* was an individual party within the suit.<sup>263</sup> Section 216(b) provides that “[n]o employee shall be a *party* plaintiff to any such action unless he gives his consent in writing to become such a *party* and such consent is filed in the court in which such action is brought.”<sup>264</sup> Furthermore, the Supreme Court, in the context of FRCP 24 intervention, has described a party as “[o]ne by or against whom a lawsuit is brought.”<sup>265</sup> For plaintiffs affirmatively opting into an FLSA collective action, the result of joining is “the same status in relation to the claims of the lawsuit as [that held by] the [originally] named plaintiffs.”<sup>266</sup> Put simply, the affirmative act of opting in to the suit gives FLSA collective plaintiffs independent party status—just like the plaintiffs in *Bristol-Myers Squibb*—because they are bringing a claim against a defendant.

Further, the joinder rule that bound the plaintiffs’ claims in *Bristol-Myers Squibb* and § 216(b) are functionally indistinguishable. As the court in *McNutt* aptly characterized it, § 216(b) is a “rule of joinder giving legal status to individual opt-in plaintiffs.”<sup>267</sup> To better explain how § 216(b) functions as a rule of joinder, a comparison of party status in FRCP 23 class actions and party status in FLSA collective actions is particularly illustrative. In FRCP 23 class actions, the named plaintiff may bring an action on behalf of other unnamed plaintiffs,<sup>268</sup> who do not have party status until the class is certified.<sup>269</sup> After certification in an FRCP 23 class action, the class itself has independent legal status and all members of that class are bound by a judgment unless they affirmatively opt out.<sup>270</sup> This is in stark contrast to the opt-in requirement for FLSA actions, which gives FLSA plaintiffs independent legal status as soon as they file an opt-in notice, regardless of whether the collective is certified.<sup>271</sup> The aggregate FLSA collective does not have independent legal status after *conditional* certification, either.<sup>272</sup> Rather, the sole consequence of conditional certification is that notice is sent

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262. See 7B WRIGHT ET AL., *supra* note 18, § 1807.

263. 29 U.S.C. § 216(b).

264. *Id.* (emphasis added); see also *Weirbach v. Cellular Connection, LLC*, 478 F. Supp. 3d 544, 551–52 (E.D. Pa. 2020).

265. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932–33 (2009) (quoting *Party*, BLACK’S LAW DICTIONARY (8th ed. 2004)).

266. *Prickett v. DeKalb County*, 349 F.3d 1294, 1297 (11th Cir. 2003) (per curiam).

267. *McNutt v. Swift Transp. Co. of Ariz.*, No. C18-5668, 2020 WL 3819239, at \*7 (W.D. Wash. July 7, 2020).

268. See generally FED. R. CIV. P. 23.

269. See A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction over Absent Class Member Claims Explained*, 39 REV. LITIG. 31, 38–39 (2019).

270. See *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013).

271. This Note does not take a position on whether *Bristol-Myers Squibb* extends to FRCP 23 class actions. The distinction between FLSA collective actions and FRCP 23 class actions, however, means that appellate decisions about whether *Bristol-Myers Squibb* applies to class actions would not control the same question in the context of an FLSA collective action.

272. See *Genesis HealthCare*, 569 U.S. at 75.



to potential plaintiffs alerting them of the opportunity to opt in to the FLSA collective action.<sup>273</sup> Thus, it follows that § 216(b)'s opt-in requirement functions as a rule of joinder for separate, albeit similar, FLSA claims. Section 216(b), in turn, is effectively indistinguishable from the joinder rule that bound the separate tort claims in *Bristol-Myers Squibb*.

