No. _____

In the
# Supreme Court of the United States

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HARRY'S NURSES REGISTRY, HARRY DORVILIER,
*Petitioners*,

v.

CLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated and as Class Representative, *et al.*,
*Respondents.*

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

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is the finding that the employer has violated Section 206 or Section 207 of the Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq*, a condition precedent that must occur *before* an employee's private right of action is triggered under Section 216(b)?

## PARTIES TO THE PROCEEDINGS

Petitioners Harry's Nurses Registry and Harry Dorvilier were the defendants in the United States District Court and the appellants in the United States Court of Appeals.

Respondents (identified below) were the plaintiffs in the District Court and the appellees in the Court of Appeals.

Claudia Gayle, Individually, On Behalf of All Others Similarly Situated and as Class Representative, Aline Antenor, Anne C. DePasquale, Annabel Llewellyn Henry, Eva Myers Granger, Lindon Morrison, Natalie Rodriguez, Jacqueline Ward, Dupont Bayas, Carol P. Clunie, Ramdeo Chankar Singh, Christaline Pierre, Lemonia Smith, Barbara Tull, Henrick Ledain, Merika Paris, Edith Mukardi, Martha Ogun Jance, Merlyn Patterson, Alexander Gumbs, Serojnie Bhog, Genevieve Barbot, Carole Moore, Raquel Francis, Marie Michelle Gervil, Nadette Miller, Paulette Miller, Bendy Pierre Joseph, Rose Marie Zephirin, Sulaiman Ali El, Debbie Ann Bromfield, Rebecca Pile, Maria Garcia Shands, Angela Collins, Brenda Lewis, Soucianne Querette, Sussan Ajiboye, Jane Burke Hylton, Willie Evans, Pauline Gray, Eviarna Toussaint, Geraldine Joazard, Niseekah Y. Evans, Getty Rocourt, Catherine Modeste, Marguerite L. Bhola, Yolanda Robinson, Karlifa Small, Joan Ann R. Johnson, Lena Thompson, Mary A. Davis, Nathalie Francois, Anthony Headlam, David Edward Levy, Maud Samedi, Bernice Sankar, Marlene Hyman

## STATEMENT OF RELATED PROCEEDINGS

- Gayle v. Harry's Nurses Registry, Inc., No. 07-CV-4672 (CPS) (MDG), 2009 WL 605790, at *1 (E.D.N.Y. Mar. 9, 2009) (granting judgment for plaintiffs and notice of collective action under Section 216(b));
- Gayle v. Harry's Nurses Registry, Inc., No. 07-CV-4672 (NGG) (MDG), 2010 WL 5477727, at *2, 5 (E.D.N.Y. Dec. 30, 2010) (granting plaintiff Gayle's summary judgment motion as to damages, but denying summary judgment as to damages for remaining plaintiffs);
- Gayle v. Harry's Nurses Registry, Inc., 594 F. App'x 714 (2d Cir. 2014) (affirming judgment), cert. denied, 135 S. Ct. 2059 (Mem) (U.S. 2015);
- Gayle v. Harry's Nurses Registry, No. 07-CV-4672 (NGG) (MDG), 2018 WL 4771885 (E.D.N.Y. Sept. 30, 2018) (denying defendants' motion for sanctions against plaintiffs' counsel for improper accounting and collection of more than due in attorneys' fees), aff'd, __ F. App'x __, 2020 WL 402452 (2d Cir. 2020).

There are no additional proceedings in any court that are directly related to this case.

## CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporations and no publicly held corporations that own 10% or more of its stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**

## PETITION FOR A WRIT OF CERTIORARI

Harry's Nurses Registry and Harry Dorvilier petition this Court for a writ of certiorari to review the Orders and Decisions of the Court of Appeals and District Court entered in this action.

## OPINIONS BELOW

The January 24, 2020 Summary Order of the United States Court of Appeals for the Second Circuit is unpublished and appears at Appendix A. The September 30, 2018 Order & Reasons of the United States District Court for the Eastern District of New York is unpublished and appears at Appendix B (with Appendix C containing the Magistrate's Report and Recommendation). The United States Court of Appeals' Opinion on the prior appeal in this matter (Gayle v. Harry's Nurses Registry, Inc., 594 F. App'x 714 (2d Cir. 2014)) is unpublished and appears at Appendix D.

