

No. 17-648

IN THE
Supreme Court of the United States

ANTHONY RAIMONDO,
Petitioner,

v.

JOSÉ ARNULFO ARIAS,
Respondent.

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

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether an attorney who retaliates against his client's employee for engaging in protected activity under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, can be held liable for that act where the FLSA allows suits for retaliation against "any person acting directly or indirectly in the interest of an employer in relation to an employee," *id.* at § 203(d).

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STATUTORY PROVISIONS INVOLVED

In addition to the FLSA provisions listed in the petition:

Section 3(a) of the FLSA, 29 U.S.C § 203(a) provides: “‘Person’ means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.”

STATEMENT OF THE CASE

This matter arises from a retaliation action brought under Sections 215(a)(3) and 216(b) of the Fair Labor Standards Act (“FLSA”), and filed on May 8, 2013 in the U.S. District Court for the Eastern District of California.¹ At all relevant times, Petitioner Anthony Raimondo (“Petitioner”) represented his client, Angelo Dairy, in a wage and hour action brought against it in California state court in 2006 by Respondent José Arnulfo Arias (“Respondent”), a former Angelo Dairy employee. In his complaint before the District Court, Respondent alleged that Petitioner contacted Immigration and Customs Enforcement (“ICE”) to report Respondent in retaliation for his having filed the 2006 wage and hour action against Angelo Dairy.

Respondent filed his original complaint in the present action against Petitioner, Angelo Dairy, and Angelo Dairy’s owners. On June 5, 2013, Petitioner filed a motion to dismiss the complaint, arguing *inter alia* that he did not act as an “employer” within the meaning of that term under Section 216(b). Without hearing oral argument, the District Court granted

¹ Respondent’s First Amended Complaint, which is the complaint at issue here, also alleged state law claims for intentional infliction of emotional distress and unfair competition. Those claims are not before the Court.

Petitioner's motion to dismiss as to the Section 215(a)(3) claim, but granted Respondent leave to amend the complaint. On July 10, 2014, Respondent filed an amended complaint ("Complaint") against Petitioner only,² wherein he added additional allegations specific to Petitioner's status as an "employer" under the FLSA.

As alleged in the Complaint, after the parties had extensively litigated the 2006 state-court action and on the same day that a mediation had failed, Petitioner emailed an ICE agent on June 1, 2011 with information about Respondent and asked that the agent "[l]et me know if there is anything that you can do." On June 15, 2011, Petitioner sent additional information to the ICE agent and told her that "Arias will be attending a deposition next week. If there is an interest in apprehending him, please let me know so that we can make the necessary arrangements." The ICE agent responded the next day, indicating that based on ICE's records, Respondent had no legal status and that she would forward the information Petitioner had provided to Enforcement and Removal Operations ("ERO"). Petitioner replied to the ICE agent, requesting that she "[p]lease let ERO know that they can expect our full cooperation and assistance" and that she "let me know if there is anything I can do to be of assistance to you." Respondent became aware of Petitioner's communications with ICE on June 22, 2011, suffering significant fear and anxiety as a result. Under the threat of deportation created by Petitioner's retaliatory acts, Respondent agreed to settle his claims on July 11, 2011, one month before trial.

² Respondent reached a settlement with the other defendants prior to filing the first amended complaint.

In his Complaint, Respondent alleged that as Angelo Dairy's "attorney, representative, and agent for purposes of the 2006 Lawsuit, Defendant RAIMONDO was acting in the interest of the ANGELOS in relation to Plaintiff" when he engaged in the above conduct and that "[a]s such, RAIMONDO is an 'employer' within the meaning of Section 203(d) for purposes of liability to suit under Section 216(b)." Respondent further alleged that Petitioner undertook his actions "in direct response to Plaintiff's assertion of workplace rights protected by the FLSA."³

As noted by the panel below, the Complaint also alleged that "[o]n at least five additional occasions, and consistent with his pattern and practice, Defendant RAIMONDO has contacted ICE with respect to employees who have asserted their workplace rights against employers whom Defendant RAIMONDO has represented, and has offered his assistance to ICE in apprehending those employees." Petitioner alluded to this practice in an email in which he stated, "The time[s] when I have had litigants deported, I have always simply taken action rather than make any threats. The attorneys find out when their clients are already gone."