This contradicts attempts to distinguish *Bristol-Myers Squibb* from FLSA collective actions on the basis that the Supreme Court's analysis in *Bristol-Myers Squibb* took place at the level of the suit.<sup>274</sup> District courts following that line of reasoning have distinguished between an FLSA collective action, in which there is one suit between the named plaintiff and the defendant, and a mass tort action, where there are many individual suits.<sup>275</sup> However, as the court in *Weirbach* correctly explained, *Bristol-Myers Squibb* did not have individual suits.<sup>276</sup> Instead, "[t]here were eight, because the plaintiffs amalgamated themselves in a few complaints."<sup>277</sup> Each of the eight complaints in *Bristol-Myers Squibb* likely contained an in-state plaintiff.<sup>278</sup> Thus, if the Court's jurisdictional analysis was conducted at the level of the suit, then exercising personal jurisdiction would have been proper because each suit contained a plaintiff whose claims arose out of or related to BMS's contacts with California. As that was not the outcome, the Supreme Court's analysis in *Bristol-Myers Squibb* actually looked at whether each plaintiff with party status could maintain a claim against one common defendant, BMS. The question is no different in the context of FLSA collective actions: can each opt-in plaintiff maintain a suit against the common employer-defendant?

The analysis in *Bristol-Myers Squibb* is more aptly characterized as at the level of the controversy. The Supreme Court twice explained in *Bristol-Myers Squibb* that, for each plaintiff, "there must be an 'affiliation between the forum and the underlying controversy, principally, an activity or occurrence that takes place in the forum State.'"<sup>279</sup> In the context of FLSA collective actions, the alleged harm to out-of-state plaintiffs almost never occurs in the forum state, simply because FLSA claims arise out of a plaintiff's employment. The employer-defendant's contacts that cause the alleged FLSA violation for out-of-state plaintiffs and create the underlying "controversy" occur within the state where the individual plaintiff worked. Thus, like in *Bristol-Myers Squibb*, plaintiffs' only option for bringing an FLSA collective action with multistate plaintiffs is to sue in a state with

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273. *See id.*

274. *See supra* Part II.B.2.

275. *See supra* Part II.B.2.

276. *See* *Weirbach v. Cellular Connection, LLC*, 478 F. Supp. 3d 544, 551–52 (E.D. Pa. 2020); *see also* *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1778 (2017) (explaining that the initial suit had eight complaints).

277. *Weirbach*, 478 Supp. 3d at 551–52.

278. *See id.* (describing the eight complaints in *Bristol-Myers Squibb*).

279. *See* *Chavira v. OS Rest. Servs., LLC*, No. 18-cv-10029, 2019 WL 4769101, at \*6 (D. Mass. Sept. 30, 2019) (emphasis added) (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1780); *see also* *Greinstein v. Fieldcore Servs. Sols., LLC*, No. 18-CV-208-Z, 2020 WL 6821005, at \*4 (N.D. Tex. Nov. 20, 2020) (noting the Supreme Court's twice-repeated phrasing).

general jurisdiction over the defendant. Or, as in *Bristol-Myers Squibb*, FLSA plaintiffs could also bring separate FLSA collective actions in their home states consisting of only in-state plaintiffs.

*C. Omnipresent Federalism Concerns Imparted by FRCP 4(k)(1)(A)*

Moreover, the federalism concerns that underpinned the Court's decision in *Bristol-Myers Squibb* exist for FLSA collective actions as well. As previously discussed, FRCP 4(k)(1)(A) sets the limits for service of process and, in turn, exercising personal jurisdiction when a federal statute like the FLSA is silent.<sup>280</sup> Under FRCP 4(k)(1)(A), a court's analysis of personal jurisdiction is identical to the Fourteenth Amendment inquiry that the relevant state court undertakes. The district court may, therefore, exercise personal jurisdiction over a defendant only with respect to claims arising out of or relating to the defendant's contacts with the forum state.

Nonetheless, district courts have attempted to distinguish FLSA collective actions from *Bristol-Myers Squibb* because the FLSA is a federal statute.<sup>281</sup> Indeed, given that the sovereign in federal question cases—like FLSA collective actions—is the United States, federalism concerns would be mitigated if Congress had not spoken on the issue by enacting a federal long-arm statute (FRCP 4(k)), thus placing jurisdiction under the governance of the Fifth Amendment.<sup>282</sup> If that were the case, exercising personal jurisdiction would only require that the defendant had minimum contacts with the United States as a whole. Congress, however, sets the bounds of personal jurisdiction by authorizing service of process by rule or statute.<sup>283</sup> As explained above, the territorial bounds of service of process for the FLSA are established through FRCP 4(k)(1)(A) because the FLSA itself does not provide for service of process.<sup>284</sup> No other rule or statutory provision allows for broader service of process for FLSA claims. It follows, then, that federal courts adjudicating FLSA claims are constrained by a state's long-arm statute and the Fourteenth Amendment.<sup>285</sup> Thus, the same federalism concerns that were central to *Bristol-Myers Squibb* are necessarily implicated in FLSA collective actions because, in both cases, courts are constrained by the territorial limits of the state in exercising personal jurisdiction. As a result, just as the California state court lacked jurisdiction over the out-of-state plaintiffs' claims in *Bristol-Myers Squibb*, a district court will lack specific jurisdiction over out-of-state FLSA plaintiffs' claims.

