No. 22-396

In The
Supreme Court of the United States

Christa Fischer, Individually and On Behalf of Other Similarly Situated Employees,
Petitioners,

v.

Federal Express Corp. and FedEx Ground Package System, Inc.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Two main considerations guide this Court's discretion in deciding whether to grant a writ of certiorari. First, are the circuits divided? Sup. Ct. R. 10(a). And second, does the case address an "important matter?" *Id.*

On these critical points, FedEx abides by David Byrne's famous lyrical maxim: "When I have nothing to say, my lips are sealed." Talking Heads, *Psycho Killer* (Sire Records 1977).

FedEx was wise to heed Byrne's counsel. What could it say? The circuits are unquestionably split. *Compare Fischer v. Fed. Express Corp.*, 42 F.4th 366, 370 (3d Cir. 2022), App. 5a, *Canaday v. Anthem Cos., Inc.*, 9 F.4th 392, 397 (6th Cir. 2021), *and Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861, 865 (8th Cir. 2021), *with Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 93–94 (1st Cir. 2022), *and Canaday*, 9 F.4th at 404 (Donald, J., dissenting).

And as FedEx's own counsel wrote last year in seeking certiorari, "[t]he question presented is exceptionally important and deserving of immediate review." *Day & Zimmermann NPS, Inc. v. Waters*, No. 21-1192, Pet. at 31. There's no arguing with that either. The question presented speaks to federal courts' authority to adjudicate a wide range of representative and group actions. It implicates plaintiffs' ability to vindicate important substantive rights. And it addresses limitations on Congress' power to authorize the enforcement of federal law. FedEx expresses no disagreement with any of this.

Yet FedEx opposes Supreme Court review. What's less clear is why. FedEx dedicates the lion's share of its submission to arguing the merits of its position. But "the perceived correctness of the [lower court's] judgment" is almost never a central consideration at the certiorari stage. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974). And FedEx is wrong about the merits in any event.

FedEx raises only four points addressing the cert-worthiness of this case. All land well wide of the mark.

FedEx first argues that the petition should be denied because this Court denied a pair of petitions presenting the same question last year. FedEx's conclusion does not follow from its premise. The denials in *Canaday* and *Day & Zimmermann* likely reflected this Court's desire for further percolation rather than an assessment that the question presented does not warrant Supreme Court review. This Court frequently takes up a question on the second or third ask. It should do so here.

Speaking of percolation, FedEx favors waiting for even more circuits to weigh in. But waiting further is neither warranted nor wise. The current circuit split subjects employers, employees, and courts alike to intolerable conflicting standards. And as FedEx concedes, there are no more cases left in the appellate pipeline. This Court should step in now.

FedEx claims that "there is…reason to expect" that the First Circuit will reverse itself and

eliminate the circuit split. Response at 2. That's extraordinarily unlikely. No judge on the First Circuit has questioned the court's thoroughly reasoned opinion in *Waters*. And the First Circuit hears en banc cases only on the rarest occasions—and overrules circuit precedent more rarely still. There is every reason to expect that the circuit split will persist.

FedEx last claims that this case makes a poor vehicle to review the question presented because the district court could theoretically decertify the case as a collective action. FedEx's point proves way too much. Courts may decertify *any* case at any point—even post-trial—if they think that the case can no longer proceed as a collective action. And in any event, the district court is very unlikely to decertify *this* case. This dispute arises from a uniform, nationwide policy of classifying a group of employees as ineligible for overtime compensation under the FLSA—a paradigm case for a collective action. This case is the best possible vehicle to address the question presented.

As FedEx readily concedes, lower federal courts remain divided on an important and recurring question of federal law. "This Court's immediate review is [therefore] needed to resolve the acknowledged circuit split on jurisdictional rules governing federal courts." *Day & Zimmermann*, No. 21-1192, Pet. at 31. For these reasons, the Court should grant the petition.

I. THE CIRCUITS ARE DIVIDED OVER *BRISTOL-MYERS*' APPLICATION TO FLSA COLLECTIVE ACTIONS.

There is no dispute that the circuits are split over the question presented. *Compare Fischer*, 42 F.4th at 370, App. 5a, *Canaday*, 9 F.4th at 397, *and Vallone*, 9 F.4th at 865, *with Waters*, 23 F.4th at 93–94. FedEx does not contend otherwise.

