No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EMPLOYER SOLUTIONS STAFFING GROUP, LLC, ET AL.,

Petitioners,

v.

EUGENE SCALIA, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fair Labor Standards Act (FLSA) provides a 2-year period for recovery of back wages, which may be increased to 3 years if the employer's failure to pay wages was *willful*. The FLSA also requires that before an employer is liable for failure to pay overtime wages, the employer must know or have reason to know that an employee is working overtime hours. And, finally, there is no provision in the FLSA that prohibits an employer from seeking contribution for a wage award from other jointly and severally-liable employers.

The questions presented are:

1. Whether this Court's willfulness standard, which requires a showing that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute," *McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 133 (1988), may be satisfied merely by a showing that a non-compliant employer was on notice of its general FLSA requirements but had no actual knowledge of or reason to believe that it was not complying with any requirement of the FLSA?

2. Whether Petitioners were liable for overtime wages when there was no evidence that they knew or should have known that overtime wages were not properly being paid by a low-level employee?

3. Whether Petitioners may seek contribution under the FLSA from other joint-employers for joint and several liability for an overtime wage award?

PARTIES TO THE PROCEEDING

Petitioners, Employer Solutions Staffing Group, LLC; Employer Solutions Staffing Group II, LLC; Employer Solutions Staffing Group III, LLC; and Employer Solutions Staffing Group IV, LLC, were defendants in the trial court and the Ninth Circuit.

Respondent, Eugene Scalia, the Secretary of the Department of Labor, was the Plaintiff in the trial court and the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that all Petitioners are Minnesota limited liability companies and no publicly held corporation owns 10% or more of any of Petitioners.

RELATED PROCEEDINGS

The proceedings in the U.S. District Court for the District of Arizona and U.S. Court of Appeals for the Ninth Circuit identified below are directly related to the above-captioned case in this Court.

Acosta v. TBG Logistics LLC, et al., Order of Final Judgment in CV-16-02916-PHX-ROS, entered July 10, 2018 (D. Ariz).

Scalia v. Employer Solutions Staffing Group, LLC, et al., Case 18-16493 (9th Cir.); Judgment filed March 2, 2020.

Scalia v. Employer Solutions Staffing Group, LLC, et al., Case 18-16493 (9th Cir.); Order denying petition for rehearing en banc filed April 14, 2020

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PETITION FOR A WRIT OF CERTIORARI

The panel's decision disserves the Fair Labor Standards Act's animating policies and deserves this Court's review.

1. The panel held that an employer "willfully violates" the FLSA (29 U.S.C. §255(a)) whenever it "recklessly 'disregard[s] the very possibility that … it was violating the statute.'" A-9[1]. This holding concurs with similar holdings in 4 circuits and conflicts with contrary holdings in 4 other circuits. The circuit conflict on this issue is sufficiently developed and will not self-heal with further development.

2. Prior to the panel's opinion, no federal court, including 3 circuit courts, in the 82 years since the FLSA was enacted had ***ever*** ruled that anyone other than someone in **management** could bind an employer by approving or denying payment of wages for overtime hours. The panel's holding is unprecedented and creates a needless and unsupportable split with 3 other circuits. The conflict is sufficiently developed to warrant review in this case.

3. Only two courts of appeals (the Ninth Circuit here and the Second Circuit 21 years ago) have ever considered whether a joint employer may seek the equitable remedy of contribution under the FLSA from other joint employers which don't pay their fair share of a joint and several judgment obligation. Both the panel

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[1] The Appendix is in a separate volume.

and the Second Circuit considered whether there was an implied right of action to contribution under the FLSA. Both courts "followed a different approach to recognizing implied causes of action than … [the Court] follows now." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). The Second Circuit's approach is not only outdated, but also misguided because contribution is *not* an implied cause of action, but an equitable *remedy*, which is analyzed under the Court's extensive equity jurisprudence. The panel failed to consider Petitioners' argument that the equitable remedy of contribution survived enactment of the FLSA, on the same basis as this Court has held in numerous cases analyzing the continued viability of other equitable remedies after Congress has passed a related statute. The question is squarely presented and the issue sufficiently important to warrant certiorari.

This case, therefore, turns on three questions keenly in need of this Court's guidance. These identical issues will certainly arise in countless FLSA cases in the coming months and years, but the importance of clarifying them now is paramount. These questions are adequately presented for the Court's review in the pending case. The Court should address the important issues of federal law raised in this petition and this is an appropriate case in which to do so.

DECISIONS BELOW

The opinion of the Ninth Circuit (A-4) is published at 951 F.3d 1097. The order denying rehearing en banc (A-17) is unpublished. The order of the district court granting Respondent summary judgment (A-22) is

unpublished but is available at 2018 WL 3145938. The order of the district court striking Petitioners' cross-claims for contribution and indemnity (A-35) is unpublished, but is available at 2016 WL 10919966. The order of the district court denying Petitioners' motion for leave to file a third-party complaint and for reconsideration (A-44) is unpublished.

JURISDICTION

The Ninth Circuit issued its opinion on March 2, 2020, and denied rehearing en banc on April 14, 2020. A-17. The Court's general order of March 19, 2020, extended the due date for this petition to September 11, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

EXCERPTS FROM THE FAIR LABOR STANDARDS ACT OF 1938—

29 U.S.C. §203 provides in part that "As used in this chapter— …

(d) "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee …"

(e) (1) " … '[E]mployee' means any individual employed by an employer."

(g) "'Employ' includes to suffer or permit to work."

29 U.S.C. §207 provides in part that

"(a) **Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions**

"(1) [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

29 U.S.C. §216 provides in part that "…….

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. ..."

29 U.S.C. §255 provides in part that "Any action commenced … to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, … —

(a) … may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

STATEMENT OF THE CASE

A. Legal Background

1. The Fair Labor Standards Act (FLSA), 29 U.S.C. §201 *et seq*., requires employers to pay overtime to covered employees who work more than 40 hours in a week. §207(a)(1). Originally, the statute had a 2-year window of recovery for claims for unpaid wages, but Congress extended the recovery to 3 years if the employee could show that the employer's failure to pay the wages was "willful." §255(a). This modified statutory scheme remains in effect today.

This Court found Congress' amendatory action meaningful. "The fact the Congress did not simply extend the limitations period to three years, but instead adopted a two-tiered statute of limitations makes it obvious that Congress intended to draw a significant distinction between ordinary … and willful violations." *McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 132 (1988).

