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,

Respondent.

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

REPLY BRIEF OF PETITIONERS

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I. THE CIRCUIT CONFLICT IS UNDENIABLE AND UNDERSCORES THE NEED FOR THIS COURT'S REVIEW

A head-on collision clearly exists in this case between the panel's decision and the Third Circuit's decision in *Souryavong v. Lackawanna County*, 872 F.3d 122 (3rd Cir. 2017). Under this Court's Rule 10(a), the Court should grant review.

Respondent does not deny the existence of a head-on conflict of law under the FLSA among the circuits, but, instead, sidesteps the issue by arguing that there are *factual* differences among the cases cited by Petitioners to show the existence of a conflict of *law* among the circuits. OB 9-12. Every case, of course, necessarily presents different relevant facts, but the Court's Rule 10(a) addresses "important matters" of law. What concerns this Court on reviewing the certworthiness of a petition is whether there is a significant conflict on a question of federal *law* between the decision of two or more courts of appeals on the same question of *law*. The importance in such cases lies in the preservation of uniformity of decision in the federal courts upon points solvable by federal *law*—a basic purpose of this Court's certiorari jurisdiction since that jurisdiction was granted by the Judiciary Act of 1891, ch. 517, 26 Stat. 826 (1891). The relevant facts surrounding any question of federal law are secondary to the basis of the Court's decision of whether to grant certiorari on an important question of federal *law* in a petition for certiorari.

The panel refused to conclude that a finding of a willful violation under §255(a) must be based on at least *some* degree of *actual knowledge* of a violation or *subjective awareness* of the possibility of a violation of the FLSA in order to meet this Court's requirement 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). Instead, the panel, citing circuit precedent, held that an employer violates §255(a) when it merely "recklessly 'disregard[s] *the very possibility* that it was violating'" the FLSA (emphasis added). A-9.

The panel's holding *conflicts most directly and 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, 872 F.3d at 127 (emphasis added).

The Third Circuit squarely conflicts with the Ninth Circuit because it requires that to prove a willful FLSA violation an employee must demonstrate that the employer had at least an *actual* awareness of a *potential*

violation of the FLSA. *Id.* The panel's decision is not faithful to *McLaughlin's* definitional requirement. An employer's failure to consider "the very possibility that it was violating" the FLSA may, under certain circumstances, amount to no more than mere negligence, which *McLaughlin* says is not willful conduct. 486 U.S. at 136-37.

If you gave a first-year law school student a set of facts relating to an employer that had failed to pay overtime to its employees and you asked the student to determine if the employer was liable for a "willful" violation of §255(a), you would quickly be asked: "What law do you want me to apply: does the employer have to be subjectively aware of a possible FLSA violation to be willfully liable, or is an employer liable merely because they are aware that they have various duties under the FLSA, for me to determine the issue of willfulness?" That is the core of the issue presented here by the current conflict among the circuits.

Lest anyone doubt this is the crux of the issue, here is how the law firm of Jackson Lewis P.C. reviewed the Third Circuit's decision in *Souryavong* on its official website:

> Despite there being evidence that the … [employer] was "generally aware" of its obligations under the FLSA, that alone was insufficient to create a genuine issue of fact for the jury. For the jury to rule on the issue of willfulness, the evidence must have established that the … [employer] was specifically aware of the two-job

> overtime issue as it related to the employees prior to the dates of the violations.
>
> …
>
> The question of willfulness is a hot-button issue in the context of FLSA claims. The decision in *Souryavong* serves to further limit the kinds of factual scenarios when the statute of limitations for FLSA claims is extended to three years.

Marla N. Presley and Joanna M. Rodriguez, "General Awareness Is Not Enough for Willfulness Under the FLSA," October 24, 2017. Accessed at: https://www.employmentclassactionupdate.com/2017/10/general-awareness-is-not-enough-for-willfulness-under-the-flsa/

Until the Court authoritatively answers the precise question under §255(a) at issue here, a conflict among the circuits on this important question will persist.

II. RESPONDENT'S ARGUMENT THAT THE DECISION BELOW IS CONSISTENT WITH *MCLAUGHLIN'S* DEFINITIONAL DIRECTIVE DISREGARDS CRITICAL ASPECTS OF THE PANEL'S DECISION

Under this Court's Rule 10(c), a petition for a writ of certiorari will likely be granted if a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." The panel's decision is not faithful to *McLaughlin's*

requirement that a "willful" violation under §255(a) have a conscious element on the employer's part.