This outcome is consistent with the Supreme Court's modern trend toward restricting nationwide class and collective actions to states with general personal jurisdiction over defendants.<sup>286</sup> The Court's modern personal

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280. See *supra* notes 73–78 and accompanying text.

281. See *supra* Part II.B.3.

282. See Spencer, *supra* note 72, at 996.

283. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1555 (2017).

284. See *supra* Part III.A.3.

285. See *supra* Part III.A.

286. See 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 6:26 (5th ed. 2020); Ichel, *supra* note 29, at 48–49.

jurisdiction decisions have established the bright-line rule that general personal jurisdiction exists only in states where the defendant is incorporated or the defendant maintains its principal place of business.<sup>287</sup> The modern specific personal jurisdiction decisions, particularly *Bristol-Myers Squibb*, have established that plaintiffs may only bring mass or collective actions with multistate plaintiffs in a state where the specific contacts of the defendant are connected to each plaintiff's claims.<sup>288</sup>

These decisions, taken together, mean that courts will almost always lack specific jurisdiction over the claims of out-of-state FLSA collective action plaintiffs. Out-of-state plaintiffs' claims—just like those of the out-of-state *Bristol-Myers Squibb* plaintiffs—do not arise out of or relate to the defendant's contacts with the forum state.<sup>289</sup> By their nature, out-of-state FLSA plaintiffs' claims arise out of or relate to the plaintiffs' employment in their home states and, in turn, the defendant's contacts with the plaintiffs' home states. Therefore, FLSA plaintiffs are limited to bringing piecemeal collective actions in their home states or bringing a collective action with multistate plaintiffs in a state with general jurisdiction over the defendant.

#### D. Congress's Omitted Intent

However, as several district courts have noted, restricting FLSA collective actions in this way appears to countermand Congress's original intent by restricting FLSA collective actions to in-state plaintiffs.<sup>290</sup> Starting with *Swamy*, district courts declining to apply *Bristol-Myers Squibb* to FLSA collective actions have noted that Congress did not intend to limit claims to only those of in-state plaintiffs.<sup>291</sup> It then follows that applying *Bristol-Myers Squibb* would contradict Congress's intent. As explained above, however, the FLSA statute itself is silent as to jurisdiction because it does not provide for service of process, meaning that FRCP 4(K)(1)(A) sets the jurisdictional bounds.<sup>292</sup> The question then becomes whether courts can infer Congress's intent, such that *Bristol-Myers Squibb* would not apply to FLSA collective actions.

First, it is helpful to examine whether Congress knew how to provide for broader service of process when the FLSA was passed in 1938. In 1914, twenty-four years before it enacted the FLSA, Congress allowed for nationwide service of process when it passed the Clayton Act.<sup>293</sup> The Clayton Act provides for service of process on a corporate defendant in an antitrust case “in the district of which it is an inhabitant, or wherever it may

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287. See *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014); *supra* Part II.A.1.

288. *Ichel*, *supra* note 29, at 49.

289. See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017).

290. See *supra* Part III.A.1.

291. See *Swamy v. Title Source, Inc.*, No. 17-cv-01175, 2017 WL 5196780, at \*2 (N.D. Cal. Nov. 10, 2017) (citing 29 U.S.C. § 216(b)); *supra* Part III.A.1.

