No. 20-660

In the Supreme Court of the United States

EMPLOYER SOLUTIONS STAFFING GROUP, LLC, ET AL., PETITIONERS

v.

EUGENE SCALIA, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners' violation of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, was willful where petitioners failed to pay a group of employees required overtime compensation for more than eighteen months and repeatedly dismissed software warnings that employees may not be receiving required overtime without obtaining any explanation for why omitting overtime compensation would be lawful.

2. Whether the court of appeals correctly held that petitioners violated the FLSA's requirements where petitioners, through their agent, failed to pay their employees overtime compensation, regardless of that agent's level of seniority.

3. Whether the court of appeals correctly held that there is no implied private right of action under the FLSA for an employer who violated the FLSA to seek contribution from other employers and declined to create such a right as a matter of federal common law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A16) is reported at 951 F.3d 1097. The orders of the district court (Pet. App. A22-A32, A35-A45) are not published in the Federal Supplement but are available at 2016 WL 10919966 and 2018 WL 3145938. Additional orders of the district court (Pet. App. A18-A21, A33-A34) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2020. A petition for rehearing was denied on April 14, 2020 (Pet. App. A17). The petition for a writ of certiorari was filed on September 9, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, requires, *inter alia*, that (with exceptions not relevant here) employers pay their employees overtime compensation of at least one and one-half times the employees' regular rate for any hours over 40 worked in a given week. 29 U.S.C. 207(a)(1). Any work that the employer "suffer[s] or permit[s]" to be performed is work time for which the employer must properly pay the employee. 29 U.S.C. 203(g). That encompasses any work about which an employer has actual or constructive knowledge, meaning that an employer who "knows or should have known that an employee * * * was working overtime" must compensate the employee accordingly. *Forrester* v. *Roth's I. G. A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981); accord *Kellar* v. *Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2011); *Davis* v. *Food Lion*, 792 F.2d 1274, 1276 (4th Cir. 1986); *Gulf King Shrimp Co.* v. *Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969).

The FLSA contains a detailed scheme for remedying violations of its substantive requirements. 29 U.S.C. 215, 216, and 217. Those remedies include criminal penalties, 29 U.S.C. 216(a), damages, including lost wages and an additional equal amount as liquidated damages, 29 U.S.C. 216(b), equitable relief, 29 U.S.C. 216(b), 217, and attorney's fees, 29 U.S.C. 216(b). To enforce its requirements, the FLSA provides a private right of action to "any one or more employees," *ibid.*, and provides for suits by the Secretary of Labor, 29 U.S.C. 216(c).

Ordinarily, a two-year statute of limitations applies to actions under the FLSA, but the limitations period is extended to three years for "willful" violations.

29 U.S.C. 255(a). This Court has held that an FLSA violation is willful where "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]." *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

2. Petitioners are four related staffing companies that contract with other entities to recruit and assign employees to worksites; petitioners also perform administrative tasks, including payroll processing for the assigned employees. Pet. App. A5 & n.1. In 2012, petitioners contracted with Sync Staffing to recruit and assign employees to TBG Logistics, LLC (TBG), where the employees unloaded deliveries for a grocery store. *Id.* at A5-A6. Petitioners processed payroll for these employees and were responsible for ensuring that they were appropriately compensated for all hours worked. *Ibid.* Petitioners conceded that they qualified as "employer[s]" of the TBG-assigned employees under the FLSA. *Id.* at A5 (quoting 29 U.S.C. 203(d)).