In *McLaughlin,* the Court ruled proof of a willful violation occurs only when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id*. at 133. The Court rejected the contention that a FLSA violation could be willful merely because an "employer knew that the FLSA 'was in the picture.'" *Id.* at 132. The Court observed that this type of loose standard "virtually obliterates any distinction between willful and non-willful violations … [because] it would be virtually impossible for an employer to show that he was unaware

of the … [FLSA] and its potential applicability, thus leaving the two-year period of wage recovery applicable to only 'ignorant employers.'" *Id*. at 132-33.

But the courts of appeals interpreting whether a wage violation was "willful" unevenly abided by the Court's holding in *McLaughlin*. Five years after *McLaughlin* was decided, this Court noted that "[s]urprisingly, the Courts of Appeals continue to be confused about the meaning of the term 'willful'" …." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993) (reaffirming *McLaughlin's* standard for "willful" violations).

Now, **32 years** since McLaughlin was decided, the circuits are still split (currently, 5-4) on how to interpret the phrase "willful violation."

2. Employers must only pay for work they knew or should have known about and, therefore, permitted. FLSA §203(g). The courts have **unanimously** said that the knowledge of only **managerial employees** may be imputable to an employer under the FLSA. The Ninth Circuit's unprecedented expansion of the scope of FLSA employer vicarious liability based on the knowledge of a low-level payroll processor employee of Petitioners creates a split with the Fifth, Tenth and Eleventh circuits on this issue.

The issue then under §203(g) is whether mere notice to or knowledge of *any* employee of an employer organization that overtime work is being done is sufficient to impose a duty on the employer to pay under the FLSA or whether the person with the knowledge or

notice must be *sufficiently associated with the employer* so that they have a status within the employer's organization which clothes them with the requisite *authority* to "suffer or permit" the work?

3. The FLSA's text and legislative history are silent on a right to contribution among joint-employers. This Court has stated that when a statute does not give any indication that a well-established rule of law, like the equitable remedy of contribution, is to be abrogated or fundamentally altered, "[the statute]'s silence is dispositive" that the rule of law does, in fact, remain viable and effective. *United States v. Bestfoods*, 524 U.S. 51, 70 (1998). The panel ruled just the opposite. It said that the FLSA's silence indicates that Congress did not "intend[] to create a right to contribution … for employers under the FLSA." A-14.

The issue is whether an established equitable remedy, such as contribution, remains viable and vibrant in the context of a statute as long as there is no expressed congressional intent to the contrary?

B. Factual Background

Respondent sued Petitioners and various other joint-employers, alleging they had violated the FLSA's overtime provision regarding 44 of Petitioners' temporary employees. A-25. Defendants TBG Logistics and its owner, Matthew Connors (not parties in this proceeding), were engaged in the business of unloading semi-trailer trucks delivering retail grocery products and merchandise to a distribution facility owned and operated in Arizona by Albertson's LLC, a non-party

worksite employer where all the overtime was worked by Petitioners' employees. A-23.

Petitioners are a temporary staffing agency (A-5), which supplied temporary employees to TBG Logistics to be assigned to work at Albertson's distribution facility worksite. A-23. Defendant Sync Staffing (dismissed by stipulated order in the district court (A-33)) worked with Petitioners, as their recruiting agent, to assist assigning Petitioners' employees to work at Albertson's distribution facility. A-23.

Petitioners received weekly spreadsheets from TBG Logistics through Sync Staffing documenting the hours worked each previous week by Petitioners' employees. TBG never separated employees' regular hours from their overtime hours in the spreadsheets. A-5-6.

The entire payroll for Petitioners' 44 employees was processed by a low-level employee of Petitioners, Michaela Haluptzok. A-6. Haluptzok was hired as a payroll processor by Petitioners on a probationary basis, in accordance with Petitioners' normal hiring practices, on August 20, 2012. A-47. After successfully completing her probationary training period, she was recommended for permanent hire. A-47.

Haluptzok's first payroll after completing her training was the account for TBG Logistics, which she was assigned on December 12, 2012. A-47. She processed the time entry portion of the payroll process by accurately paying at the regular wage rate for up to 40 hours of work and at a time and a half overtime

premium for any hours worked over 40 hours by each employee. A-47. She then sent what is called a "payroll proof," a draft of the wage payments and deductions scheduled to be made for each employee, by email to Sync Staffing. A-47.

Haluptzok was directed by Sync Staffing to re-do the time entry on the payroll proof to match the payroll spreadsheet that had been created by TBG Logistics and forwarded by Sync Staffing to Petitioners, which did not separate hours into regular and overtime hours and thus did not pay any overtime hours. A-48. Haluptzok, as a new and relatively inexperienced employee (only 3.5 months on the job), followed this directive, which was provided to her by Sync Staffing on behalf of TBG Logistics. A-48. She continued to process the payroll without overtime in this erroneous manner through the end of ESSG's relationship with TBG Logistics, on July 27, 2014. A-6, 48, 50.

In processing payroll, Petitioners' payroll software would generate an alert to the payroll processor indicating that the hours for a particular employee were not being paid with a proper overtime premium. A-54. Haluptzok manually dismissed these alerts in order to process the payroll as she had been directed by Sync Staffing. A-6, 50. These alerts remained "live" in the system only up to the time they were dismissed each payroll by Haluptzok. A-54. Haluptzok was the only employee to see these alerts during her time entry process. A-54. The alerts were not saved or otherwise logged in the payroll software system after they were dismissed by Haluptzok. A-54.

Haluptzok stated in her declaration in opposition to Respondent's motion for summary judgment that after she had processed the payroll the first time to include both regular and overtime pay and was then directed by Sync Staffing to eliminate all overtime pay, she "believed there must be an exception for why the payroll would be processed in that manner and not include overtime hours." A-48. Haluptzok stated that at no time did she believe she was in "violation of the Fair Labor Standards Act or any other wage law." A-49.

C. Court Proceedings

1. District Court. Respondent filed suit against Petitioners and various other alleged joint employers, asserting violations of the FLSA, including failure to pay proper overtime wages. A-22. The district court had jurisdiction under 29 U.S.C. §217, 28 U.S.C. §1331 and 28 U.S.C. §1345.