The panel relied upon the Ninth Circuit's current interpretation of the willful standard under §255(a), which is contained in *Alvarez v. IBP, Inc.,* 339 F.3d 894, 909 (9th Cir. 2003): §255(a) "can apply where an employer disregarded the very possibility that it was violating" the FLSA. A-9 and note 2 (cleaned up).

Respondent contends that the panel never confronted the *Alvarez* willful standard since the facts were clear that Petitioners' low-level payroll employee was in willful violation of the FLSA under any interpretation of *McLaughlin*. OB 12.

The only way to square the two alternate meanings of the word "willful" set out by the Court's holding in *McLaughlin* ("willful" means "the employer either *knew* or showed *reckless disregard* …," 486 U.S. at 133 (emphasis added)) is to attribute a *conscious* element to the phrase "reckless disregard." The phrase "reckless disregard" must necessarily imply *awareness*, since how can a person disregard that which they do not know about or actually comprehend?

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, Petitioners willfully violated the overtime statute. A-7-8.

Since summary judgment was granted for Respondent, the Court "must take the facts alleged by … [Petitioners] to be true." *Burlington Industries, Inc. v.*

Ellerth, 524 U.S. 742, 747 (1998). The uncontested evidence in the record demonstrates that the employee's failure to pay overtime was not willful since she acted (more properly, failed to act) without any *conscious* awareness (much less any conscious indifference) of whether she was violating the FLSA. The *uncontradicted* evidence in the record indicates 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. She recalls "there being a potential exception to overtime requirements as I understood them potentially due to the type of work being performed by employees …." A-49. 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 negligence or an innocent mistake of law, neither of which qualifies as knowledge or even a conscious indifference (if "reckless disregard" is properly interpreted under *McLaughlin*) and therefore cannot rise to the level of a willful violation under §255(a).

The panel's holding contravenes the basic thrust of *McLaughlin* and the Court should take this opportunity to recalibrate once again the definition of "willful" in §255(a).

III. RESPONDENT FAILS TO REBUT THE CLEAR STATUTORY IMPERATIVE THAT THE FLSA WAS NEVER INTENDED TO AND DOES NOT ALLOW LOW-LEVEL EMPLOYEES TO MAKE BINDING DECISIONS ABOUT OVERTIME WORK

Respondent doesn't deny that under the FLSA, employers must only pay for work they knew or should have known about and, therefore, permitted. OB 14-15. Respondent also doesn't disagree that the courts have **unanimously** held that 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 for failure to pay overtime wages. OB 14-15.

Respondent asserts, however, that the cases cited by Petitioners stand for only the proposition that a finding of *management knowledge* is a merely "sufficient" but not necessary condition for a finding of willful liability under §255(a). OB 14. But that's not what the cases, in fact, hold. See, *e.g.*, *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) (Employee "did not raise a genuine issue of material fact concerning whether any **official** of …[employer's] should have known about his alleged uncompensated hours."); *Maciel v. City of Los Angeles*, 569 F. Supp. 2d 1038, 1046 (C.D. Cal. 2008) (particular employee with knowledge "does not qualify as **management**") (all emphasis added).

Under §203(g), it is an *employer's* knowledge that the work is being done that provides the justification for compelling the employer to compensate the employee for

it. This leads to the conclusion that the knowledge of a person like the low-level payroll processor in this case was not intended to be imputed as knowledge to an employer under the FLSA. The panel 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.

In *Burlington Industries, Inc. v. Ellerth*, *supra*, the Court undertook a similar analysis (admittedly, in a different legal setting) to determine what level of employee within an employer is sufficiently clothed with corporate authority to bind the company by their knowledge of a violation (in that case) of Title VII. The Court said that "the Restatement (Second) of Agency (1957) … is a **useful beginning point** for a discussion of general agency principles, but **"common-law principles may not be transferable in all their particulars to Title VII."** 524 U.S. at 755 (emphasis added).

The Court continued:

> [O]ne co-worker … cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.
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> …

> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act.
>
> …
>
> For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.

Id. at 762-64.

While general agency law may be the starting point of analysis under §203(g) as well, it does not necessarily supply the ultimate rule that Congress intended under the FLSA. Section 203(g) requires that the person who has the requisite knowledge about overtime work be someone *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. Congress phrased §203(g) to delimit rather than expand the range of potential employer violations for not paying wages.

Finally, Respondent fails to address how his argument is plausible in light of 5 C.F.R. §551.104 (definition of "Suffered or permitted work"). That regulation states that if "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" (emphasis added), then the work is compensable under the FLSA.