292. See *supra* Part III.A.3.

293. See Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended in scattered sections of the U.S.C.).

be found.”<sup>294</sup> In effect, courts need not analyze jurisdiction under a state’s long-arm statute when faced with claims under the Clayton Act.<sup>295</sup> Further, in the years since the FLSA’s enactment, Congress has similarly provided for broader service of process<sup>296</sup> in the Racketeering Influenced and Corrupt Organizations Act,<sup>297</sup> an anti-terrorism statute,<sup>298</sup> and in<sup>299</sup> the Employee Retirement Income Security Act of 1974.<sup>300</sup> Certainly, then, Congress knows how to provide for broader service of process and jurisdictional reach when it chooses.

Given that Congress has provided for nationwide service of process in statutes enacted both prior to and after the FLSA, courts ought to assume the absence of a similar provision in the FLSA was intentional. And, indeed, that is what the Supreme Court has held. For instance, in *Omni Capital International v. Rudolf Wolff & Co.*,<sup>301</sup> a plaintiff brought a private cause of action under the Commodity Exchange Act<sup>302</sup> (CEA). Defendant Omni Capital, in turn, impleaded its broker and the broker’s agent.<sup>303</sup> The impleaded defendants moved to dismiss for lack of personal jurisdiction, and the Court examined whether the CEA provided for nationwide service of process.<sup>304</sup>

The Court observed that the CEA does provide for nationwide service of process for certain enforcement provisions.<sup>305</sup> The private right of action under which the plaintiff was suing, however, was silent as to service of process.<sup>306</sup> The Fifth Circuit had declined to hold that the CEA implied nationwide service of process for private rights of action.<sup>307</sup> The Supreme Court also refused to make that inference on certiorari.<sup>308</sup> Instead, the Court noted that Congress knows how to provide for nationwide service of process and explained that its failure to do so “argues forcefully that such authorization was not its intention.”<sup>309</sup>

In the case of FLSA collective actions, the absence of a nationwide service of process provision also indicates forcefully that its omission was

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294. 15 U.S.C. § 22. For a plaintiff to avail itself of the privilege of nationwide service of process under the Clayton Act, it must first satisfy the statute’s venue provisions. *See, e.g.,* *KM Enters., Inc. v. Global Traffic Techs., Inc.*, 725 F.3d 718, 724 (7th Cir. 2013).

295. *See, e.g.,* *Sportmart, Inc. v. Frisch*, 537 F. Supp. 1254, 1256 (N.D. Ill. 1982).

296. 18 U.S.C. § 1965.

297. Pub. L. No. 91-450, 84 Stat. 922 (1970) (codified as amended in scattered sections of the U.S.C.).

298. 18 U.S.C. § 2334(a).

299. 29 U.S.C. § 1132(e)(2).

300. Pub. L. No. 93-406, § 502(e)(2), 83 Stat. 829, 891 (codified at 29 U.S.C. § 1132(e)(2)).

301. 484 U.S. 97 (1987).

302. 7 U.S.C. §§ 1–65.

303. *Omni Capital*, 484 U.S. at 99.

304. *See id.* at 100.

305. *See id.* at 105.

306. *See id.* at 106.

307. *See id.*

308. *See id.*

309. *Id.*

intentional. Congress knew how to craft such provisions before and after enacting the FLSA. Further, Congress has amended the FLSA several times, and each amendment provided ample opportunity to add a service of process provision.<sup>310</sup> Thus, even if courts hold that Congress intended the FLSA to reach broadly, the absence of a service of process provision strongly suggests Congress intended the Fourteenth Amendment and state long-arm statutes to constrain the jurisdictional reach of federal courts.

Second, it is important to note that applying *Bristol-Myers Squibb* to FLSA collective actions does not bar nationwide collective actions entirely. Plaintiffs may bring a nationwide collective action in any state that may properly exercise general personal jurisdiction over the defendant.<sup>311</sup> As explained above, that could be the state in which the defendant was incorporated or the state where the defendant maintains its principal place of business.<sup>312</sup> For example, in *Pettenato v. Beacon Health Options, Inc.*,<sup>313</sup> the court explained that applying *Bristol-Myers Squibb* did not prevent the plaintiffs from joining together in a collective action in Virginia, one of at least two states that could exercise general personal jurisdiction over the defendant.<sup>314</sup> As such, while applying *Bristol-Myers Squibb* certainly creates an additional hurdle for FLSA collective action plaintiffs, it does not completely frustrate congressional intent to allow for far-reaching collective actions.

