

**In The
Supreme Court of the United States**

— ♦ —
ANTHONY P. RAIMONDO,
Petitioner,

v.
JOSE ARNULFO ARIAS,
Respondent.

— ♦ —
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

— ♦ —
**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

— ♦ —
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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

The Ninth Circuit construed the term “employer” in the private right of action for retaliation under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 216(b) (2012), so that any person—including an attorney representing an employer—can be sued for retaliation. As Anthony Raimondo’s petition for writ of certiorari demonstrated, this holding conflicts with the law of other circuits, flouts this Court’s precedent mandating an economic reality/operational control test for determining employer status under the FLSA, and creates harmful consequences for attorneys and other professionals representing employers. This Court’s review is urgently required.

Jose Arias’s brief in opposition is an exercise in wishful thinking. He does not deny that Raimondo would have prevailed in other courts (like the Second and Eleventh Circuits), all but conceding a split over the proper mode of analysis that merits this Court’s review. Arias pretends as though the Ninth Circuit limited its holding to the facts of this case, when in fact it construed the term “employer” for all retaliation cases under the FLSA. He tries to make it seem that this Court’s economic reality/operational control test—which other circuits apply to determine employer status under the FLSA—somehow does not apply to FLSA retaliation claims, when in fact the statute does not support this view and no court has ever so held.

Because of the Ninth Circuit’s decision, attorneys advising employers in making personnel decisions involving employees have now become potential targets for individual liability (in addition to any liability their employer-clients may bear). Arias refuses to acknowledge this and other detrimental consequences of the Ninth Circuit’s decision. Indeed, it appears he may welcome them. How else to explain Arias’s decision to proceed against Raimondo after quickly settling his FLSA retaliation claim against his dairy employers? Whatever the motive, however, a precedent that chills attorneys from offering their employer-clients candid advice in order to limit their own risk of personal liability is undesirable. And such a precedent is neither required nor permitted by the FLSA. This Court should grant a writ of certiorari and reverse the Ninth Circuit’s opinion in this case.



ARGUMENT

I. THE NINTH CIRCUIT’S OPINION CREATES A CIRCUIT SPLIT OVER THE MEANING OF “EMPLOYER” UNDER THE FLSA’S PRIVATE RIGHT OF ACTION.

In his petition, Raimondo explained how the Ninth Circuit’s opinion created a circuit split regarding the meaning of the term “employer” under the FLSA and whether anyone lacking economic control over the terms and conditions of the plaintiff’s employment can be liable as an “employer” for retaliation under the

FLSA. Pet. 10-19. Arias argues there is no conflict, Opp’n 6-10, but he is mistaken.

Arias’s passing discussion of *Moore v. Appliance Direct, Inc.*, 708 F.3d 1233, 1237 (11th Cir. 2013)—which involved an FLSA retaliation claim against a corporate executive—tacitly concedes a circuit split. Opp’n 7. Arias halfheartedly distinguishes *Moore* as not involving “whether someone outside of the corporation could be an ‘employer’” under the FLSA, *id.*, but he fails to explain why this distinction matters. Indeed, there is no principled justification for distinguishing insiders from outsiders in this context. They are all third parties—or in Arias’s and the Ninth Circuit’s terminology, they are not “de facto” employers—which means the economic reality test would be applied by courts other than the Ninth Circuit.

Arias likewise fails to grasp the split the Ninth Circuit created with the Second Circuit’s opinion in *Irizarry v. Catsimatidis*, 722 F.3d 99 (2d Cir. 2013). Arias argues that the FLSA retaliation claim in that case was not asserted against an individual defendant, Opp’n 7, but this does not negate the split. The Second Circuit adopted a test for *all* FLSA claims seeking to hold *individuals* liable, meaning that its analysis of employer status necessarily encompasses retaliation claims against third parties like Raimondo. For that reason, when the next FLSA case involving a retaliation claim against an individual comes before the Second Circuit, the rule in *Irizarry* will control. Because it focuses on individual liability, the Second

Circuit’s approach is not susceptible to making distinctions between the types of FLSA claims brought against individuals (unlike the Ninth Circuit’s decision in this case). *See, e.g., Irizarry*, 722 F.3d at 105 (“None of the cases above dealt specifically with the question we confront here: whether an individual within a company that undisputedly employs a worker is personally liable for damages as that worker’s ‘employer.’”); *id.* at 107 (“We also noted that ‘operational control’ had been cited as relevant by other circuits considering the question of individual liability under the FLSA.”), *id.* (“Most circuits to confront this issue have acknowledged—and plaintiffs do not dispute—that a company owner, president, or stockholder must have at least some degree of involvement in the way the company interacts with employees to be a FLSA “employer.”). All of this demonstrates that Raimondo would have prevailed in the Second Circuit, such that a split of authority exists.