The District Court granted Petitioner's second motion to dismiss, again without hearing oral argument, reasoning that "the FLSA's plain language within Section 216 explicitly provides that an employee may only sue employers for retaliation." Based

³ Petitioner suggests that he contacted ICE solely to ensure that Respondent's counsel was not violating federal funding restrictions related to representing undocumented immigrants. Pet. 24. Respondent has alleged otherwise and, given the procedural posture of this case, his allegations must be accepted as true.

primarily on FLSA wage and hour cases, the court determined that an “economic realities” or “economic control” test defined the scope of “employer” liability, even for retaliation claims. According to the District Court, since Respondent had not “alleged that Defendant exercised any control over Plaintiff’s employment relationship,” he could not state a retaliation claim against him.

Respondent appealed to the U.S. Court of Appeals for the Ninth Circuit. Respondent asked that court to decide whether “Appellant, who was subjected by Appellee to retaliation prohibited by Section 215(a)(3) of the [FLSA], should nonetheless be denied any recourse for that retaliation based on Appellee’s contention that he was not Appellant’s ‘employer,’ even though the FLSA proscribes retaliation undertaken by ‘any person,’ and defines ‘employer’ as ‘any person acting directly or indirectly in the interest of an employer in relation to an employee.’” Opening Br. 1-2, No. 15-16120, Dock. No. 13-1.

In a unanimous opinion authored by Judge Stephen S. Trott, the Ninth Circuit reversed, holding that “Arias may proceed with this retaliation action against Raimondo under FLSA sections 215(a)(3) and 216(b).” *Arias v. Raimondo*, 860 F.3d 1185, 1192 (9th Cir. 2017); Pet. App. 18a. The court found that in reaching the opposite result, the District Court had ignored the plain language of the relevant statutory provisions and relied on inapposite case law. Pet. App. 10a, 12a.

According to the court, the issue before it was whether “an employer’s attorney [can] be held liable for retaliating against his client’s employee because the employee sued his client for violations of workplace laws.” Pet. App. 3a. The court held that Petitioner was a proper defendant because he fell

under the plain language of the FLSA’s statutory definition of “employer.” Pet. App. 18a. To reach this conclusion, the court reviewed the relevant statutory provisions. *See, e.g.*, Pet. App. 10a-11a, 16a. It noted that Section 215(a)(3), the anti-retaliation provision, applies to “any person” and that the FLSA definition of “person” includes “legal representative.” *Id.* at 10a-11a. “Section 216(b) in turn creates a private right of action against any ‘employer’ who violates section 215(a)(3); and the FLSA defines ‘employer’ to include ‘any person acting directly or indirectly in the interest of an employer in relation to an employee.’” *Id.* at 11a.

The Ninth Circuit determined that the plain language of these statutory terms was also in line with the purpose of the FLSA’s anti-retaliation provision—“to enable workers to avail themselves of their statutory rights in court by invoking the legal process designed by Congress to protect them.” *Id.* at 11a. This purpose, the court reasoned, “is not served by importing an ‘economic control’ or an ‘economic realities’ test” into the retaliation context. *Id.* The court therefore concluded that Petitioner’s “behavior as alleged in Arias’s complaint manifestly falls within the purview, the purpose, and the plain language of FLSA sections 203(a), 203(d), and 215(a)(3).” *Id.* at 18a.

In answering the narrow question posed in the affirmative, the court limited its holding “to retaliation claims.” *Id.* The panel expressly distinguished and left intact the line of FLSA cases applying “tests involving economic control and economic realities to determine who is an employer” in actions involving “substantive wage and hour issues.” *Id.* at 11a.

Petitioner’s characterization of the Ninth Circuit’s opinion notwithstanding, the court did not hold that Respondent could bring a retaliation claim directly

under 29 U.S.C. § 215(a)(3), Pet. 15-19, or that “an employee can sue any person who retaliates against him or her, whether or not the defendant is truly an ‘employer’ under the FLSA.” Pet. 5.

On July 6, 2017, Petitioner filed a Petition for Panel Rehearing and Rehearing En Banc. The Ninth Circuit denied the petition on August 2, 2017, noting that the panel voted to deny the petition for panel rehearing and that “[t]he full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it.” Order Den. Pet. for Reh’g and Reh’g En Banc, No. 15-16120, Dock. No. 60. Petitioner now seeks certiorari.