#### *E. Circumventing Bristol-Myers Squibb and Reestablishing Congress's Intent*

Nonetheless, Congress is free to remove that additional hurdle by amending § 216 of the FLSA to allow for nationwide service of process, and it should do so in the wake of *Bristol-Myers Squibb*.<sup>315</sup> If Congress did so amend the FLSA, federal courts would escape the restrictions imposed by *Bristol-Myers Squibb* and it would more easily allow FLSA plaintiffs to litigate the merits of their claims. Although FLSA plaintiffs may currently bring nationwide collective actions in states with general jurisdiction, that effectively limits plaintiffs to two states in most cases, which may very likely dissuade out-of-state plaintiffs from joining a suit at all.<sup>316</sup> This is an unnecessary obstacle for what was intended to be “the most comprehensive and pervasive federal statute in this area.”<sup>317</sup> Allowing for nationwide

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310. See Norris, *supra* note 101, at 1508–09 (discussing major amendments to the FLSA and the statute's reach).

311. See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1783 (2017).

312. See *supra* Part I.A.1.

313. 425 F. Supp. 3d 264 (S.D.N.Y. 2019).

314. See *id.* at 280.

315. Professor Scott Dodson has similarly advocated that Congress provide for broader jurisdiction in aggregation cases. See Dodson, *supra* note 24, at 38–45. This Note, however, argues that Congress should specifically provide for nationwide service of process in the context of FLSA collective actions and does not take a position on other federal statutes that allow for the aggregation of claims.

316. See *supra* Part I.A.1.

317. KALET, *supra* note 96, at v.

service of process would more fully realize that purpose, allowing plaintiffs the opportunity to vindicate their statutory rights.

Indeed, providing for nationwide service of process would give federal courts the right to exercise jurisdiction over an employer-defendant if it had sufficient minimum contacts with the United States.<sup>318</sup> In effect, FLSA plaintiffs could bring a nationwide collective action in any federal court. Concerns about forum shopping and inconvenience to the defendant are not dispositive in the case of FLSA collective actions. The burden placed on an employer-defendant with employees in enough states to be subjected to a nationwide collective action would be minimal. On the other hand, the employee-plaintiff's burden to prosecute its claim in another state may likely be greater. While plaintiffs could bring separate collective actions in their home states to mitigate that burden, such an outcome may be undesirable for both FLSA plaintiffs and defendants. Plaintiffs may be dissuaded from bringing an action in a state without a large number of employees if their individual claims are negligible.<sup>319</sup> Defendants, on the other hand, likely have an interest in a global resolution of claims stemming from the same employment policy rather than piecemeal litigation in separate states.<sup>320</sup> Providing for nationwide service of process would eliminate these concerns.<sup>321</sup>

This narrowly tailored solution is politically feasible. Congress has had the political will to amend the FLSA numerous times since its inception. Many amendments simply raised the minimum wage.<sup>322</sup> Others, however, significantly expanded the scope of the FLSA's coverage. For instance, the Equal Pay Act of 1963<sup>323</sup> extended the FLSA to make it illegal to pay workers less on the basis of their sex.<sup>324</sup> Similarly, the 1985 amendments provide protection against job discrimination and employment termination for those who bring complaints against their employers under the FLSA.<sup>325</sup> Amending to include nationwide service of process would not be nearly as drastic an expansion as other earlier amendments. Rather, it would simply restore the effectiveness of FLSA collective actions to their pre-*Bristol-Myers Squibb* levels.

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318. *See supra* Part II.A.3.

319. *See Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1789 (2017) (Sotomayor, J., dissenting).

320. *See id.* at 1786 (reasoning that the cost of defending separate suits in separate forums would "prove far more burdensome" than for defendant BMS).

321. The legislative and rule amendments proposed by Professors Sachs and Borchers respectively would have the same effect. *See generally* Borchers, *supra* note 85; Sachs, *supra* note 83. Their proposals, however, like other proposed FRCP 4 amendments, would broadly apply to all federal statutes. This Note does not take a position on their proposals. Rather, this Note focuses on a particularized amendment to the FLSA in the hopes that there is sufficient political will to enact a more narrowly tailored solution.