Shortly before the events at issue, petitioners hired a payroll administrator, Michaela Haluptzok; they trained her on FLSA requirements and designated her as solely responsible for processing the TBG payroll. Pet. App. A6. Beginning in November 2012, TBG provided a spreadsheet identifying the employees and their hours worked for each pay period to Sync Staffing, which forwarded the spreadsheet to petitioners for payroll processing. *Ibid.* When Haluptzok received the first such spreadsheet, she prepared a draft payroll that would pay the TBG-assigned employees at the overtime rate for all hours worked over 40 in a given week, and she sent the draft payroll to Sync Staffing for review. *Ibid.* In response, a Sync Staffing employee instructed

Haluptzok to pay the TBG-assigned employees the regular rate for all hours worked, without any explanation for why that action would be appropriate. *Ibid.* Haluptzok followed that instruction, processing the payroll without overtime pay. *Ibid.* When she did so, petitioners' payroll software issued automatically-generated error messages. *Ibid.* Haluptzok understood the error messages to be a warning that qualifying employees were not receiving proper overtime compensation, but she disregarded the messages and processed the payroll to issue paychecks without overtime pay. *Ibid.* She did so despite the fact that she had no understanding of the type of work the employees were performing and without asking for further guidance. *Id.* at A24. Haluptzok "admitted that she knew the recruited employees were not being paid overtime." *Id.* at A8.

Haluptzok continued to process the TBG payroll in that manner for over a year, accurately recording the employees' total hours but directing that all hours, including overtime hours, be paid at the regular rate. Pet. App. A6. Between August 30, 2013 and July 27, 2014, petitioners failed to pay the TBG employees overtime in 1103 instances, averaging 22 violations per week. *Id.* at A25. The total amount of unpaid overtime for that period was $78,518.28. *Ibid.*

3. On August 30, 2016, the Secretary sued petitioners, TBG, Sync Staffing, another company, and two individuals under the FLSA on behalf of the TBG-assigned employees. See Pet. App. A6. Petitioners filed cross-claims for contribution or indemnification against the other defendants. *Id.* at A6-A7. The district court dismissed petitioners' cross-claims against the other defendants, concluding, as relevant here, that neither the FLSA nor federal common law provided a private

right of action for contribution under the FLSA. *Id.* at A38-A40 & n.6. The Secretary subsequently entered into consent judgments with all other defendants, leaving petitioners as the sole remaining defendants. *Id.* at A7.

The district court then granted the Secretary's motion for summary judgment against petitioners. See Pet. App. A7. The court ruled, in relevant part, that petitioners willfully violated the FLSA's overtime requirements. *Id.* at A26-A32. Specifically, the court concluded that Haluptzok's "knowledge and behavior" must be attributed to petitioners despite her position as a lower-level employee, because petitioners structured their business so that Haluptzok "was the only individual who could possibly act on behalf of [petitioners] regarding overtime decisions" and thus acted as petitioners' agent for those decisions. *Id.* at A31; see *id.* at A27, A30-A31. The court further concluded that petitioners "knew or showed reckless disregard" for whether their conduct violated the FLSA, *id.* at A26 (citation omitted), because they were indisputably aware of the FLSA's overtime obligations, and, through their agent, knew that employees worked more than 40 hours per week but did not pay them overtime compensation, while dismissing repeated warnings that the payments violated the FLSA. *Id.* at A28-A32. It ordered petitioners to pay approximately $78,500 in unpaid overtime wages plus an equal amount in liquidated damages. See *id.* at A7.

4. The court of appeals affirmed. Pet. App. A4-A16.

The court of appeals first held that petitioners were liable for the FLSA overtime violations. Pet. App. A8. Petitioners "chose Haluptzok as [their] agent for payroll processing," and Haluptzok "knew that the relevant

employees were working more than 40 hours per week without receiving overtime pay." *Ibid.* Accordingly, the court explained that Haluptzok's actions were imputed to petitioners under "the law of agency." *Ibid.* Observing that petitioners structured their business so that no supervisors or managers processed the payroll, the court observed that allowing petitioners to "disavow [Haluptzok's] actions merely" due to her relatively low level of seniority within the company would create an impermissible "loophole" in the FLSA. *Ibid.*