This Court should grant Petitioners' request to resolve this conflict.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

The question presented is also important and recurring, further supporting Supreme Court review.

The novel due-process limitations proposed by employers in the wake of *Bristol-Myers* would severely undermine the FLSA. "Actions that combined hundreds of claims based on similar violations of the FLSA [would] be splintered into dozens, if not hundreds, of lawsuits all over the country." *Canaday*, 9 F.4th at 416 (Donald, J., dissenting). That would "undoubtedly result in piecemeal litigation, potentially divergent outcomes for similarly situated plaintiffs, and major inefficiencies for the federal courts." *Id.*

And as Petitioners have explained, much more than the FLSA is at stake. Congress has authorized collective actions in other contexts. 29 U.S.C. § 626(b); 29 U.S.C. § 206(d); 29 U.S.C. § 216(b).

More than that, corporate defendants have employed the same logic and reasoning FedEx advances here to attempt to broadly undermine representative and group litigation in federal court, including Rule 23 class actions and MDL proceedings. *See e.g.*, *Lyngaas v. Curaden Ag*, 992 F.3d 412, 433 (6th Cir. 2021); *id.* at 440 (Thapar, J., dissenting); *In re Delta Dental Antitrust Litig.*, 509 F. Supp. 3d 1377, 1380 (J.P.M.L. 2020).

FedEx tries to distance itself from the radical consequences of its position. But it can muster only a hyper lawyerly disclaimer: "For purposes of this brief in opposition, FedEx takes no position on whether a court must have personal jurisdiction over absent Rule 23 class members' claims." Response at 26. Translation: FedEx would gladly advance the same arguments it presents here to undermine Rule 23 class actions.

The Third and Sixth Circuit panel majorities in *Fischer* and *Canaday* similarly tried to wall off their decisions from other types of group litigation, but their efforts to do so weren't particularly reassuring. Collective actions, like modern Rule 23 class actions, are a form of representative litigation. *See* 29 U.S.C. § 216(b) (named plaintiff or plaintiffs may bring a suit "in behalf of himself or themselves and other employees similarly situated"). And both FLSA opt-in plaintiffs and Rule 23 class members may be considered parties. *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002) ("The label 'party' does not indicate an absolute characteristic, but rather a conclusion

about the applicability of various procedural rules that may differ based on context.").

With respect to MDL cases, the Third and Sixth Circuits observed only that "[m]ultidistrict litigation implicates a different statute, a different history, and a different body of caselaw [than the FLSA]." *Fischer*, 42 F.4th at 388 (quoting *Canaday*, 9 F.4th at 403–04); App. 48a. True; but the logic and reasoning of the arguments FedEx presses here would undo the MDL regime all the same. Appellee's Brief at 12, *Fischer*, 42 F.4th 366 (asserting that "[a]ll claimants must show the court has personal jurisdiction over the defendant as to their claims" and that "[t]his rule has no exceptions"). Like the FLSA, the MDL statute explicitly authorizes neither nationwide service of process nor national personal jurisdiction. 28 U.S.C. § 1407. By FedEx's reasoning, then, an MDL transferee court could not proceed unless *each claim* arose from or related to the relevant defendant's contacts with the transferee forum state. This is a far cry from what Congress wanted when it passed the MDL statute. The same goes for the FLSA. There is no question that the fates of both statutes are inextricably linked.

Even setting aside the FLSA and other forms of group litigation in federal courts (no small things), establishing the proper bounds of federal court jurisdiction is inherently valuable. For hundreds of years this Court has recognized that "whether [courts] are…prevented from proceeding in personam" is "an important question." *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 350–51 (1806).

That point rings especially true when, as here, corporate defendants seek to impose sweeping and categorical new limits on the authority of federal courts.

This Court should grant the petition to resolve an important question of federal law.

III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT.

FedEx's position also conflicts with the Constitution, the FLSA, the Federal Rules, and Supreme Court precedent. These conflicts likewise favor Supreme Court review.