Several defendants moved to strike claims from Petitioners' response to the compliant that alleged a contingent right to contribution from other defendant joint employers if Petitioners were found liable to Respondent. The district court granted the motion to strike. A-35. Petitioners moved for reconsideration of the district court's order striking its contribution claims and requested leave under FRCP 12(b)(6) to file a third-party claim for contribution against Albertson's, a non-party alleged joint-employer of the workers represented by Respondent on their overtime claims. The district court denied Petitioners' motion. A-44.

Joint-employer Sync Staffing was dismissed from the action by stipulated (between Respondent and Sync

only) order in the district court without the payment by Sync of any back wages or damages to Respondent. A-33. Following discovery, Respondent moved for summary judgment, which the district count granted and entered final judgment against Petitioners. A-18. All other joint-employers, except Petitioners, settled with Respondent before the motion for summary judgment was filed.

2. Court of Appeals. The Ninth Circuit affirmed (A-4), concluding that Petitioners had acted willfully since Haluptzok had dismissed the payroll software's repeated warnings about overtime pay and never received any explanation from Sync Staffing that justified dismissing the software error messages.

Petitioners argued that they could not be liable under the FLSA for the actions of a low-level employee, such as Haluptzok. The panel disagreed stating that since Petitioners had selected Haluptzok as their employee for processing payroll, they could not disavow her actions merely because she lacked a specific job title or a certain level of seniority.

Petitioners also contended that they had a right to the remedy of contribution against other joint-employers for the wages and liquidated damages that the district court awarded. The panel ruled that the FLSA did not implicitly authorize contribution among joint-employers, and it declined to make new federal common law recognizing that remedy.

REASONS FOR GRANTING THE WRIT

I. The Circuit Courts Are Genuinely Split On The Standard For Finding A Willful Violation Under §255(a) Of The FLSA

The decision below deepens a clear 5-4 split in the courts of appeals. Five circuit courts, including the Ninth Circuit as demonstrated in this case, along with the Second, Sixth, Seventh and Eleventh Circuits, hold that an employer commits a "willful violation" of the FLSA whenever there is proof that the employer had a general awareness of the FLSA's requirements and failed to follow them.

Four other circuit courts, the Third, Fourth, Fifth, and Eighth, by contrast, hold that an employer has willfully violated the FLSA's overtime requirement only when the employee can show that the employer had a subjective awareness of either a violation, or the *possibility* of a specific violation, of the FLSA that was not followed up on or otherwise addressed.

Had Petitioners been employers in the Third, Fourth, Fifth, or Eighth Circuits, Respondent would not have recovered any back wages against them. But because Petitioners employed workers in the Ninth Circuit, the workers were awarded 3 years of overtime back pay plus liquidated damages.

Given the circuits' deep disagreement over what *McLaughlin's* "willful violation" requirement entails, only this Court's review can provide uniformity and clear guidance nationwide on this issue. A genuine and deep

circuit split exists. Like the Second, Sixth, Seventh and Eleventh Circuits, the Ninth Circuit panel refused to conclude that a finding of a willful violation must be based on at least *some* degree of actual knowledge of a violation or awareness of the distinct possibility of a violation of the FLSA in order to meet *McLaughlin's* requirement that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin*, 486 U.S. at 133.

The panel's decision conflicts with decisions of the Third, Fourth, Fifth and Eighth Circuits, which have arrived at the opposite conclusion, namely, that a finding of a willful violation of the FLSA wage payment requirement turns on whether the employer knew or at least subjectively realized the possibility of a violation of the FLSA. The Ninth Circuit's position in this case *conflicts most acutely* with that of the Third Circuit, which has explained that a FLSA employer's

> [a]cting only 'unreasonably' is insufficient—some degree of actual awareness is necessary. … Willful FLSA violations require a more specific awareness of the legal issue. … A plaintiff must put forward at least some evidence of the employer's awareness of a violation of the FLSA overtime mandate. … [The] Supreme Court 'willfulness' precedents require a showing of some degree of subjective actual awareness of an FLSA violation....

Souryavong v. Lackawanna County, 872 F.3d 122, 127 (3rd 2017).

There is no reason to continue allowing employees in the Second, Sixth, Seventh, Ninth and Eleventh Circuits to prevail in overtime backpay cases merely by proving only some presumed vague awareness by the employer of the FLSA's general requirements. Employees in the Third, Fourth, Fifth, and Eighth Circuits, on the other hand, are required to show that the employer was, to at least some degree, *actually knew or was aware* of the possibility of a specific violation of the FLSA that was not followed up on or addressed, to succeed on a claim for back wages.

The conduct of Petitioners' low-level employee would not have been sufficient to support a finding of a willful violation by Petitioners in the Third, Fourth, Fifth, and Eighth Circuits, but it would have been enough (although incorrectly so) in the Second, Sixth, Seventh, Ninth and Eleventh Circuits to do so.

This wide and hardened split among the circuits presents an important question of federal labor that has divided the circuits for 32 years and it deserves this Court's review.

A. Five Circuits Hold There Is A Willful Violation under §255(a) Whenever An Employer Is On Notice of the FLSA's Requirements

Ninth Circuit.

The panel exacerbated a certworthy circuit split with its decision in this case when it held that an employer willfully violates the FLSA when it "recklessly 'disregard[s] the very possibility that it was violating the

statute.'" A-9. Like the Second, Sixth, Seventh, and Eleventh Circuits, the Ninth Circuit, following its own circuit precedents, held that all that is required to find that a failure to pay wages was willful is a showing that the employer was generally aware of its FLSA obligations, even though the employer had no actual awareness or even plausible notice that its conduct was violating any provision of the FLSA.

Second Circuit.

The Second Circuit agrees with the Ninth Circuit in holding that an employer's **general knowledge** of the FLSA's requirements is sufficient to establish a willful violation. *Reich v. Waldbaum, Inc.,* 52 F.3d 35, 41 (2nd Cir. 1995) ("Prior investigations by the Secretary regarding [employer]'s compliance with the FLSA … sufficed to *acquaint [employer] with the general requirements and policy of the statute,* and no more is required … to reach the conclusion that … [employer] acted in reckless disregard of its obligations under the FLSA." (emphasis added)).

Sixth Circuit.

The Sixth Circuit mirrors the Second Circuit's rule and holds that general knowledge of the FLSA's requirements along with past infractions makes future infractions presumptively willful. *Herman v. Palo Group Foster Home, Inc.,* 183 F.3d 468, 474 (6th Cir. 1999) ("There is undisputed evidence that … [the employer] had actual notice of the requirements of the Act. He had been investigated for violations twice in the past for unpaid overtime wages, received explanations of what was required to comply with the Act, and assured the DOL that he would comply in the future. The district

court properly found that Defendants' violations were willful … .")