The court of appeals then held that the action was timely because petitioners' violation was "willful" within the meaning of 29 U.S.C. 255(a). Pet. App. A9. The court explained that, under this Court's decision in *Richland Shoe*, *supra*, an FLSA violation is willful if "the employer either knew or showed reckless disregard for whether its conduct was prohibited by the FLSA." Pet. App. A9 (quoting *Richland Shoe*, 486 U.S. at 133) (ellipsis and brackets omitted). Petitioners, "through [their] agent," "recklessly 'disregarded the very possibility that [they were] violating the statute'" because Haluptzok "dismissed the payroll software's repeated warnings that employees might not be receiving earned overtime pay" and did so "[f]or more than a year." *Ibid.* (citation omitted). Given "Haluptzok's admissions," the court noted, "we have little trouble concluding that [petitioners] recklessly disregarded [their] obligations under the [FLSA] even under the strictest reading of *Richland Shoe*." *Id.* at A9 n.2.[1]

Finally, the court of appeals held that neither the FLSA nor federal common law permits petitioners to

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[1] The court of appeals also affirmed the award of liquidated damages. Pet. App. A10. Petitioners do not seek review of that aspect of the court's ruling.

sue other employers for indemnification or contribution. Pet. App. A11-A15.[2]

The court of appeals "join[ed] the Second Circuit in holding that the FLSA does not imply a right to contribution or indemnification for liable employers." Pet. App. A16. It first noted that, while joint employers of the same employees may be jointly and severally liable under the FLSA, this Court "has rejected the argument that joint and several liability always goes hand-in-hand with contribution." *Id.* at A12 (citing *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981)). The court of appeals then applied this Court's framework for determining whether "a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right." *Id.* at A11-A15 (quoting *Northwest Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 91 (1981)). It explained that the FLSA's text "says nothing about a right to contribution or indemnification for employers who have violated the statute"; moreover, the FLSA's text indicates that the statute was enacted for the special benefit of employees rather than employers. *Id.* at A12-A13. The court further observed that the FLSA has a "'comprehensive remedial scheme'" that provides "'private enforcement in certain carefully defined circumstances,'" and "'strongly evidences [Congress's] intent not to authorize additional remedies' beyond those expressly allowed under the statute." *Id.* at A13-A14 (citations omitted). And, the court noted, the legislative history offers no indication that Congress intended to authorize contribution or indemnification. *Id.* at A14.

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[2] Petitioners do not seek review of the indemnification portion of the ruling.

The court of appeals likewise declined to formulate a right of action for contribution or indemnification as a matter of federal common law. The court explained that, although courts retain the power to do so in certain "limited circumstances," none were applicable here, and emphasized that the FLSA's comprehensive remedial scheme indicated that Congress "did not intend for [courts] 'to supplement the remedies enacted.'" Pet. App. A15-A16 (citations omitted).

5. The court of appeals denied a petition for panel rehearing and a petition for rehearing en banc. Pet. App. A17.

ARGUMENT

Petitioners contend that the court of appeals erred in determining that their conduct was willful; that it erred in finding them liable for violations of the FLSA because the employee who processed payroll for petitioners was not a manager or supervisor; and that the court erred in declining to imply or create a private right of action for contribution. The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly applied the willfulness standard set out by this Court, and its factbound decision does not conflict with that of any other court of appeals.

a. This Court has held that a violation of the FLSA is willful if "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). It is not enough, however, for an employer simply to know that the FLSA "'was in the picture,'" or to engage in "merely

negligent" conduct. *Id.* at 132-133. Civil recklessness is generally understood as "conduct violating an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." *SafeCo Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 68 (2007) (citation and internal quotation marks omitted).

The court of appeals correctly concluded, consistent with *Richland Shoe*, that petitioners willfully violated the FLSA because they showed reckless disregard for whether they were failing to pay overtime compensation in violation of the Act. Pet. App. A9. Specifically, petitioners, through their designated agent for payroll processing, processed payroll for employees who worked more than 40 hours per week by "pay[ing] all of the hours as 'regular hours' instead of overtime." *Id.* at A6. In doing so, petitioners "dismissed the payroll software's repeated warnings that employees might not be receiving earned overtime pay." *Id.* at A9. Petitioners continued to do so for more than 18 months, resulting in "more than 1000 violations" of the FLSA "in which employees did not receive their earned overtime pay." *Id.* at A6. Moreover, although petitioners' agent for processing payroll "(at least initially) acted on Sync's instructions not to pay overtime, she never received any explanation from Sync that justified dismissing the software's error messages." *Id.* at A9. Thus, through their agent, petitioners recklessly disregarded their obligations under the statute. *Ibid.*