The same point applies to *Dellinger v. Science Applications International Corp.*, 649 F.3d 226 (4th Cir. 2011). Arias contends that the Fourth Circuit did not consider the precise legal question here, Opp’n 8-9, but he ignores the fact that the mode of analysis the Fourth Circuit adopted in *Dellinger* is directly at odds with the Ninth Circuit’s opinion below. The Fourth Circuit stated that “if the person retaliating against an employee is not an employer, the person is not subject to a private civil action by an employee under § 216(b) [of the FLSA].” *Dellinger*, 649 F.3d at 230. Raimondo would have prevailed in this case under that standard. That alone merits review by this

Court. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 551 (2005) (review warranted where circuits' mode of legal analysis conflicts, even if their holdings may not).

Finally, Arias fails to explain away the Ninth Circuit's reliance on *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37 (3d Cir. 1943), which would (by reference to 29 U.S.C. § 215(a)(3)) allow an FLSA plaintiff to sue "any person" for retaliation. Opp'n 10-11. The Ninth Circuit's interpretation of the term "employer" under § 216(b) borrows from § 215(a)(3)'s broad prohibition against retaliation and effectively allows "any person" to be sued for retaliation. The Ninth Circuit's decision thus conflicts with those cases, see Pet. 15-16, that have held that a plaintiff cannot sue "any person" for retaliation under the FLSA. Arias has no response to this point. As for *Bowe*, Arias asserts the Ninth Circuit did not "embrace" it but that "its reasoning reinforced the panel's interpretation" of § 215(a)(3) and § 216(b). Opp'n 11. There is no daylight between these two positions, and *Bowe* should play no interpretive role here because it was decided long before § 216(b) was amended to authorize suits against "employer[s]." By relying on *Bowe*, the Ninth Circuit split from the great weight of circuit authority holding that an FLSA plaintiff may not sue "any person" for retaliation, but rather is limited to suing his "employer," a term given meaning by the economic reality/operational control test.

II. THE NINTH CIRCUIT'S INCORRECT DECISION FLOUTS THIS COURT'S PRECEDENT.

In his petition, Raimondo explained that the Ninth Circuit fell afoul of this Court's precedent defining the term "employer" under the FLSA and how the Ninth Circuit's posited distinction between substantive wage and hour claims and retaliation claims under the FLSA was specious. Pet. 20-23. Arias responds by recasting the Ninth Circuit's opinion more narrowly than its language warrants. He focuses on the specific facts of this Court's cases defining FLSA employer status, rather than their mode of analysis. Opp'n 12-13. And he points to inapposite cases from this Court to defend the Ninth Circuit's baseless distinction between retaliation claims and all other FLSA claims, invented in the decision below. Opp'n 13-15, 17-20. Arias's arguments actually reinforce the reasons why review is necessary here.

Arias first claims the opinion below did not contravene *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961), because (he claims) *Goldberg* did not apply the economic reality test to determine whether an employment relationship existed—and thus whether the defendant was an FLSA "employer." Opp'n 12-13. Arias is mistaken; this Court took precisely that step. *Goldberg*, 366 U.S. at 33. More significantly, other courts of appeals have interpreted *Goldberg* as requiring "employer" status to be determined using the economic reality/operational control test. See, e.g., *Irizarry*, 722 F.3d at 104

“Accordingly, the Court has instructed that the determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in “economic reality rather than technical concepts.” *Id.* (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961).”). The Ninth Circuit’s refusal here to apply the economic reality test defies *Goldberg*. Moreover, if Arias were somehow correct about *Goldberg*’s meaning and scope, that would reinforce the need for this Court’s review to set the circuits straight regarding the proper test for determining “employer” status under the FLSA.

Next, Arias contends that the Ninth Circuit properly distinguished substantive wage and hour claims from retaliation claims in interpreting the term “employer” by pointing to two cases arising under Title VII of the Civil Rights Act of 1964: *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), and *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). Opp’n 13-15, 20. While Arias analogizes to this Court’s discussion of the broader purpose of antiretaliation provisions, he ignores the materially different language of the Title VII provisions in those two cases, as Raimondo explained in his petition. *See* Pet. 21-23. In *Robinson*, this Court construed the term “employees” under Title VII’s antiretaliation provision, 42 U.S.C. § 2000e-3(a) (2012), to include former employees because the meaning of that term was ambiguous when viewed in its statutory context. *Robinson*, 519 U.S. at 340-45. Only after finding this ambiguity did the Court examine the statute’s purpose and construe it broadly. *Id.* at 345-46. Likewise, in

Burlington Northern, this Court construed Title VII's antiretaliation provision more broadly than its substantive antidiscrimination provision because of the different language of those two provisions. *Burlington Northern*, 548 U.S. at 61-63. Only after reaching this textual conclusion did the Court analyze the purpose of the provisions. *Id.* at 63-67.

Here, by contrast (as Raimondo explained in his petition and Arias ignores), the single term “employer” is a constant in the substantive wage and hour provision and the antiretaliation provision of § 216(b), which creates the private right of action here. Because the FLSA uses a single term where the other statutes contained multiple provisions, no statutory ambiguity arises here that requires resort to the statute’s purpose or other extrinsic interpretive aids. Reliance on *Robinson* and *Burlington Northern* is therefore misplaced.