## JURISDICTION

The Summary Order of the United States Court of Appeals was entered on January 24, 2020. App. 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 216 (b)-(c) provides as follows:

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

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable

attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtAme compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

*(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions*

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring

an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the

complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action. The authority and requirements described in this subsection shall apply with respect to a violation of section 203(m)(2)(B) of this title, as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and an additional equal amount as liquidated damages.

29 U.S.C. § 215 provides as follows:

*§ 215. Prohibited acts; prima facie evidence*

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Secretary issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any

common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Secretary issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing

such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a)(1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

## STATEMENT OF THE CASE

This is an action by nurses claiming alleged unpaid overtime from a nursing staffing company and its owner.

The owner, Mr. Dorvilier, is a hard-working, highly motivated and successful immigrant from Haiti. His company, Harry's Nurses Registry, Inc., is a domestic corporation organized under the laws of the State of New York with its principal place of business in New York City, at 88-25 163rd Street, Jamaica. Harry's Nurses refers temporary nurses, nurse's aides, and housekeepers to patients confined to their homes in and around New York City.

This litigation began in 2007, when a nurse named Claudia Gayle, and other nurses recruited to join Ms. Gayle's lawsuit, sued Mr. Dorvilier and his company under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 (West) *et. seq*, claiming they were due unpaid overtime wages, liquidated damages, and (for plaintiffs' counsel who started the lawsuit) attorneys' fees. App. 46-51.

A central issue in the litigation was whether the nurses who sued were employees entitled to overtime pay under the FLSA. Defendants contended that they were not; that Harry's Nurses acted as a referral service, not an employer, and that the FLSA therefore did not apply to the plaintiffs' claims. The District court ruled that the nurses were employees under the FLSA, however, granting plaintiffs' motion for summary judgment and entering judgments against defendants for $931,959.39 (in compensatory damages plus attorneys' fees). Defendants appealed, but the Court of Appeals affirmed the judgment. Gayle v. Harry's Nurses Registry, Inc., 594 F. App'x 714, 716 (2d Cir. 2014). Defendant petitioned for a writ of certiorari, but this Court denied the petition. Harry's Nurses Registry, Inc. v. Gayle, 135 S. Ct. 2059 (U.S., May 04, 2015).

The litigation continued over enforcement of the judgment. Defendants contended that plaintiffs' counsel did not properly collect the judgment, moving in the District court to remedy the improper collection by plaintiffs' counsel and to impose sanctions on plaintiffs' counsel for counsel's charged improper accounting of the monies collected (defendants contended that plaintiffs' counsel effectively "double dipped" on the counsel fees to which he was entitled and thereby collected from defendants more than was legally owed under the FLSA). Plaintiffs' counsel opposed defendants' motion. Following receipt of a Report and Recommendations by United States Magistrate Court Judge Marilyn Go, and objections thereto by the parties, the District court, by Order and Decision of September 30, 2018, adopted in full the

Magistrate Judge's Report and Recommendations and denied defendants' motion for sanctions and related relief. App. 8-42.

Defendants appealed the District court's order, but the Court of Appeals affirmed the decision. In affirming the District court's decision to deny relief to defendants on the charged improper collection of the judgment by plaintiffs' counsel, the Court of Appeals noted and relied on the prior grant of summary judgment for plaintiffs in the litigation and entry of judgments for plaintiffs against defendants for the unpaid wages, liquidated damages, attorneys' fees afforded by the FLSA on which the plaintiff nurses rested their claims for relief. App. 1-7.

## REASON FOR GRANTING THE PETITION

### The Court should clarify that 29 U.S.C. § 216(b) does not provide a private right of action to an employee until the employer is found to have violated "the provisions of section 206 or section 207" of the Fair Labor Standards Act.

Enacted in 1938, the FLSA, § 201 et seq., was designed "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n. 18, 65 S. Ct. 895, 89 L. Ed. 1296 (1945). There are two main provisions in this regard: per 29 U.S.C. § 206, an employer must pay its employees at least a specified minimum hourly wage for work performed,

and per 29 U.S.C. § 207, an employer must pay its employees one and one-half times the regular wage for hours worked in excess of 40 hours per week.