Seventh Circuit.

The Seventh Circuit agrees with the rule in the Second, Sixth, Ninth and Eleventh Circuits. That circuit holds that knowledge of the FLSA's requirements along with past infractions makes future similar infractions presumptively willful. *Bankston v. Illinois*, 60 F.3d 1249, 1254 (7th Cir. 1995) ("[T]he jury heard that the …[employer] received a memorandum from its legal department in 1985 that explained their responsibilities under the FLSA. That memorandum advised that exempt employees could not be docked pay for partial day absences. This advisory put the … [employer] on notice that treating the plaintiffs as managers while at the same time docking their pay for partial day absences were inconsistent positions. … [T]he plaintiffs were subject to being docked pay for partial day absences. The jury could reasonably have found that this inconsistency amounted to reckless disregard of the FLSA's requirements.")

Eleventh Circuit.

The Eleventh Circuit agrees with the 4 other circuits that mere general knowledge of the FLSA along with a failure to make further reasonable inquiry amounts to a willful violation. *Davila v. Menendez,* 717 F.3d 1179, 1185 (11th Cir. 2013) *(*"An employer willfully violates the … [FLSA] if he should inquire as to whether his actions violate the … [FLSA] but fails to do so." An employer is "blameworthy if the employer should have inquired further into whether [his] conduct was in compliance with the … [FLSA] and failed to make

adequate further inquiry.") See also *Allen v. Bd. of Pub. Educ. for Bibb Cnty.*, 495 F.3d 1306, 1324 (11th Cir. 2007) ("The three-year statute of limitations … may apply when … [an employer] simply disregarded the possibility that it might be violating the FLSA.").

B. Four Other Circuits Hold There Is A Willful Violation Only When There Is Proof That An Employer Was At Least Aware of Possible Non-Compliance With the FLSA

The Third, Fourth, Fifth and Eighth Circuits have a narrower view of the necessary factual basis of liability for a willful violation of the FLSA than do the Second, Sixth, Seventh, Ninth, and Eleventh Circuits. To state a willful violation claim in these four circuits, an employee must show that the employer had some awareness of an actual or possible violation of the FLSA.

Third Circuit.

The Third Circuit squarely conflicts with the Second, Sixth, Seventh, Ninth and Eleventh Circuits. The Third Circuit requires an employee to show that the employer had an *actual* awareness of *specific* violation of the FLSA to prove a willful violation. *Souryavong,* 872 F. 3d at 127 ("Acting only "unreasonably" is insufficient — **some degree of actual awareness is necessary**. … Willful FLSA violations require a more **specific awareness of the legal issue**. … A plaintiff must put forward at least some evidence of the employer's awareness of a violation of the FLSA overtime mandate. … [The] Supreme Court 'willfulness' precedents require a showing of **some degree of subjective actual awareness of an FLSA violation** ... ." (emphasis added)).

Fourth Circuit.

The Fourth Circuit embraces a holding similar to the Third Circuit's—reasonable efforts at compliance, although mistaken, do not constitute a willful violation of the FLSA. *Calderon v. GEICO General Insurance Co.,* 809 F.3d 111, 131 (4th Cir. 2015). ("[T]there is no evidence that any of the executives involved in the … process made anything other than their **best attempts to resolve this difficult exemption question**, and we conclude that their **decision** to continue classifying the … [employees] as exempt **was a reasonable one**. … [T]here was no basis upon which a reasonable factfinder could conclude that … [the employer's] decision to classify its investigators as exempt was *knowingly* incorrect or reckless." (emphasis added)).

Fifth Circuit.

The Fifth Circuit is diametrically opposed to the rule in the Ninth Circuit on virtually similar facts. *Dacar v. Saybolt, L.P.,* 914 F.3d 917, 926 (5th Cir. 2018). ("Here, it is not even clear that [the employer]'s conduct was negligent: (1) [the employer] twice sought the advice of legal counsel to ensure compliance with the FLSA; (2) [the employer] knew from these communications that the relevant legal issue was unsettled and had not been addressed in the Fifth Circuit; and (3) [the employer] knew that the DOL had issued proposed regulations that would vindicate its application of the … method. Ultimately, of course, [the employer]'s view of the law, though not irrational, was rejected.") The court held that there was no willful violation of the FLSA.

Also, especially in contrast with the Second and Ninth Circuits, the Fifth Circuit also holds that there is no affirmative duty on an employer to investigate whether it is in compliance with the FLSA unless there is *actual* knowledge or awareness of a specific potential violation. *Ikossi-Anastasiou v. Board of Supervisors of Louisiana State University*, 579 F.3d 546, 553 (5th Cir. 2009) ([Employee] has not provided evidence that … [the employer] actually knew that the pay structure violated the FLSA, or that … [the employer] ignored or failed to investigate … [plaintiff's] complaints.")

Eighth Circuit.

The Eighth Circuit mirrors the Third, Fourth and Fifth Circuits' rule that mere general knowledge of FLSA requirements cannot be the basis for a finding of a willful violation of the FLSA. *Hanger v. Lake County*, 390 F.3d 579, 584 (8th Cir. 2004) ("[W]e cannot say that the [employer] knew, or acted with reckless disregard of whether, it would violate the [FLSA]. Clearly the [employer] knew that the [FLSA] was "in the picture." … That general knowledge, however, shows neither that the [employer] knew it would violate the [FLSA] nor that it acted with reckless disregard for whether its conduct would violate … [the employee's FLSA] rights. Further, although it would have been prudent for the [employer] to have followed …[the] suggestion and obtain legal advice before making the employment decision, *McLaughlin* makes clear that the [employer]'s failure to do so does not demonstrate "willful" violation of the [FLSA]. … However, we find nothing to suggest recklessness on the part of the [employer].")

It is now 32 years since *McLaughlin* was decided, and there is still an entrenched split (5-4) among the circuits. The arguments on both sides of the conflict have been fully vetted in various circuit court opinions. This issue has sufficiently percolated in the courts of appeals and the split will not abate without this Court's intervention. Only this Court can establish a uniform meaning of "willful violation" under the FLSA.