Perhaps sensing that a grant is likely, FedEx dedicates an inordinate share of its response to making its case on the merits. But FedEx's merits briefing is riddled with flaws. It asks this Court to start with *Bristol-Myers*—a case that arose in a dramatically different context—then extend that decision to radically remake federal court jurisdiction.

FedEx's cardinal flaw is its steadfast refusal to grapple with the text of the legal sources it claims to interpret. FedEx ignores the critical provision of the FLSA, which allows named plaintiffs to represent the interests of opt-in plaintiffs in litigation. *See* 29 U.S.C. § 216(b). It similarly ignores the key text of Rule 4, which does not remotely suggest that opt-in plaintiffs need to separately establish jurisdiction that has already been secured by the named plaintiff.

FedEx likewise casts aside history. FedEx fails to acknowledge that Congress added the FLSA's opt-in procedure to codify the prevailing practice of treating FLSA collective actions as opt-in representative class actions (sometimes called "spurious" class actions)—one of three kinds of class actions recognized by the contemporaneous version of Rule 23. *See* 7 W. Rubenstein, Newberg on Class Actions § 23.36 (5th ed. 2011). Congress' intent in doing so is directly relevant here: "The ability of other persons similarly situated to intervene without regard to jurisdictional limitations applicable to the original parties [wa]s the raison d'etre of the spurious class suit." *Zachman v. Erwin*, 186 F. Supp. 681, 689 (S.D. Tex. 1959).

FedEx similarly ignores the important role that federalism concerns played in *Bristol-Myers*. The Fourteenth Amendment, this Court has held, protects defendants from "submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1780 (2017). "[A]t times, this federalism interest may be decisive." *Id.* FedEx would have this Court extend *Bristol-Myers*, a case that involved extraordinary federalism concerns, to an entire category of disputes that poses no federalism problems at all.

Even FedEx would likely agree that its position finds no support in the original meaning of the Fifth or Fourteenth Amendment. As originally understood at the time of framing, "[a] court's competency

normally depended on the defendant's presence in, or consent to, the sovereign's jurisdiction." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1036 (2021) (Gorsuch, J., concurring). "But once a plaintiff was able to 'tag' the defendant with process in the jurisdiction, that State's courts were generally thought competent to render judgment on any claim against the defendant, whether it involved events inside or outside the State." *Id.* (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878)). Granting review in this case would provide the Court with an excellent opportunity to continue reconciling the Court's modern personal-jurisdiction jurisprudence with "what the Constitution as originally understood requires." *Id.* at 1036 n.2.

The rest of FedEx's merits briefing consists of a string of red herrings. For example, FedEx claims to find support for its preferred result in Congress' failure to add a nationwide-service-of-process provision to the FLSA. Response at 22. This argument falls apart quickly. Nobody—not even FedEx—claims that opt-in plaintiffs need to serve process. Response at 21. More fundamentally, as already discussed, the Congress that passed and amended the FLSA would have understood personal jurisdiction to be conclusively established when a named plaintiff tagged the defendant with service in the forum state. FedEx also claims that its rule would prevent disuniformity between state-court and federal-court jurisdiction. That's wrong too. Congress wanted to empower both state and federal courts to adjudicate collective actions—again, so

long as the named plaintiff served process and established the court's jurisdiction over a defendant present in the forum state. *See* 29 U.S.C. § 216(b).

This Court should grant review to bring much-needed resolution to these important interpretive disputes.

IV. THIS CASE PRESENTS THE IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED.

This case presents the ideal vehicle to address the question presented.

FedEx objects on this score, arguing that this case cannot serve as a vehicle to review the question presented because the district court could theoretically decertify the case as a collective action. Response at 36–38.

But that is hardly a knock against this case. Courts may decertify *any* case at any point—even post-trial—if they think that the case can no longer proceed as a collective action. *E.g.*, *Roussell v. Brinker Int'l, Inc.*, 2008 WL 2714079, at *16 (S.D. Tex. July 9, 2008).