REASONS FOR DENYING THE PETITION

Certiorari would be inappropriate. The decision below does not conflict with any decision of this Court or any circuit court. Nor could it; neither this Court nor any other circuit court has decided the narrow issue before the panel below. The Petition should therefore be denied.

I. THERE IS NO SPLIT OF AUTHORITY BECAUSE NO OTHER CIRCUIT COURT HAS SQUARELY ADDRESSED THE ISSUE BEFORE THE PANEL BELOW.

A. The decision below does not conflict with those of other circuit courts.

No other circuit court has decided the issue before the panel below. Petitioner nonetheless attempts to create the appearance of a conflict by pointing, for the most part, to FLSA decisions that did not involve retaliation claims at all. *See* Pet. 12-13. And the other FLSA cases Petitioner cites did not entail any consideration of whether a third party acting in the

interest of a nominal employer in relation to an employee could be held liable for retaliation. *See* Pet. 11, 17-18.

In *Moore v. Appliance Direct, Inc.*, 708 F.3d 1233, 1237 (11th Cir. 2013), the court noted that “[a] corporate officer is personally liable as an FLSA employer if he has ‘operational control of a corporation’s covered enterprise,’” and upheld a jury finding that the CEO and majority owner met this test. *Moore* did not have occasion to explore whether someone outside of the corporation could be an “employer” under Section 203(d). *Irizarry v. Catsimatidis*, 722 F.3d 99 (2d Cir. 2013), is even less relevant. The *Irizarry* plaintiffs originally brought wage and hour claims against corporate and individual defendants, including John Catsimatidis,⁴ and a claim for “retaliation pursuant to [the] FLSA . . . against [the corporate defendants] *only*.” *Torres v. Gristede’s Operating Corp.*, 628 F. Supp. 2d 447, 453 (S.D.N.Y. 2008) (emphasis added).⁵ Contrary to Petitioner’s characterization of the case, Pet. 12, the Second Circuit therefore examined whether the individual defendant, Catsimatidis, was an “employer” for purposes of the wage and hour claims, not the retaliation claim. Likewise, *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26 (1st Cir. 2007), and *United States Department of Labor v. Cole Enterprises, Inc.*, 62 F.3d

⁴ Catsimatidis was the “owner and corporate head” of the corporate defendants. *Irizarry*, 722 F.3d at 102.

⁵ The Second Circuit opinion refers to this decision as “*Torres II*”. *Irizarry v. Catsimatidis*, 722 F.3d 99, 102 (2d Cir. 2013) (citing to *Torres v. Gristede’s Operating Corp.*, 628 F.Supp.2d 447, 461–63, 475 (S.D.N.Y.2008)).

775 (6th Cir. 1995), *see* Pet. 12-13, did not involve retaliation claims.

Nor does the decision below conflict with *Dellinger v. Science Applications International Corp.*, 649 F.3d 226 (4th Cir. 2011). In that case the plaintiff, an applicant, brought a FLSA claim for retaliation against a prospective employer for rescinding its job offer to her after it discovered that she had filed a FLSA complaint against her prior employer. *Id.* at 227. The question for decision in *Dellinger*, therefore, was “whether an applicant for employment is an ‘employee’ authorized to sue and obtain relief for retaliation under § 216(b).” *Id.* at 228. *Dellinger*’s holding that “the FLSA anti-retaliation provision . . . does not authorize prospective employees to bring retaliation claims against prospective employers,” *id.* at 231, turned on whether the plaintiff—who had never been in an employment relationship with the defendant—was nonetheless an “employee” under the FLSA. *See id.* at 229 (“[A]n applicant who never began or performed any work could not, by the language of the FLSA, be an ‘employee.’”). Notably, the majority did not even cite to Section 203(d)’s definition of “employer”—which, presumably, would have been its starting point had it been attempting to decide the scope of “employer” under the facts of that case. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (“The starting point for our interpretation of a statute is always its language.”).