II. The Ninth Circuit's Willful Violation Jurisprudence Cannot Be Reconciled With *McLaughlin*

Even if the absence of a circuit split, the panel's opinion still merits this Court's review because, although the Ninth Circuit purports to apply *McLaughlin*, members of its own circuit acknowledge that, in reality, its FLSA precedents have strayed "off track." See *Flores v. City of San Gabriel*, 824 F.3d 890, 907 (9th Cir. 2016) (Owens, J., concurring, joined by Trott, J.). This is because, in the Ninth Circuit, a FLSA violation is considered willful merely because "an employer disregarded the very 'possibility' that it was violating the statute," *id.* at 906*;* or because an employer "was on notice of its FLSA requirements, yet took no affirmative action to assure compliance with them" or "could easily have inquired into the meaning of the relevant FLSA terms and the type of steps necessary to comply therewith," *Alvarez v. IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003); or because prior FLSA violations, "even if they were different in kind from the instant one and not found to be willful," put the employer "on notice of other potential FLSA requirements." *Haro v. City of Los Angeles*, 745 F.3d 1249, 1258 (9th Cir. 2014).

This Court must direct the circuit courts, like the Ninth Circuit in this case, to refocus FLSA willful violation jurisprudence on the *factual* predicates required by *McLaughlin*, which are themselves mandated by §255(a). It is not mere *general awareness of possible FLSA requirements or concerns*, but *actual subjective awareness* of *specific violations* of the FLSA that are not followed up on or addressed that is a prerequisite for a finding of a willful violation of §207(a) (the overtime statute), which is a necessary pre-condition to satisfying the "willful violation" standard of §255(a). Only this reading of §255(a)'s requirement keeps a subjective element in the factual and legal analysis, which can correctly lead to a finding of willfulness. Any other reading improperly makes either negligence or strict liability the standard for willful violation liability under §255(a), which was declared in *McLaughlin* to be error.

This case presents an ideal vehicle for the Court to enunciate a unitary, concrete meaning of the phrase "willful violation" under §255(a), which is an important issue that cuts across not only FLSA cases, but also other statutes, such as the Age Discrimination in Employment Act of 1967, 29 U.S.C. §626(b) ("liquidated damages shall be payable only in cases of ***willful violations*** of this chapter), and the Family and Medical Leave Act, 29 U.S.C. §2617(c)(2) ("In the case of such action brought for a ***willful violation*** of section 2615 of this title, such action may be brought within 3 years …") (emphasis added). Both these statutes specifically incorporate into their liability schemes the willful violation standard of §255(a).

The matter of defining the word "willful" in these statutory contexts is especially important since this Court's general "willfulness" jurisprudence has become more nuanced and focused since *McLaughlin*. In non-FLSA litigation, this Court has defined the term "willful" quite clearly: "[I]n order to establish a 'willful' violation of a statute, … '[an employee] must prove that the defendant acted with knowledge that his conduct was unlawful.'" *Bryan v. United States,* 524 U.S. 184, 191-92 (1998). Subsequently, the Court has further refined the definition of "willful" to include two additional types of conduct, which may show either a willful blindness, or a conscious reckless indifference, to whether specific conduct is unlawful. *Global-Tech Appliances, Inc. v. SEB S. A.,* 563 U. S. 754, 769 (2011).

If these post-*McLaughlin* decisions are distilled, it leads to the unremarkable conclusion that "willfulness" requires some subjective awareness, or other conscious process, on the employer's part, of an actual or potential violation of the FLSA. This is most cogently explained by the Third Circuit: "Willful FLSA violations require a more specific awareness of the legal issue. … A plaintiff must put forward at least some evidence of the employer's awareness of a violation of the FLSA overtime mandate." *Souryavong*, 872 F. 3d at 127. "This [conclusion] reflects the ordinary, transsubstantive principle that a defendant's mental state is relevant to assigning an appropriate remedy," *Romag Fasteners, Inc. v. Fossil Group, Inc*., 140 S.Ct. 1492, 1497 (2020), such as the enlarged period of wage recovery that §255(a) provides for a "willful violation" of the overtime statute, §207(a).

In the present case, the Ninth Circuit held that because a low-level employee of Petitioners acted on directions from a co-employer not to pay overtime to employees, despite a complete lack of knowledge or even reason to know by any supervisor or manager of Petitioners that such non-payment was occurring, Petitioners willfully violated the overtime statute. A-7-8. The uncontested evidence in the record demonstrates, however, that the low-level payroll processor employee "believed there must be an exception for why the payroll would be processed in that manner and not include overtime hours." A-48. "I recall there being a potential exception to overtime requirements as I understood them potentially due to the type of work being performed by employees …", she stated. A-48. She added, "I did not believe I was in any violation of the Fair Labor Standards Act or any other wage law." A-49.

The low-level employee's failure to pay overtime wages amounts, at most, to an innocent mistake or negligence, neither of which qualifies as willful blindness or reckless disregard under *McLaughlin* and therefore cannot rise to the level of a willful violation under §255(a).

The Ninth Circuit's decisions in *Haro, Alvarez* and *Flores*, which dictated the outcome in this case, all disregard *McLaughlin's* clear teaching and unnecessarily perpetuate confusion for employers and employees. *Evidence-based decision-making* is, of course, precisely what *McLaughlin* both authorizes and requires, and precisely what the Ninth Circuit eschews. If the Ninth Circuit's precedents are accepted in cases

such as this, any principled difference between willful behavior and reasonable but incorrect breach of a duty to comply with the requirements of the FLSA disappears. Moreover, the consequences for unreasonable but innocent acts are identical to those for wrongful ones. This nullifies the Court's holding in *McLaughlin*, contravenes the will of Congress, and would be a retrograde step.

This issue is sufficiently important to warrant certiorari and the Court needs to resolve it.

III. The Ninth Circuit's Decision Creates An Additional Conflict Among The Circuits Because It Imputed FLSA Liability To An Employer Based Solely On The Knowledge Of A Low-Level Employee, Which No Other Federal Court Has Done Under The FLSA

The Ninth Circuit's decision in this case introduced a genuine circuit conflict on a *second* FLSA issue.

Under the FLSA, employers must only pay for work they knew or should have known about and, therefore, permitted. As defined in 29 U.S.C. §203(g), "'(e)mploy' includes to suffer or permit to work." "(T)he words 'suffer' and 'permit' as used in the statute mean 'with the knowledge of the employer.'" *Fox v. Summit King Mines*, 143 F.2d 926, 932 (9th Cir. 1944). See also *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2016) ("The FLSA stops short of requiring the employer to pay for work it did not know about, and had no reason to know about.").