The court of appeals' application of the established recklessness standard to the record in this case is a fact-bound issue that does not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence

and discuss specific facts."). Moreover, the court was correct to conclude, Pet. App. A9, that petitioners' repeated dismissal of software warnings about missing overtime pay without receiving or seeking any justification that would reconcile that omission with the FLSA's requirements created an "unjustifiably high risk" that the FLSA would be violated. See *SafeCo*, 551 U.S. at 68 (citation omitted). That is particularly so because petitioners do not dispute that the FLSA unequivocally requires overtime compensation for hours worked over 40 per week for the TBG-assigned employees. See 29 U.S.C. 207(a)(1).

In contending that further review is warranted, petitioners assert that the court of appeals held 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." Pet. 12. Petitioners are incorrect. The court did not hold that general awareness of the FLSA's requirements was sufficient; instead, it expressly applied this Court's decision in *Richland Shoe*—which rejected the argument that such general awareness was sufficient, 486 U.S. at 132-133—and concluded that petitioners "showed reckless disregard for whether [their] conduct was prohibited by the FLSA." Pet. App. A9 (quoting *Richland Shoe*, 486 U.S. at 133) (ellipsis and brackets omitted).

b. Petitioners have identified no decision that reaches a different result in similar circumstances. See Pet. 12-20. Instead, the decisions petitioners cite in asserting a circuit conflict stand for the proposition that, in order to act willfully, an employer must be aware of the relevant FLSA requirement. See *Souryavong* v. *Lackawanna Cnty.*, 872 F.3d 122, 126-127 (3d Cir. 2017)

(concluding that an employer's conduct was not willful where there was no evidence that the employer was aware of the relevant "legal issue"—namely, the FLSA requirement to aggregate hours across different jobs for purposes of overtime); *Calderon* v. *GEICO Gen. Ins. Co.*, 809 F.3d 111, 130-131 (4th Cir. 2015) (determining that an employer did not willfully violate the FLSA where it made good-faith efforts to comply by reasonably, albeit mistakenly, concluding after careful examination that employees were exempt from a particular requirement), cert. denied, 137 S. Ct. 53 (2016); *Dacar* v. *Saybolt, L.P.*, 914 F.3d 917, 926-927 (5th Cir. 2019) (per curiam) (concluding that an employer did not willfully violate the FLSA where it made reasonable efforts, including by obtaining advice of counsel, to determine compliance in a legally unsettled area); *Hanger* v. *Lake Cnty.*, 390 F.3d 579, 584 (8th Cir. 2004) (determining that the employer did not willfully violate the FMLA where it was generally aware of its FMLA obligations and took some steps to achieve compliance, even though it might have been "prudent" to do more). By contrast, it is undisputed here that petitioners were aware of the FLSA's requirement to pay overtime compensation for excess hours worked. See Pet. App. A6, A8; 29 U.S.C. 207(a)(1).

Petitioners also cite the Fifth Circuit's decision in *Ikossi-Anastasiou* v. *Board of Supervisors*, 579 F.3d 546 (2009), cert. denied, 559 U.S. 904 (2010), but that case held only that the fact that an employee was paid less than many colleagues and expressed dissatisfaction with her salary was not sufficient to raise a fact question as to willfulness absent any evidence that the employer either knew that the pay structure violated the FLSA, or "ignored or failed to investigate" the employee's

complaints. *Id.* at 553. Here, by contrast, petitioners ignored specific warnings that their failure to pay overtime compensation may violate the FLSA. Pet. App. A6, A9.

c. Petitioners also contend that the court of appeals diluted the willfulness requirement in *prior* decisions by holding that failing to take affirmative action to assure compliance with the FLSA can constitute willfulness in certain circumstances. See Pet. 20-24 (citing *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003), aff'd, 546 U.S. 21 (2005)). But whatever the merits of that argument, it is not implicated here. As the court of appeals explained, regardless of whether its earlier cases were correctly decided, the court had "little trouble concluding" that petitioners' conduct was willful "even under the strictest reading of *Richland Shoe.*" Pet. App. A9 n.2.