Dellinger is not only inapposite to the issue decided below; it is hardly in tension with the panel’s opinion. Respondent alleged that Petitioner, “acting as the Angelos’ agent, retaliated against [Respondent] . . . for filing his original case against [Petitioner’s] clients[.]” Pet. App. 9a. Accordingly, Respondent alleged that

Petitioner engaged in retaliatory acts “*directly or indirectly in the interest of* [Angelo Dairy] in relation to” the Respondent. 29 U.S.C. § 203(d) (emphasis added). In *Dellinger*, the plaintiff did not allege that her prospective employer had acted in the direct or indirect interest of her former employer, against whom she had filed the FLSA action.⁶ Even under the analysis of the panel below, therefore, the *Dellinger* defendant would not have necessarily been subjected to suit.

Petitioner lastly attempts to conjure a conflict with *Dellinger* by pointing to a comment in *dicta* by the *Dellinger* majority that “by using the term ‘employee’ in the anti-retaliation provision, Congress was . . . providing protection to those in an employment relationship with their employer.” Pet. 17; *see also* Pet. 18. Because *Dellinger* never considered the scope of “employer” under the FLSA, this language has no direct bearing on the panel’s decision. Moreover, as discussed above, Respondent had an employment relationship with Angelo Dairy, and Petitioner retaliated against him in the interest of that employer. Permitting Respondent to hold Petitioner liable for this retaliation “foster[s] a climate in which compliance with the substantive provisions of the [FLSA] would be enhanced.” *Dellinger*, 649 F.3d at 230 (internal quotation marks and citation omitted). *Dellinger* and the decision below are reconcilable, and any inferred inconsistency in *dicta* or general principles is not sufficient reason for certiorari.

⁶ *Dellinger* therefore did not involve a retaliation claim against a third party acting in the interest of a nominal employer in relation to an employee. 649 F.3d at 227. As such, the *Dellinger* court did not have occasion to consider whether a defendant such as Petitioner could be held liable for retaliation under the FLSA.

Even assuming *arguendo* that *Dellinger* and the decision below present a conflict on the same matter of law, however, the lack of any other conflicting federal circuit court decision makes this case inappropriate for certiorari. As the Court has recognized, where an issue has not been thoroughly explored by the courts below, “further consideration of . . . the problem by other courts” would enable the Court “to deal with the issue more wisely at a later date.” *McCray v. New York*, 461 U.S. 961, 962 (1983). *See also* Stephen S. Shapiro et al., *Supreme Court Practice* 247 (10th ed. 2013) (“[C]onflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved . . . The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.”) (quoting Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177, 183 (1982)). This is especially true here, where no other circuit court has explored the scope of the statutory definition of “employer” within the context of a FLSA retaliation claim brought against an individual acting in the interest of the employee’s nominal employer.

B. The panel did not hold that a retaliation claim could be brought directly under Section 215(a)(3).

Petitioner misleadingly argues that the decision below held that an employee can sue “any person” for retaliation directly under § 215(a)(3), instead of being limited to suing “employers” under § 216(b), the section delineating the FLSA’s private rights of action. Pet. 15-19. This is a straw man argument based on a mischaracterization of the panel’s decision. Because the decision below nowhere held that an action for retaliation can be brought directly under Section

215(a)(3), it does not conflict with any of the decisions Petitioner cites that hold otherwise. *See* Pet. 15-16 (citing to various circuit court decisions that have either held or noted that Section 215(a)(3) does not create a private right of action).⁷

Moreover, contrary to Petitioner’s suggestion, the panel below did not “embrace” *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37 (3d Cir. 1943), for the proposition that Respondent could bring his action directly under § 215(a)(3). Pet. 17. As the panel recognized, *Bowe* was decided “before Congress amended the FLSA in 1977 to explicitly create a private right of action for violations of section 215(a)(3).” Pet. App. 16a. Instead, the panel referred to *Bowe* to the extent that its reasoning reinforced the panel’s interpretation of “the difference in reach between FLSA’s substantive economic provisions and its anti-retaliation provision,” and the scope of the definition of “employer.” *Id.* at 16a-17a.

⁷ Moreover, the decisions Petitioner cites in support of this argument did not address the issue *actually* before the panel below—whether a third party such as Petitioner could be held liable for retaliation when acting in the interest of an employer in relation to an employee. *See, e.g., Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 930, 932 n.7 (11th Cir. 2000) (deciding whether the plaintiff could recover punitive damages under his retaliation claim and expressly *not* deciding “whether the district court’s determination that [the defendant] could be sued individually as an ‘employer’ under the FLSA is correct.”).