IV. THIS COURT'S CONSISTENT EQUITY JURISPRUDENCE MAKES CLEAR THAT THE FLSA PRESERVES THE LONG-STANDING EQUITABLE REMEDY OF CONTRIBUTION AMONG JOINT-EMPLOYERS

Petitioners contend that 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). That is, Petitioners argue that an equitable remedy, like contribution, does not lose its identity simply because it finds itself enmeshed in a statute that embraces subject matter related to that equitable remedy.

Respondent seeks to reaffirm the validity of the rationale put forward by the Second Circuit in 1999 to conclude that the FLSA did not *create* an implied cause of action for contribution. *Herman v. RSR Security Services Ltd.*, 172 F.3d 132 (2nd Cir. 1999). OB 15-19. The panel relied on this case to come to the same conclusion. Respondent misses the thrust of Petitioners' argument, which is that the *pre-existing* remedy of contribution was not nullified when Congress created a statutory right of action in the FLSA for an employee to sue their employer for failure to pay regular wages and overtime.

Respondent contends that Petitioners are wrongdoing tortfeasors and so on that basis not entitled

to contribution under the FLSA. OB 18. The courts are unanimous that §216(b) of the FLSA is a codification of the common law action for assumpsit, which is an action sounding in contract. See, *e.g., Wirtz v. Jones*, 340 F.2d 901, 904 (5th Cir. 1965). Therefore, since §216(b) is a claim for relief for breach of contract, and breach of contract is *not* a tort (at least where the defendant's act is not independently wrongful), Respondents are not joint *tortfeasors*. See Richard A. Posner, Let Us Never Blame a Contract Breaker, 107 Mich. L. Rev. 1349 (2009). Accessed at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1312&context=mlr So, Respondent's objection[1] to allowing contribution between joint tortfeasors is not relevant under the facts here.

The case of *Batard v. Hawes*, 2 El. & Bl. 287, 118 Eng.Rep. 775 (Q. B. 1853) (12 defendants on a joint contract of employment of a civil engineer entitled to the remedy of contribution). Accessed at: http://www.commonlii.org/uk/cases/EngR/1853/2.pdf, cited in the Petition, Pet. 33, clearly demonstrates that contribution has been allowed for at least 170 years (and probably longer) between joint employers on a claim for breach of contract for failure to pay wages. The essence of Petitioners' argument is that since §216(b) is a codification of the common law claim for breach of contract for failure to pay wages, for which joint employers *could* seek contribution from those who didn't

[1] However misplaced that objection may be under modern law. See *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286 (1993) (allowing contribution among "joint tortfeasors" in 10b-5 actions).

pay their fair share of a judgment for wages, a joint employer in a §216(b) action under the FLSA also should be allowed the same remedy of contribution, since codification of the action for assumpsit by the FLSA did not abolish the concomitant remedy of contribution among joint obligors on a joint judgment for unpaid wages.

Respondent largely ignores this argument, commenting only that "Petitioners' analogy to joint debtors is inapposite." OB 18.

But, as this Court has repeatedly emphasized, principles of common law are entrenched in our federal system of law and related legislation must expressly convey an intent to override established common law doctrines. See, *e.g., 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. Texas*, 507 U.S. 529, 534 (1993) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); *Miller v. French*, 530 U.S. 327, 340-41 (2000) (Courts "should not construe a statute to displace courts' traditional equitable authority absent the 'clearest command,' … or an 'inescapable inference' to the contrary… .").

The continuing relevance of established general doctrines of common law is undeniable. Statutes, even if

silent, do not automatically displace rules of unwritten law (that is, the common law). *United States v. Bestfoods*, 524 U.S. 51, 63 (1998) ("[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.'"). This is not to say that Congress somehow tacitly "commands" that a common law doctrine be "inserted" into a statute, it is merely an acknowledgement that enactment of a statute does not necessarily extinguish related background common law doctrines consistent (or at least, not inconsistent) with statutory law. See generally Caleb Nelson, The Persistence of General Law, 106 Colum. L. Rev. 503 (2006). Accessed at: https://www.law.virginia.edu/system/files/faculty/hein/nelson/106colum_l_rev503_2006.pdf

The Court should grant review on this question and hold that the FLSA did not displace the equitable doctrine of contribution among joint employers in FLSA §216(b) actions.

CONCLUSION

This case presents a clean vehicle to decide several important FLSA questions presented—several recurrent issues that will affect the rights and responsibilities of employees and employers across the country under a statute that is becoming increasingly important in today's workplace. The Court should take this opportunity to settle the debate. The petition deserves this Court's review, which should be granted.

Respectfully submitted,

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