322. *See, e.g.*, Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (codified as amended in scattered sections of the U.S.C.) (setting the minimum cash wage to one half of the federal minimum wage at the time).

323. 29 U.S.C. §§ 201, 206.

324. *Id.* § 206.

325. *Id.* § 207(o)-(p).

In the wake of *Bristol-Myers Squibb*, it is very likely that FLSA collective actions will be fundamentally changed without congressional action. Although congressional inaction pre-*Bristol-Myers Squibb* suggests it never intended to provide for nationwide service of process in the FLSA, the statute itself was enacted as a powerful tool for enforcing workers' rights. These two propositions are now at odds because FLSA collective actions are unlikely to escape the reach of *Bristol-Myers Squibb*, rendering courts unable to exercise jurisdiction over the claims of out-of-state plaintiffs. Thus, to best fulfill the FLSA's initial purpose, Congress should provide for nationwide service of process in § 216.

#### CONCLUSION

This Note argues that *Bristol-Myers Squibb* necessarily applies to FLSA collective actions, barring courts from asserting jurisdiction over out-of-state plaintiffs' claims when they do not arise out of or relate to an employer-defendant's contacts with the forum state. FLSA collective actions are not significantly distinguishable from the mass tort action in *Bristol-Myers Squibb*, and FRCP (4)(k) imparts the same jurisdictional restrictions on a federal court as the state court in which it sits. Thus, jurisdiction in FLSA cases must be analyzed under the forum state's long-arm statute and the Fourteenth Amendment, just as in *Bristol-Myers Squibb*.

Further, in both FLSA collective actions and in the mass tort actions, the plaintiffs retain legal party status and therefore there is a suit between each party and the defendant. As the Supreme Court explained, each suit must arise out of or relate to the defendant's contacts with the forum state. By their nature, out-of-state FLSA plaintiffs' claims do not. And although some district courts have noted that Congress intended the FLSA to be a far-reaching statute, the FLSA is silent as to service of process. The jurisdictional limitations of the forum state still apply to federal courts through FRCP 4(k)(1)(A). Until Congress provides for nationwide service of process in the FLSA, collective actions under the statute will not be able to escape the reach of *Bristol-Myers Squibb*. Ultimately, this Note advocates that Congress should do exactly that and add a nationwide service of process provision to § 216 to ensure the FLSA remains an effective safeguard for workers.

## APPENDIX

*District Court Cases Considering the Application of Bristol-Myers Squibb to FLSA Collective Actions*

<b>Case</b>	<b>Application of <i>Bristol-Myers Squibb</i></b>
Fischer v. Fed. Express Corp., No. 19-cv-04924, 2020 WL 7640081 (E.D. Pa. Dec. 23, 2020)	Applied
Hodapp v. Regions Bank, No. 18CV1389, 2020 WL 7480562 (E.D. Mo. Dec. 18, 2020)	Applied
Altenhofen v. Energy Transfer Partners, LP, No. 20-200, 2020 WL 7336082 (W.D. Pa. Dec. 14, 2020)	Declined to Apply
Hutt v. Greenix Pest Control, LLC, 20-cv-1108, 2020 WL 6892013 (S.D. Ohio Nov. 24, 2020)	Applied
Greinstein v. Fieldcore Servs. Sols., LLC, 18-CV-208, 2020 WL 6821005 (N.D. Tex. Nov. 20, 2020)	Applied
Pavloff v. Cardinal Logistics Mgmt. Corp., No. CV 20-00363, 2020 WL 6828902 (C.D. Cal. Oct. 2, 2020).	Declined to Apply
Hager v. Omnicare, Inc., No. 19-cv-00484, 2020 WL 5806627 (S.D.W. Va. Sept. 29, 2020)	Declined to Apply
Cooley v. Air Methods Corp., No. CV-19-00850, 2020 U.S. Dist. LEXIS 177139 (D. Ariz. Sept. 25, 2020)	Declined to Apply
Wiggins v. Jedson Eng'g Inc., No. 19-cv-00354, 2020 WL 6993858 (E.D. Tenn. Aug. 27, 2020)	Applied
Weirbach v. Cellular Connection, LLC, 478 F. Supp. 3d 544 (E.D. Pa. 2020)	Applied
Chavez v. Stellar Mgmt. Grp. VII, LLC, No. 19-cv-01353, 2020 WL 4505482 (N.D. Cal. Aug. 5, 2020)	Declined to Apply
McNutt v. Swift Transp. Co. of Ariz., No. C18-5668, 2020 WL 3819239 (W.D. Wash. July 7, 2020)	Applied
O'Quinn v. TransCanada USA Servs., Inc., 469 F. Supp. 3d 591 (S.D.W. Va. 2020)	Declined to Apply