**II. THE DECISION BELOW IS
CONSISTENT WITH THE COURT'S
PRECEDENT.**

**A. The decision below does not violate the
Court's precedent regarding the
“economic reality” test employed in
wage and hour cases.**

Petitioner suggests the decision below is somehow inconsistent with this Court's precedent regarding the inquiry into “employer” status utilized in adjudicating violations of the FLSA's substantive wage and hour protections. Pet. 10-11, 20. But neither its holding nor its reasoning disturbs those cases.

In this regard, Petitioner cites to *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961), and *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947), neither of which addressed the issue before the court below. Pet. 10. Neither case involved retaliation claims or any significant exploration of the FLSA's statutory definition of “employer.” Furthermore, neither case held that an “economic reality” test defined that term. Instead, in *Goldberg*, the Court considered whether a cooperative's members were also its “employees,” as defined under the FLSA. *Goldberg*, 366 U.S. at 28–29. It held that they were. *Id.* at 32. In *Rutherford*, the Court “pass[ed] only upon the question whether” a group of meat “boners were employees of the operator of [a] Kansas plant under the [FLSA]” or independent contractors, as alleged by the defendants. 331 U.S. at 727–28. The Court considered “the circumstances of the whole activity,” *id.* at 730, and held that they were employees, not independent contractors, *id.* at 729, 730.

The decision below therefore does not disturb, much less conflict with, the above cases or others that involve an analysis of “economic realities” in the context of FLSA wage and hour actions. Instead, the narrow issue before the panel, its reasoning, and its holding turned on the definition of “employer” in particular relation to FLSA retaliation claims. Pet. App. 18a-19a.

B. The decision below is consistent with the Court’s broad construal of statutory protections against retaliation.

The panel relied on and faithfully applied decisions of this Court that explore the scope of anti-retaliation provisions in remedial statutes. *See* Pet. App. 11a, 13a-16a. (citing to *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997), and *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)). This Court has consistently interpreted these statutes’ anti-retaliation provisions to be broader in scope than their substantive provisions. *See, e.g., id.* Unlike the District Court, the Ninth Circuit properly recognized that application of an “economic control” or “economic reality” test to FLSA retaliation claims would not conform with the Court’s guidance in analogous statutory contexts.

In *Robinson*, the Court considered “whether the term ‘employees,’ as used in” the anti-retaliation provision in Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e-3(a), “includes former employees[.]” 519 U.S. at 339. Because the Court found this term ambiguous, to resolve this question it looked to the broader statutory context and to the “primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms.” 519 U.S. at 346. The Court resolved the

ambiguity in favor of including former employees within the definition of “employee” as to do otherwise “would be destructive of” the anti-retaliation provision’s purpose. *Id.* This purpose would be severely undermined if an “an entire class of [retaliatory] acts under Title VII,” *id.* at 346, such as retaliatory discharge, could escape the statute’s reach.

The Court in *Burlington* relied in part on *Robinson* to decide whether Title VII’s anti-retaliation provision “confine[s] actionable retaliation to activity that affects the terms and conditions of employment[.]” 548 U.S. at 57. In exploring this question, the Court compared the text of the anti-retaliation and substantive provisions, and then reasoned that Congress intended the provisions to be different in scope, “for the two provisions differ not only in language but in purpose as well.” *Id.* at 63. The Court noted that, unlike the substantive provisions, the “antiretaliation provision’s ‘primary purpose,’” was to “[m]aintain[] unfettered access to statutory remedial mechanisms.” *Id.* at 64 (citing to *Robinson*, 519 U.S. at 346). As the Court explained, this objective cannot be secured “by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the antiretaliation provision’s objective would *not* be achieved.” *Id.* at 63. In light of this, the Court held that “Title VII’s substantive provision and its anti-retaliation provision are not coterminous. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.” *Id.* at 67; *see also id.* at 66-67 (finding support for this conclusion in case law, such as *Bill Johnson’s Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 740 (1983), regarding the scope of the National Labor Relations Act’s anti-retaliation provision).