Companies, being fictional persons, must of course function through the medium of real human beings. But which employees are identified with the mind of the company so that their knowledge of employee work may be imputed to an employer under FLSA §203(g)?

The courts have given a **unanimous answer** to this question: Only the knowledge of **managerial employees**—owners, officers, and high-level employees, such as managers and supervisors—may be imputable to an employer under the FLSA. The Ninth Circuit disagreed but failed to cite ***even a single case that contradicts this statement***.

The relevant cases represent the unified understanding that the knowledge of or notice to only **management** may be the basis of employer liability under §203(g) to pay wages. See, *e.g., Fox,* 143 F.2d at 932 ("***manager and superintendent;" "officers"***); *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) ("any ***official"*** of employer); *Brennan v. General Motors Acceptance Corporation*, 482 F. 2d 825, 828 (5th Cir. 1973) ("***immediate supervisors,"*** "***management"***); *Bailey v. TitleMax of Georgia, Inc.,* 776 F. 3d 797, 802 (11th Cir. 2015) (**"*supervisor***"); *Donovan v. McKissick Products Co.*, 719 F.2d 350, 354 (10th Cir. 1983) (***general manager***); *Maciel v. City of Los Angeles*, 569 F. Supp. 2d 1038, 1046 (C.D. Cal. 2008) (particular employee "does not qualify as ***management***"); *Ellerd v. County of Los Angeles*, 2012 WL 893608 (C.D. Cal. 2012) (***"manager"***); *Garcia v. SAR Food of Ohio, Inc.,* 2015 WL 4080060 (N.D. Ohio 2015) ("***supervisors"***).

A Department of Labor regulation interpreting FLSA §203(g) corroborates this approach:

> *Suffered or permitted work* means any work performed by an employee for the benefit of an agency, whether requested or not, *provided the* ***employee's supervisor*** knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

5 C.F.R. §551.104 (2020) (some emphasis added).

The Ninth Circuit's unprecedented expansion of the scope of FLSA employer vicarious liability based on the knowledge of a low-level payroll processor employee of Petitioners is directly at odds with the text of §203(g), as well with as the congressional policy behind the statute. The panel's decision creates a split with the Fifth, Tenth and Eleventh circuits on this issue (see above-cited cases).

While it is the general rule of agency law that a principal is affected by the knowledge that it is the agent's duty to communicate to the principal, *The Distilled Spirits*, 78 U.S. (11 Wall.) 356, 367 (1871); Restatement (Second) Agency §275 (1957) (same), a *different policy* animates and undergirds the knowledge requirement in the FLSA. Section 203(g) indicates that Congress intended to create an obligation to pay wages that is limited to only those situations when the employer "suffer[ed] or permit[ted]" an employee's work to be performed. Thus, it is not the mere notice to or knowledge of just *any* employee of an employer

organization that work is being done on the employer's behalf that is sufficient to impose a duty on the employer to pay wages under the FLSA. Instead, it is notice to or the knowledge of only some person *sufficiently associated with the employer* that the person has a status in the employer's organization which clothes that person with the *authority* to "suffer or permit," that is, to affirmatively approve, such work on behalf of the employer, that creates FLSA liability for failure to pay wages. Section 203(g) is phrased to delimit rather than expand the range of potential employer violations for not paying wages.[2] Any other reading of the statute disserves §203(g)'s animating policy.

The Ninth Circuit's wholesale adoption of a general, undifferentiated concept of imputed liability, encompassing the knowledge of *all* employees and agents, regardless of their level of authority within a company, conflicts with the primary thrust of §203(g), which bases liability on the knowledge or reason to know of *someone sufficiently associated with the employer* so that the person has the requisite authority to approve the work being performed. The Ninth Circuit erred by imposing what amounts to strict liability on employers and by failing to observe Congress' policy decision to limit the scope of employer liability for wage payments to the existence of something more than merely the employment relation itself.

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[2] "In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. … Management has the power to enforce the rule and must make every effort to do so." 29 C.F.R. §785.13.

In order to conform to Congress' clear intent to insulate employers from liability for payment of overtime wages when they neither knew nor had reason to know that work was being performed, the Ninth Circuit should have acknowledged that the knowledge of ***only managerial and supervisory employees can create FLSA liability*** for employers, which is consistent with ***all*** other FLSA cases on this issue. This distinction makes sense because a supervisor or manager, as opposed to a low-level employee, has been empowered by the employer as a distinct class of agents to make economic decisions (that is the approval or disapproval of work) affecting other employees under his or her managerial control.

The Ninth Circuit's imputation of the knowledge of a low-level employee to an employer (here, Petitioners) is irreconcilable with ***all other FLSA cases***, contravenes the text of and policy behind §203(g), and is not a fair reading of the statute. See *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140 (2018) (FLSA must be read "fairly"). Only **management**—owners, officers, supervisors and other higher-ranking employees ***authorized to approve overtime work***—not low-level staff employees—can bind an employer for payment of overtime wages under §207(a) of the FLSA.

The circuit conflict is sufficiently developed on this on this important question, which requires consideration by this Court.

IV. It Was Error For The Ninth Circuit To Conclude That The FLSA Precludes The Equitable Remedy Of Contribution Among Joint-Employers

Nationwide, FLSA litigation is booming. Currently, more FLSA actions are filed than any other type of employment litigation.[3] The number of FLSA cases filed nationally in 2019 totaled 6,780; 7,494 were filed in 2018.[4] In 2019, the value of the top 10 leading FLSA class action settlements totaled almost $450 million.[5] In many FLSA actions, the question of joint employment is a key issue. In fact, the Department to Labor issued a new regulation in January 2020, which imposes joint and several liability on all joint-employers under the FLSA.[6] The issue certainly will continue to be a key factor in future FLSA litigation.

The FLSA does not address whether joint-employers have a remedy among themselves for contribution if one or more jointly liable employers pays more than their fair share of a joint and several wage award. The Second Circuit was the only court of appeals (before the panel in this case) to consider whether joint-employers have a remedy of contribution among

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[3] Michael Trimarchi, "Top Class Action Settlement Values Rise in 2019, Law Firm Says," Bloomberg Tax, Jan. 13, 2020. Accessed at: https://news.bloombergtax.com/payroll/top-class-action-settlement-values-rise-in-2019-law-firm-says.