2. The court of appeals was also correct in considering the knowledge of petitioners' designated employee for payroll processing in finding FLSA liability. And, contrary to petitioners' assertion, no court of appeals has held that the awareness of an employer's agent is only relevant to the FLSA if the agent is a manager or supervisor. Accordingly, further review is not warranted on the second question presented in the petition.

a. An employer who "knows or should have known that an employee * * * was working overtime" must compensate the employee accordingly. *Forrester* v. *Roth's I. G. A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981); see p. 2, *supra*. Here, the court of appeals correctly held that petitioners violated the FLSA's overtime requirements. The court explained that petitioners chose Michaela Haluptzok as their "agent for payroll processing." Pet. App. A8. Haluptzok knew

that the relevant employees worked overtime hours but were not paid overtime compensation: she accurately recorded the employees' hours worked, including the hours over 40 in a workweek, in petitioners' system, but processed payroll so those employees were paid the regular, not overtime, rate for all hours. *Id.* at A6, A8. Because Haluptzok was petitioners' agent, "act[ing] on [petitioners'] behalf and subject to [petitioners'] control," her actions are properly imputed to petitioners. *Id.* at A8 (quoting Restatement (Third) of Agency § 1.01 (2005)).

Although petitioners acknowledge the "general rule of agency law" that an agent's knowledge is imputed to the principal, Pet. 26, they contend that the FLSA departs from that rule, permitting courts to consider only the knowledge of an agent who is a manager or a supervisor, Pet. 25-28. But petitioners identify nothing in the text of the FLSA that would support such a departure. See *ibid.* In fact, courts of appeals have uniformly held that an employer may not evade liability under the FLSA by delegating compliance to subordinates, and that an employer is responsible for the knowledge and actions of its chosen agents. See *Chao* v. *Barbeque Ventures, LLC*, 547 F.3d 938, 943 (8th Cir. 2008) (rejecting the proposition that "delegating the payroll function to a subordinate" satisfies an employer's obligations under the FLSA); *Reich* v. *Department of Conservation & Natural Res.*, 28 F.3d 1076, 1083 (11th Cir. 1994) ("[A]n employer is not relieved of the duty to inquire into the conditions prevailing in his business 'because the extent of the business may preclude his personal supervision, and compel reliance on subordinates.'") (citation omitted); *Gulf King Shrimp Co.* v. *Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969) (the employer must "stand or fall with

those whom he selects to act for him" because "the mandate of the [FLSA] is directed to the employer and 'he may not escape it by delegating it to others'") (citation omitted); see also, *e.g.*, *Brennan* v. *General Motors Acceptance Corp.*, 482 F.2d 825, 828 (5th Cir. 1973) (employer suffered or permitted work within the meaning of the FLSA despite a lack of awareness of the work by upper management). A contrary rule would make little sense: as the court of appeals observed, if courts were required to disregard the knowledge of lower-level employees, an employer could evade the FLSA's requirements by delegating authority over recording hours or processing payroll to a lower-level employee and never reviewing that employee's work—precisely what happened here, see Pet. App. A30-A31—thereby "creat[ing] a loophole in the FLSA," *id.* at A8.

b. Petitioners assert a circuit conflict on this question, contending that other courts have "unanimously" held that only the knowledge of a supervisor or manager may bind the employer. Pet. 6 (emphasis omitted); see Pet. 24-28. But none of the decisions they cite supports that proposition. Rather, those decisions held that a supervisor or manager's knowledge of hours worked is *sufficient* even where employees do not officially report their hours. See *Bailey* v. *TitleMax of Ga., Inc.*, 776 F.3d 797, 802 (11th Cir. 2015) (where employee's supervisor directed the employee not to record all hours worked, "[t]he supervisor's knowledge may be imputed to [the employer], making it liable for the FLSA violation"); *Brennan*, 482 F.2d at 828 (where the employees' immediate supervisors pressured employees not to report accurately all hours worked, the supervisors' constructive knowledge of the unreported overtime worked was imputed to the employer). Petitioners also invoke