Waters v. Day & Zimmermann NPS, Inc., 464 F. Supp. 3d 455 (D. Mass 2020)	Declined to Apply
Hammond v. Floor & Decor Outlets of Am., Inc., No. 19-cv-01099, 2020 WL 2473717 (M.D. Tenn. May 13, 2020)	Declined to Apply
Aiuto v. Publix Super Mkts., Inc., No. 19-CV-04803, 2020 WL 2039946 (N.D. Ga. Apr. 9, 2020)	Declined to Apply
White v. Steak N Shake Inc., No. 20 CV 323, 2020 WL 1703938 (E.D. Mo. Apr. 8, 2020)	Applied
Camp v. Bimbo Bakeries USA, Inc., No. 18-cv-378, 2020 WL 1692532 (D.N.H. Apr. 7, 2020)	Applied
Warren v. MBI Energy Servs., Inc., No. 19-CV-00800, 2020 WL 937420 (D. Colo. Feb. 25, 2020)	Declined to Apply
Vallone v. CJS Sols. Grp., LLC, 437 F. Supp. 3d 687 (D. Minn. 2020)	Applied
Canaday v. Anthem Cos., 439 F. Supp. 3d 1042 (W.D. Tenn. 2020)	Applied
Turner v. Concentrix Servs., Inc., No. 18-cv-1072, 2020 WL 544705 (W.D. Ark. Feb. 3, 2020)	Declined to Apply
Hunt v. Interactive Med. Specialists, Inc., No. 19CV13, 2019 WL 6528594 (N.D.W. Va. Dec. 4, 2019).	Declined to Apply
Pettenato v. Beacon Health Options, Inc., 425 F. Supp. 3d 264 (S.D.N.Y. 2019)	Applied
Chavira v. OS Rest. Servs., LLC, No. 18-cv-10029, 2019 WL 4769101 (D. Mass. Sept. 30, 2019)	Applied
Meo v. Lane Bryant, Inc., No. CV 18-6360, 2019 WL 5157024 (Sept. 30, 2019)	Declined to Apply
Turner v. Utiliquest, LLC, No. 18-cv-00294, 2019 WL 7461197 (M.D. Tenn. July 16, 2019)	Applied

Rafferty v. Denny's Inc., No. 18-cv-2409, 2019 WL 2924998 (N.D. Ohio July 8, 2019)	Applied
Mason v. Lumber Liquidators, Inc., No. 17-CV-4780, 2019 WL 2088609 (May 13, 2019)	Declined to Apply
Gibbs v. MLK Express Servs., LLC, No. 18-cv-434, 2019 WL 1980123 (M.D. Fla. Mar. 28, 2019)	Declined to Apply
Seiffert v. Qwest Corp., No. CV-18-70, 2018 WL 6590836 (D. Mont. Dec. 14, 2018).	Declined to Apply
Roy v. FedEx Ground Package Sys., 353 F. Supp. 3d 43 (D. Mass. 2018)	Applied
Garcia v. Peterson, 319 F. Supp. 3d 863 (S.D. Tex. 2018)	Declined to Apply
Hickman v. TL Transp., LLC, 317 F. Supp. 3d 890 (E.D. Pa. 2018)	Applied
Maclin v. Reliable Reps. of Tex., Inc., 314 F. Supp. 3d 845 (N.D. Ohio 2018)	Applied
Swamy v. Title Source, Inc., No. C 17-01175, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017)	Declined to Apply
Thomas v. Kellogg Co., No. C13-5136, 2017 WL 5256634 (W.D. Wash. Oct. 17, 2017).	Declined to Apply