Just as under Title VII, the scope of the FLSA’s anti-retaliation provision is necessarily broader than that of its substantive wage and hour provisions; interpreting it otherwise would allow the statute to be fatally undermined with impunity. The Ninth Circuit recognized this. As the panel noted, unlike the FLSA’s substantive economic provisions, its anti-retaliation provision aims to “enable workers to avail themselves of their statutory rights in court by invoking the legal process designed by Congress to protect them.” Pet. App. 11a (citing to *Robinson*, 519 U.S. at 346). Persons other than actual employers can engage in retaliation that flouts this purpose, and the FLSA’s private right of action allows for suit against these persons. Pet. App. 16a. Therefore, as in *Burlington*, the FLSA anti-retaliation provision’s “purpose reinforces what language already indicates,” *Burlington*, 548 U.S. at 64—that persons who do not exert economic control over an employee, but engage in retaliatory acts in the interest of an employer in relation to that employee, can be held liable for retaliation under the FLSA.

III. THE NARROW DECISION BELOW IS CLOSELY TETHERED TO THE ANTI-RETALIATION AIMS OF THE FLSA.

Petitioner attempts to suggest that the decision below will enable employees to sue anyone for retaliation as long as that defendant had any sort of relationship with the employee’s nominal employer. Pet. 23-26. This is simply not the case. The panel decided the narrow question whether “an employer’s attorney [can] be held liable for retaliating against his client’s employee because the employee sued his client for violations of workplace laws[.]” Pet. App. 3a. Its holding relied on the underlying allegations, to be taken as true, that Petitioner retaliated because

Respondent had filed a wage and hour action against his client—a protected activity under the FLSA—and that he did so in his client’s direct or indirect interest. *Id.* at 4a-9a. Petitioner’s posited hypotheticals of unintended consequences miss their mark as none involves these necessary underlying elements. None of these hypotheticals involve the imaginary defendant herself committing the act of retaliation (the triggering adverse employment action) or herself having a retaliatory motive—let alone sharing such a motive with the employer—because the employee engaged in protected FLSA activity.

Petitioner’s discussion of the decision’s asserted consequences for attorneys “advising their clients regarding the legality of a contemplated” action or for advocating on behalf of their clients is completely beside the point. Petitioner did not “advise” his client to contact ICE to assist in Respondent’s deportation—he did this himself. Therefore, nothing in the decision implicates the confidentiality of the attorney-client relationship. Moreover, the panel did not address whether there is ever a legitimate reason to “inquir[e] about the immigration status of . . . clients’ employees.” Pet. 24. Indeed, the panel had no need to since, here, Respondent alleged that Petitioner reported him to ICE in retaliation for his protected activity. *See Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 895–96 (1984) (holding that even otherwise lawful contacts with the Immigration and Naturalization Service are made unlawful by the National Labor Relations Act if undertaken for retaliatory reasons).

The facts of the present case demonstrate the actual widespread and harmful consequences of the opposite scenario, allowing attorneys like Petitioner to retaliate against their clients’ employees with impunity. The

FLSA anti-retaliation provision’s “primary purpose of . . . [m]aintaining unfettered access to statutory remedial mechanisms,” *Robinson*, 519 U.S. at 346, would be severely undermined if an employer’s attorney could simply make plaintiffs who bring FLSA claims quite literally disappear. As the panel noted, Petitioner’s “activity in this case on behalf of his clients illustrates the wisdom of” the FLSA’s plain language extending its reach to actors like him. Pet. App. 16a.

**IV. CERTIORARI SHOULD BE DENIED
BECAUSE THE DECISION BELOW WAS
CORRECTLY DECIDED.**

The panel properly interpreted the relevant FLSA provisions to encompass Petitioner as an “employer.”⁸ As noted above, the panel determined that the plain language of the FLSA’s relevant provisions subjected Petitioner to suit for retaliation; the anti-retaliation provision’s “purpose reinforce[d] what [this] language already indicate[d.]” *Burlington*, 548 U.S. at 64.

Section 215(a)(3), an anti-retaliation provision, makes it unlawful “for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . . under or related to this chapter.” The FLSA defines the term “person” to include a “legal representative.” *Id.* § 203(a). Section 216(b) in turn creates a private right of action against any “employer” who violates section 215(a)(3); and the FLSA defines “employer” to include “any

⁸ Even if the Court were to disagree, “the perceived correctness of the judgment” below is not sufficient grounds to grant certiorari. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974).

person acting directly or indirectly in the interest of an employer in relation to an employee.” *Id.* §§ 203(d), 216(b).