Donovan v. *McKissick Products Co.*, 719 F.2d 350 (10th Cir. 1983), cert. denied, 467 U.S. 1215 (1984), but that case, which concerned whether certain pay plans complied with a specific exception to the FLSA's overtime requirement, *id.* at 353-354 (citing 29 U.S.C. 207(f)), is entirely inapposite.[3]

3. Review is also not warranted as to the third question presented. The court of appeals was correct in declining to imply a cause of action for contribution under the FLSA or to create such a right as a matter of federal common law. And, as petitioners concede, the only other circuit to address this question has reached the same conclusion.

a. The court of appeals was correct in determining that neither the FLSA nor federal common law provides a private right of action for an employer who violated the FLSA to seek contribution from other employers. Pet. App. A11-A16.

As this Court has clarified in recent years, "when deciding whether to recognize an implied cause of action,

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[3] Petitioners also claim a conflict with two of the Ninth Circuit's earlier decisions. Pet. 25. But any intracircuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Nor have petitioners identified such a conflict. The Ninth Circuit's decades-old decision in *Fox* v. *Summit King Mines, Ltd.*, 143 F.2d 926 (1944), held only that an employer was not required to compensate employees for a free lunch period that employees did not claim as a period worked on their time sheets. *Id.* at 932. And its decision in *Forrester*, see p. 12, *supra*, held that an employer is not liable for overtime pay where an employee does not notify the employer about his overtime hours. See 646 F.2d at 414 (holding that an employee did not establish that the employer "should have known" about the employee's alleged uncompensated hours where the employee did not report his overtime hours on his time sheets nor otherwise mention them to any of the employer's officials).

the determinative question is one of statutory intent." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1855 (2017) (citation and internal quotation marks omitted). "If the statute itself does not display an intent to create a private remedy, then a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 1856 (citation, brackets, and internal quotation marks omitted).

The FLSA does not "display an intent," *Ziglar*, 137 S. Ct. at 1855 (brackets omitted), to create a private remedy for employers who violate the statute. To the contrary, it specifically allows suit by "any one or more employees," 29 U.S.C. 216(b), and by the Secretary of Labor, 29 U.S.C. 216(c), without authorizing a suit by an employer, see 29 U.S.C. 215-217. See Pet. App. A12; *Herman* v. *RSR Sec. Servs. Ltd.*, 172 F.3d 132, 144 (2d Cir. 1999). The omission indicates that Congress made a "deliberate choice" to exclude employers. See *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 233 (2011) (citation omitted). Nor can it "possibly be said that employers are members of the class for whose especial benefit" the FLSA was enacted. *Northwest Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 91-92 (1981). Indeed, it is "exactly the opposite," Pet. App. A13: the principal purpose of the FLSA is to protect *workers*, not employers who fail to pay wages and overtime. See 29 U.S.C. 202(a) (setting out FLSA's policy of eliminating labor conditions detrimental to "workers"); *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); *Herman*, 172 F.3d at 144. Moreover, the FLSA contains a comprehensive remedial scheme, see 29 U.S.C. 215-217, and the existence of such a scheme "expressly fashioned by Congress

strongly evidences an intent not to authorize additional remedies." *Northwest Airlines*, 451 U.S. at 93-94. Finally, the legislative history of the FLSA is silent on a right of contribution for employers. Pet. App. A14; accord *Herman*, 172 F.3d at 144. Accordingly, it provides "no support for" petitioners' argument that a private cause of action should be implied. *Northwest Airlines*, 451 U.S. at 94.