FedEx attacks this point only obliquely by highlighting a claimed circuit split over the standard for certifying collective actions—implying that some cases from some circuits could not be decertified and would therefore make better vehicles. Response at 37–38. That's not right. First, there is no circuit split on the standard for certifying an FLSA collective action. *See* Response to Application for Stay, *Maximus, Inc. v. Thomas*, No. 22-185 (S. Ct.). And

more to the point, district courts in every circuit (including the Fifth Circuit) have the authority to decertify collective actions. *See, e.g.*, *Mondeck v. LineQuest, LLC*, 2021 WL 7184965, at *5 (W.D. Tex. Nov. 5, 2021). What FedEx sees as a defect unique to this case is really just a feature of all FLSA collective actions.

And FedEx makes no attempt to argue that *this case* is a likely candidate for decertification. That's because it's not. This dispute arises from a uniform, nationwide policy that classifies a group of employees as exempt from the FLSA's overtime protections. *Fischer v. Fed. Express Corp.*, No. 5:19-cv-04924, ECF No. 1 at 3 (E.D. Penn.). Disputes like this one present the strongest possible case for certification because the employees are so obviously "similarly situated." *See* 29 U.S.C. § 216(b).

This case is the best possible vehicle to address the question presented.

V. THIS COURT SHOULD ACT NOW TO RESOLVE THE QUESTION PRESENTED.

The Court should also act now to address the question presented. Four circuits—and at least fifty district courts—have addressed the question. This Court can act with confidence that the best arguments on both sides have been refined through the adversarial process. There are no other cases posing the question presented in the appellate courts. And, most critically, the costs of letting the circuit split fester far outweigh any benefits of waiting.

FedEx's first pitch for waiting is based on its claim that "there is…reason to expect" that the First Circuit will reverse itself and eliminate the circuit split. Response at 2. That is not likely to happen. As a matter of first principles, "a potential circuit split, in and of itself, is not a reason to grant en banc review." *Abilene Retail #30, Inc. v. Bd. of Comm'rs of Dickinson Cty., Kan.*, 508 F.3d 958, 960 (10th Cir. 2007) (Lucero, J., responding to the dissent from denial of rehearing en banc). No active First Circuit judge has questioned the court's opinion in *Waters*. And the First Circuit hears en banc cases only on the rarest occasions. It has issued just five en banc opinions in the past 15 years—and only one that overruled circuit precedent.[1] And remember that the First Circuit took *Waters* as an interlocutory appeal. Unless the question presented arose again on a final-judgment appeal, the First Circuit would have to take another interlocutory appeal (itself an uncommon occurrence) for the sole purpose of overruling circuit precedent en banc. Any lawyer (or client) hoping to make this parlay happen would have better luck playing the lottery. The circuit split is only likely to grow unless this Court intervenes.

FedEx's main pitch is for this Court to simply wait. True: this Court denied review in *Canaday* and

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[1] *See Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc.*, 32 F.4th 99 (1st Cir. 2022) (en banc); *Diaz Ortiz v. Garland*, 23 F.4th 1 (1st Cir. 2022) (en banc); *Eves v. LePage*, 927 F.3d 575 (1st Cir. 2019) (en banc); *San Geronimo Caribe Project, Inc. v. Acevedo-Vila*, 687 F.3d 465 (1st Cir. 2012) (en banc); *S.E.C. v. Tambone*, 597 F.3d 436 (1st Cir. 2007) (en banc).

Day & Zimmermann despite a broad range of employers, employees, and amici on both sides urging this Court to grant certiorari. But the Court's desire for further percolation last year made sense: *this case* was still pending before the Third Circuit at the time. Now this case has arrived. And there is no reason to think another suitable case will reach this Court anytime soon.

At day's end, this Court must exercise judgment in balancing the costs and benefits of acting versus waiting to resolve circuit splits. Here, the scales tip decidedly in favor of acting. The question presented does not address some arcane point of federal law—the kind where most of us can tolerate some interpretive disagreement. Waiting to resolve the question would force courts, employees, businesses, and Congress to operate indefinitely against a backdrop of extraordinary jurisdictional uncertainty. This Court should not permit that state of affairs to last any longer than necessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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