[4] *Id.*

[5] *Id.*

[6] Joint-employer Status Under the Fair Labor Standards Act, Federal Register, Jan. 16, 2020, at 2820-62, effective Mar. 16, 2020; codified at 29 CFR Part 791. Accessed at: https://www.govinfo.gov/content/pkg/FR-2020-01-16/pdf/2019-28343.pdf.

themselves under the FLSA. See *Herman v. RSR Security Services Ltd.*, 172 F.3d 132, 144 (2nd Cir. 1999). The Second Circuit said they do not, reasoning that since the text of the FLSA did not contain either an express or implied provision for allowing contribution and the FLSA's legislative history was silent on such a right, the remedy of contribution among jointly liable joint-employers was unavailable. *Id.* In the present case, the Ninth Circuit followed *Herman.* A-16.

The issue presented is one of considerable legal and practical significance. If a prevailing FLSA employee enforces a judgment against a single deep pocket joint-employer, that employer currently has no right of contribution from any other jointly liable employer. In the present case, for instance, Respondent exercised his discretion and dismissed one joint-co-employer, Snyc Staffing (which itself had instigated the error on overtime pay by ordering Petitioners' payroll processor to disregard all overtime pay) from the action without payment to Respondent of any back wages or damages. A-33.

The Ninth Circuit erred by not considering a *distinct, independent ground* asserted by Petitioners in both courts below for allowing joint-employers the remedy of contribution in FLSA wage cases. Supreme Court review is required, and this is an excellent vehicle in which to confirm that joint-employers may resort to the remedy of contribution under the FLSA.

FLSA §216(b) allows employees a right to recover "the amount of their unpaid minimum wages, or their unpaid overtime compensation," which is identical to the

common law **action of assumpsit** for wages owed.[7] See J. B. Ames, The History of Assumpsit: Implied Assumpsit, Harv. L. Rev., vol. 2 (1888), at 53-69. See also *Sigard v. Roberts*, 3 Esp. N.P. Rep. 71, 170 Eng.Rep. 542 (K.B. 1799) (merchant seaman allowed to recover his wages in assumpsit where he was turned ashore in a foreign port before the voyage was concluded); *Limland v. Stephens*, 3 Esp. N.P. Rep. 269, 170 Eng.Rep. 611 (K.B. 1801) (same). That is, §216(b) is a codification of the common law assumpsit action for failure to pay wages.

In fact, courts have been unanimous in the conclusion that the FLSA did **not create** a new cause of action for workers seeking back wages, but instead **codified the already existing judge-made, common law cause of action for assumpsit** for back wages. *See, e.g.*, *Rogers v. Loether*, 467 F.2d 1110, 1122 n.39 (7th Cir. 1972) (FLSA claims are analogous to "common law action[s] of debt or **assumpsi**t"); *Calderon v. Witvoet*, 999 F.2d 1101, 1109 (7th Cir. 1993) (FLSA actions are "**suits at common law**"); *Olearchick v. American Steel Foundries*, 73 F.Supp. 273 (W.D. Pa. 1947) (FLSA action like action in **assumpsit** upon contract); *JUROR 157 v. Corporate*, 710 F.Supp. 324 (M.D. Fla. 1989) (FLSA claim is like action for special **assumpsit**); *Martin v. Detroit Marine Terminals, Inc.,* 189 F.Supp. 579 (E.D. Mich. 1960) (FLSA damage action analogized to common law action of debt on **assumpsit**); *Donovan v. Home Lighting, Inc.*, 536 F.Supp. 604 (D. Colo. 1982)(FLSA claim sufficiently similar to an action

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[7] "The action of assumpsit is the legal remedy provided by the common law for the recovery of simple debts." E. Merwin, *Principles of Equity and Equity Pleading* (1895) §576 at 311.

of **assumpsit**); *Wirtz v. Wheaton Glass Co.,* 253 F.Supp. 93 (D. N.J. 1966) A**ssumpsit**). See generally D. R. Coquillette, *et al.*, 6 Moore's Federal Practice ¶ 38.27 (4th ed. 2015) (FLSA action like action for general **assumpsit**); Note, Fair Labor Standards Act and Trial by Jury*,* 65 Colum.L.Rev. 514-29 *(*1965*)* (FLSA action "clearly analogous to [a] **common-law contract action**").

These are clearly not "obscure and possibly aberrant" cases. *Department of Homeland Security v. Turaissigiam*, 140 S. Ct. 1959, 1972 n.18 (2020). Instead, they represent the unanimous agreement of courts and commentators that §216(b) codified the common law cause of action for assumpsit for back wages. When, as here, *all* of the relevant decisions give a statute a "consistent judicial gloss," *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011), that gloss represents the judicial understanding of the legal origin and nature of that section. It is axiomatic that statutes are presumed not to disturb the common law, "unless the language of a statute be clear and explicit for this purpose." *Norfolk Redevelopment Hous. Auth. v. Chesapeake Potomac Tel. Co. of Va.*, 464 U.S. 30, 35-36 (1983).

In equity courts, there was a correlative remedy to the cause of action for assumpsit when there were *joint* debtors and each had not paid a fair share of the plaintiff's judgment. The remedy was the **equitable doctrine of contribution**. "That the law imposed an obligation on … [one debtor] to reimburse … [another debtor] for the amount … paid on the common obligation in excess of … [that debtor's] share is well settled." *Carter v. Lechty*, 72 F.2d 320, 322 (8th Cir. 1934) (collecting cases).

Numerous works on equity jurisprudence[8] confirm that an equitable contribution remedy, available whenever there was an unequal allocation of a common debt among joint debtors, has long been a mainstay of equity courts. For instance, Justice Story's *Commentaries on Equity Jurisprudence,* a well-established treatise which was published in 14 editions between 1836 and 1918, sets out the nature, scope and lineage of the equitable remedy of contribution.

> It would be against equity for the creditor to exact or receive payment from one and to permit or by his conduct to cause the other debtors to be exempt from payment. … It can be no matter of surprise therefore to find that Courts of Equity at a very early period adopted and acted upon this salutary doctrine [of contribution] as equally well founded in equity and morality.

Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America*. 1886, 13th ed. sec. 493. See also *Pomeroy's Equity Jurisprudence* (4th ed.) vol. 2, §§173, 407, 411 (1918); *Dering v Earl of Winchelsea*, [1787] EngRep. 39, (1787) 1 Cox 319, (1787) 29 ER 1184 (remedy of contribution among sureties is the result of general equity on the ground of equality of burden and benefit); *Batard v. Hawes*, 2 El. & Bl. 287, 118 Eng.Rep. 776 (Q. B. 1853) (same result for 12 defendants on a joint contract of employment of a civil engineer).