Nor does this case fall into one of the limited circumstances in which, after "Congress addresses a subject," a court may fashion a remedy as a matter of federal common law. *Northwest Airlines*, 451 U.S. at 95 n.34; see Pet. App. A15. Formulating a right of contribution is not "'necessary to protect uniquely federal interests,'" such as the rights or duties of the United States, intrastate and international disputes, and admiralty matters, nor has Congress "given the courts the power to develop substantive law" in this area. *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-643 (1981) (citation omitted). Rather, petitioners' liability "is entirely a creature of federal statute," and the judiciary may not, in the face of such a scheme, "fashion new remedies that might upset carefully considered legislative programs." *Northwest Airlines*, 451 U.S. at 97; see *Ziglar*, 137 S. Ct. at 1856.

b. Petitioners contend that this Court's *Northwest Airlines* framework does not apply here because it is "outdated." Pet. 2. But petitioners misunderstand the direction of this Court's jurisprudence about implied rights of action, which has followed a more "cautious course," disfavoring the implication of causes of actions or remedies not explicitly provided by statute. *Ziglar*, 137 S. Ct. at 1855. Because petitioners' claim fails even under *Northwest Airlines*, that is the end of the matter.

Petitioners also suggest that "[c]ontribution is an equitable remedy, not a cause of action, and so is not controlled by the factors previously used by this Court." Pet. 35 (emphasis omitted). That argument conflicts with petitioners' own litigating position: they made a claim for contribution by bringing cross-claims—*i.e.*, causes of action—against the other employers. See Pet. App. A35. In any event, in *Northwest Airlines*, this Court referred to a right to contribution interchangeably as both a "cause of action" and a "remedy." 451 U.S. at 90-91; accord *Texas Indus.*, 451 U.S. at 638-639, 646. Thus, under either framing, this Court's *Northwest Airlines* framework governs.

c. Petitioners concede that there is no conflict among the courts of appeals on this question, and acknowledge that the Second Circuit, like the Ninth Circuit, has held that employers have no private right of action for contribution under the FLSA. See Pet. 30; *Herman*, 172 F.3d at 143-144. Nor do petitioners assert a conflict with any decision of this Court. See Pet. 29-36.

Instead, petitioners seek this Court's review based on a purported "tension" between the decision below and this Court's "equity jurisprudence." Pet. 36. In particular, petitioners assert that the common law recognized an equitable contribution remedy "among joint debtors," Pet. 33, and contend that the right to contribution was "retained and implicitly codified" in the FLSA, Pet. 35. Petitioners' analogy to joint debtors is inapposite: as the court of appeals explained, petitioners "do[] not merely owe a debt to [their] employees; [they] committed a wrong against them." Pet. App. A15. And "[a]t common law there was no right to contribution among joint tortfeasors." *Northwest Airlines*, 451 U.S. at 86; see Pet. App. A12.

Petitioners also contend that various courts have concluded that the FLSA "codified the already existing judge-made, common law cause of action for assumpsit for back wages." Pet. 31 (emphasis omitted). But the cases they cite demonstrate only that some courts have described a claim for wages brought by an employee as similar to a common-law right of assumpsit for purposes of determining whether parties to FLSA suits had a Seventh Amendment right to a jury trial. See, *e.g.*, *Rogers* v. *Loether*, 467 F.2d 1110, 1121-1122 nn. 37, 39 (7th Cir. 1972) (an employee's FLSA claim for wages "is generally viewed as analogous to a common law action of debt or assumpsit" and thus triable to a jury under the Seventh Amendment), aff'd, 415 U.S. 189 (1974). By contrast, in assessing the contribution remedy for purposes of employee-protection laws—including specifically in considering the Equal Pay Act of 1963, which is an amendment to the FLSA, see Pub. L. No. 88-38, 77 Stat. 56—this Court has deemed the situation of joint tortfeasors the relevant comparison. See *Northwest Airlines*, 451 U.S. at 86. In any event, petitioners' mode of analysis fails at the threshold: their efforts "to invoke principles of equity presuppose a legislative intent to allow parties violating the law to draw upon equitable principles to mitigate the consequences of their wrongdoing." *Texas Indus.*, 451 U.S. at 635. Nothing in the FLSA indicates such an intent. To the contrary, as explained above (pp. 15-18, *supra*), the FLSA's text and comprehensive remedial scheme foreclose a right of action for contribution implied or formulated by the courts. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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