Finally, Arias defends the Ninth Circuit’s opinion based on a purported plain language reading of the FLSA, Opp’n 17-18, but his defense proves too much. If Arias’s mix-and-match approach to the FLSA’s statutory terms were correct, it would render the economic reality/operational control test superfluous even for substantive wage and hour cases. Why would a court sort through and apply the complex, multi-factored analysis of the economic reality/operational control test in a substantive wage and hour case if the individual defendants—say, executives of a corporation that employed the plaintiff—were obviously working “in the interest of”

the corporate employer “in relation to” the plaintiff when they made decisions resulting in the plaintiff not being paid minimum wage or overtime compensation? *See* 29 U.S.C. § 203(d) (2012). Even Arias and the Ninth Circuit admit that the economic reality/operational control test applies to substantive wage and hour claims under the FLSA, Opp’n 12-15, 18-20; Pet. App. 11a-19a, so their effort to conjure a favorable plain meaning from the FLSA’s terms fails.

Arias resists Raimondo’s point that the Ninth Circuit gave two different definitions to the term “employer” under § 216(b). Opp’n 18-19. But his defense of the Ninth Circuit lays bare the fallacy of the court’s statutory interpretation. Immediately after arguing the Ninth Circuit used one definition only, Arias shows why that is not the case. Quoting the Ninth Circuit’s opinion, he reasons that the FLSA’s substantive wage and hour provisions, 29 U.S.C. §§ 206-07 (2012), “‘focus [only] on de facto employers,’” Opp’n 18, quoting Pet. App. 16a, and that the meaning of “employer” under those provisions must derive from the surrounding statutory context of § 206 and § 207. The key is that Arias had to add a modifier like “de facto”—or, as the Ninth Circuit put it, “non-actual,” Pet. App. 18a—to the statutory term “employer” to explain his reasoning. This shows that two different definitions of “employer” *are* at work in the Ninth Circuit’s opinion. Indeed, the entire edifice of the Ninth Circuit’s analysis would collapse without this dichotomy, which is the basis for distinguishing the treatment of retaliation claims from wage and hour claims. No other circuit has varied its interpretation of

the term “employer” depending on the type of FLSA claim asserted. That merits this Court’s review.

III. THE NINTH CIRCUIT’S OPINION WILL HAVE BROAD-REACHING, HARMFUL CONSEQUENCES, ESPECIALLY FOR ATTORNEYS REPRESENTING EMPLOYERS.

In his petition, Raimondo explained how the Ninth Circuit’s opinion, if left standing, will have harmful consequences for anyone doing business with employers because it exposes them to retaliation liability under the FLSA, and how (in particular) attorneys representing employers will be deterred from defending their employer clients with the zealous advocacy and candid advice that professional norms require. Pet. 23-26. The amicus brief submitted by DRI-The Voice of the Defense Bar elaborates upon the detrimental impact of the Ninth Circuit’s opinion. Amicus pinpoints the risks to attorneys representing employers, such as the potential for gamesmanship as FLSA plaintiffs file strategic retaliation claims against attorneys representing employers to create conflicts of interest requiring attorney disqualification. DRI ACB 11-14.

Arias’s opposition does not acknowledge the adverse consequences that his position entails, but rather attempts to evade them by narrowing the Ninth Circuit’s opinion beyond recognition. Opp’n 15-17. He contends that there is nothing to fear in the Ninth Circuit’s opinion because the hypotheticals posited by

Raimondo do not replicate the facts of this case. But that is neither here nor there since the Ninth Circuit's mode of analysis will be followed in future cases in that circuit. The Ninth Circuit did not confine its new and expanded definition of "employer" in FLSA retaliation cases to situations where an employer's attorney allegedly contacted immigration authorities in retaliation for an employee's protected conduct. Rather, it construed the term "employer" under § 216(b) for all FLSA retaliation cases, of whatever stripe or factual idiosyncrasy.

Arias fears that reversing the Ninth Circuit's decision would deprive employees of any remedy for retaliation of the kind he allegedly experienced. Opp'n 16-17. His concern is misplaced. Employees who experience retaliation can sue their true employer—the entity or person Congress intended to be the sole defendant under the FLSA. Indeed, Arias availed himself of that remedy here by bringing an FLSA retaliation claim against his dairy employers and obtaining a monetary settlement. Pet. App. 9a. The fact that Arias swiftly settled with his true employer, while maintaining a retaliation claim against Raimondo, raises the inference that his lawsuit seeks to establish a precedent codifying the harmful consequences highlighted by amicus and in Raimondo's petition for writ of certiorari. Additionally, employees in Arias's position can seek the assistance of the government in pursuing a retaliation remedy, *see* 29 U.S.C. §§ 216(a)-(b), 217 (2012), or the separate protections of state law. Employees in Arias's position

will continue to have suitable remedies if the Ninth Circuit's decision is reversed, as it should be.



CONCLUSION

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

Respectfully submitted,

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