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[8] "[T]reatises and handbooks on the 'principles of equity' generally contain transsubstantive guidance on broad and fundamental questions about matters like … remedies." *Romag,* 140 S.Ct. at 1496.

The link between an action for assumpsit and the correlative equitable remedy of contribution among co-defendants was not severed when Congress codified the assumpsit cause of action in FLSA §216(b). When a federal statute embraces subject matter related to an equitable remedy, that remedy does not lose its identity merely because it finds itself enmeshed in the statute. *Impression Products, Inc. v. Lexmark International, Inc.,* 137 S. Ct. 1523, 1536 (2017) ("'[W]here a common-law principle is well established, … courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.'") (cleaned up).

United States v. Bestfoods, 524 U.S. 51 (1998), is instructive here. In that case, the Court held that the traditional common law rules for imputing the liability of a subsidiary to a parent corporation were incorporated into a federal environmental statute that was *silent on the subject*.

> [The statute] is … like many another congressional enactment in giving no indication that "the entire corpus of … law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." … The District Court['s] … focus … erroneously … treated ... [the statute] as though it displaced or fundamentally altered common-law. … But … such a rule does not arise from congressional silence, and ... [the statute]'s silence is dispositive.

Id. at 63, 70.

The panel said that the FLSA's legislative history is silent on a right to contribution. A-14. Contribution is an equitable *remedy*, not a cause of action, and so is not controlled by the factors previously used by this Court (and by the Second Circuit in *Herman*) for evaluating the propriety of finding implied private causes of action under federal statutes (if, in fact, that doctrine still exists under the Court's current jurisprudence. See, e.g., *Comcast Corp. v. National Assn. of African American-Owned Media*, 140 S. Ct. 2561, 2570 (2020) ("'Raising up causes of action where a statute has not created them … [is not] a proper function … for federal tribunals.'")).

Since Congress clearly codified the common law cause of action of assumpsit when it enacted the FLSA, there is no reason not to conclude that the correlative equity court remedy of contribution was retained and implicitly codified at the same time. Courts "should not construe a statute to displace courts' traditional equitable authority absent the 'clearest command,' … or an 'inescapable inference' to the contrary … ." *Miller v. French*, 530 U.S. 327, 340-41 (2000).

Additionally, equitable remedies may be utilized by federal courts without any explicit statutory authority from Congress. *See Liu v. SEC*, 140 S. Ct. 1936, 1946-47 (2020) ("[In the] federal courts …, [u]nless otherwise provided by statute, all . . . inherent equitable powers . . . are available for the proper and complete exercise of … [equity] jurisdiction.")

Congress neither nullified nor trimmed the contours of the remedy of contribution, established by

longstanding principles of equity, by failing to mention the term in §216(b). To understand the statute in this way does not in any way revise the text of the statute. The equity to seek contribution arises because the exercise of FLSA wage collection rights by an employee ought not to disadvantage any of those correlative rights that belong to joint-employers of the employee.

The tension between the panel's decision and the decision in *Herman*, on the one hand, and, on the other, this Court's clearly enunciated equity jurisprudence on this issue is sufficiently developed and the Court needs to resolve it.

V. The Case Presents An Excellent Vehicle

This case is an ideal vehicle to address the three important issues of federal law presented here. Six factors highlight this conclusion.

First, the record cleanly frames the question presented. The facts are not disputed because the district court ruled on a motion for summary judgment. All the facts in Petitioners' papers filed in opposition to the motion must be accepted as true, and those facts do not establish a basis for finding a willful violation by Petitioners of the FLSA.

Second, the Ninth Circuit's ruling on the standard for willful violations is the most tenuous of any circuit in faithful adherence to the teachings of *McLaughlin*. Even judges of its own court have stated that the circuit's cases on the standard for finding a willful violation have gone "off track." *Flores*, 824 F.3d at 907 (Owens, J., concurring, joined by Trott, J.). Employers are

particularly vulnerable in the Ninth Circuit. Their defenses against a finding of willful violation are almost always futile because the circuit rule is that general awareness of the requirement of the FLSA is sufficient to make any violation willful. If this standard is allowed to continue and possibly predominate and spread to other circuits, mistaken but innocent employers will be all too often left with no viable way to challenge allegations of willful violations made against them. Requiring close adherence to the mandate of *McLaughlin*, which is currently not observed in the Ninth Circuit, is the only way to ensure that employer defenses under the FLSA are fairly observed.

Third, this case presents an ideal vehicle for the Court to correct not only the Ninth Circuit's current interpretation of the meaning of the phrase "willful violation" under §255(a) of the FLSA, but also the identical phrase in other statutes, such as the Age Discrimination in Employment Act of 1967 and the Family and Medical Leave Act. Both these statutes specifically incorporate into their liability schemes the willful violation standard of §255(a).

Fourth, the fact that Respondent, the Secretary of Labor, has been involved in this matter since even before the civil complaint was filed makes this case an especially suitable vehicle. This is not a private FLSA action in which the Secretary would be involved only much later, and then only at the invitation of this Court. Instead, the Secretary has been directing and developing the prosecution of this FLSA case from the beginning and so there can be no complaint by the Secretary that this matter is currently in a flawed position before this

Court as the result of a private party's mishandling of the civil action.

Fifth, the facts involving Petitioners have the additional nuance that the wrongful behavior imputed to Petitioners in the courts below was the act of a low-level employee whose only task was to process the payroll forwarded to her by another joint-employer. This fact presents the Court with the opportunity to provide guidance regarding what level of authority an employee must have within an employer organization before the employee is cloaked with sufficient status to bind the employer to pay for work done by employees. The FLSA does not require an employer to pay for work it did not know about and had no reason to know about. Before the opinion in the present case, the unanimous answer was that **only management**—owners, managers and supervisors—have the authority to approve work on behalf of an employer. The panel abrogated that longstanding rule when it held that the knowledge of *any* employer within an employer's organization can be considered a willful violation by the employer.

Sixth, the equitable contribution issue presented is not one where the Court will benefit from further percolation in the circuit courts. This Court's sustained jurisprudence on the viability of equitable doctrines in the face of congressional silence requires that the Court affirm that the long-established equitable remedy of contribution is available to a joint-employer against a co-employer that has not paid its fair share of a joint wage award under the FLSA.

CONCLUSION

The petition deserves this Court's review, which should be granted.

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