Pet. App. 10a-11a. In other words, a “legal representative” violates the FLSA’s anti-retaliation provision if she “in any . . . manner discriminate[s] against any employee because such employee has filed any complaint.” 29 U.S.C. §§ 203(a), 215(a)(3). A “legal representative” “acting directly or indirectly in the interest of *an* employer *in relation to* an employee” is an “employer.” *Id.* § 203(d) (emphasis added). And “*any* employer who violates” § 215(a)(3) “shall be liable for such legal or equitable relief as may be appropriate *to effectuate the purposes of*” that section. *Id.* § 215(a)(3) (emphasis added). Under these plain terms, Petitioner is subject to suit. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (“When a statute includes an explicit definition, we must follow that definition, even if it varies from that term’s ordinary meaning.”).

The panel did not equate the statutory term “any person” with “employer.” Pet. 18-20. Instead, it correctly recognized that the statutory definition of “employer” incorporates “any person” into its terms. These two terms, as made clear by the panel, are not coterminous since “employer” limits the universe of “persons” that fall within its reach to only those who act directly or indirectly in the interest of a nominal employer in relation to an employee. Pet. App. 10a-11a, 16a.

Nor does the panel opinion require that “employer” be given two definitions. While the statutory definition of “employer” is broad, the FLSA’s substantive wage and hour provisions, 29 U.S.C. §§ 206-07, “focus [only] on de facto employers[.]” Pet. App. 16a; *see also id.* at 12a (“[T]he FLSA’s primary wage and hour obligations

are unambiguously imposed only on an employee’s de facto ‘employer’[.]”). For example, Section 206 outlines the wages an “employer shall pay to each of *his* employees” under a variety of scenarios. 29 U.S.C. § 206 (emphasis added). Section 207 provides that “no employer *shall employ* any of *his* employees” for more than a certain number of hours, depending on a variety of factors. 29 U.S.C. § 207 (emphasis added).⁹ Because these provisions confine only the behavior of de facto employers who “pay” or “employ” *their* employees, “[i]t stands to reason that” courts would apply “tests involving economic control and economic realities to determine” whether a defendant in a wage and hour action “controls substantive wage and hours issues.” Pet. App. 11a. If he does not, he falls outside the scope of these substantive wage and hour provisions—not of the FLSA’s statutory definition of “employer.”¹⁰

⁹ See also, *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 29 (1961) (citing to the provisions at issue there, including 29 U.S.C. § 211(c), which provides that “[e]very employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons *employed by him*[.]”) (emphasis added).

¹⁰ In *Robinson*, the Court examined a similar issue when arriving at its holding that Title VII’s reference to “employees” under its anti-retaliation provision included former employees. *Robinson*, 519 U.S. at 342-44. There, the Court noted that “there are sections of Title VII where, in context, use of the term ‘employee’ refers unambiguously to a current employee,” whereas in other sections it included former employees. *Id.* at 343-44. In light of this, the Court instructed that “each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute.” *Id.* There, the Court agreed that use of “his” before “employees” “narrows the scope of [a] provision.” *Id.* at 344.

Although involving a different statute, the contextual considerations here parallel those *Burlington* found significant. Pet. 22 (stating to the contrary). As in *Burlington*, the panel’s “conclusion was dictated by different language in the [relevant] provisions[.]” Moreover, the FLSA replicates Title VII in that the purpose of its substantive wage and hour provisions differs from the purpose of its anti-retaliation provision. The latter is similar in both statutes. *Compare Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“By the proscription of retaliatory acts set forth in [§ 215(a)(3)] . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.”) *with Burlington*, 548 U.S. at 63 (2006) (noting that Title VII’s “antiretaliation provision seeks to secure [the anti-discrimination provision’s] primary objective by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.”); *see also Robinson*, 519 U.S. at 346 (relying, in a Title VII case, on *Mitchell*, a FLSA case, to determine the purpose of Title VII’s anti-retaliation provision).

V. THE DECISION BELOW IS NOT THE PROPER VEHICLE TO DECIDE THE NARROW QUESTION PRESENTED.

The Ninth Circuit’s decision does not conflict with any decision of this Court or any other federal circuit court. Even if it did, any such conflict would be potential, not actual and, if anything, should await further development in the lower courts. Finally, the decision below was correctly decided. That a reversal by this Court “would end the litigation,” Pet. 26, is hardly a ground on which to grant certiorari.

CONCLUSION

The petition should be denied.

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