These provisions are enforced, first and foremost, by the Department of Labor's Wage and Hour Division's enforcement section in charge of the FLSA, carried out by investigators across the United States. These investigators gather data on wages, hours, and other employment conditions and practices in order to determine an employer's compliance with the FLSA's governing provisions. Where violations are found, these investigators may recommend changes in employment practices to bring an employer into compliance. Willful violations of an employer may be prosecuted criminally with fines up to $10,000.

This Petition presents a narrow question about the contours of the private right of action which Congress provided in the FLSA. 29 U.S.C. § 216(b) of the Act provides, "Any employer **who violates the provisions of section 206 or section 207** of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." The subsection further provides, "An **action to recover the liability prescribed** in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." (emphasis added).

We submit that the highlighted language of these provisions shows that in order for an employee "to recover the liability prescribed" by the FLSA from his or her employer, there must first be a finding that the employer has violated Section 206 or Section 207 of the Act – a condition precedent that must occur before the employee's private right of action is triggered.

Section 216(b) is an enforcement mechanism, in other words, enabling the employee to, collect whatever damages were caused to the employee by the employer having violated Section 206 or Section 207. This construction is supported by the statutory language conditioning an employee's right of action on an employer "who violates" Sections 206 or 207, rather than language providing (for example) an employer "alleged to have" or "charged with" violating Sections 206 or 207. The following language of the Act -- "Any employer who violates … shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages" – also supports the conclusion that the employer's violation must exist first, as a condition precedent, before the employee's private right of action to collect the damages is statutorily-triggered.

So construed, plaintiffs' Complaint filed in this action was fundamentally flawed because there was not a prior finding that Mr. Dorvilier and his company violated Section 206 or Section 207 when plaintiffs instituted their lawsuit. Plaintiffs only alleged that defendants violated Section 207's overtime pay

provision. There was not a finding beforehand in this regard with respect to nurse Gayle or any of the other nurses ultimately named as plaintiffs in the Complaint filed. Without that condition precedent of the employer's violation of Section 206 or Section 207, there was no private right of action "to recover the liability" prescribed by the FLSA, the District court lacked subject matter jurisdiction over plaintiffs' Complaint, and the resulting judgment entered in this action against defendants and all subsequent orders premised on the judgment – including the latest orders regarding collection of the judgment by plaintiffs' counsel -- are void, we respectfully submit. Cf. Michigan Corr. Org. v. Michigan Dep't of Corr., 774 F.3d 895, 902–03 (6th Cir. 2014) ("The FLSA does not provide a basis for this declaratory judgment action. The statute, to be sure, provides a private right of action for compensatory damages to remedy wage-and-hour violations. *See* 29 U.S.C. § 216(b). But that action exceeds the plaintiffs' reach. They sued Director Heyns in his official capacity, and an official-capacity lawsuit for money damages counts as a lawsuit against the State. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989). As just noted, we lack jurisdiction over money-damages lawsuits against a State to enforce the FLSA. When a court lacks jurisdiction over the underlying right of action, it lacks jurisdiction over a related declaratory judgment action as well. Skelly Oil, 339 U.S. at 671–72, 70 S. Ct. 876. *** All in all, neither the FLSA nor § 1983 nor Ex parte Young provides the private right of action the officers need to obtain declaratory relief against Director Heyns. This stops their declaratory judgment action in its tracks. No private right of action

means no underlying lawsuit. No underlying lawsuit means no jurisdiction. Skelly Oil, 339 U.S. at 671–72, 70 S. Ct. 876. And no jurisdiction means no declaratory relief.")

It is important for the Court to clarify the scope of the private right of action that Congress provided in Section 216(b) because this affects thousands of employees and employers throughout our Country. Such private rights of action must be construed carefully. In Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), which involved the interpretation of Title VI of the Civil Rights Act of 1964, the Court observed that "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." Alexander, 532 U.S. at 286. Unless the statute evinces an intent to create a private remedy, "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," the Court stressed. Id. at 287.

"A statute explicitly creates a private right of action when the statute contains language that defines a cause of action. *** Statutes that expressly provide for a private right of action identify the person(s) able to bring suit, those that are potentially liable, the forum for suit, and the potential remedy available." See Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148, 166, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008) (holding that 15 U.S.C. § 77k provides an express private right of action because it says that "any person acquiring such security ... may, either at law or in

equity, in any court of competent jurisdiction, sue ... every person who signed the registration statement").

The language that Congress employs is the touchstone for assessing the existence of and, in this case, the scope of the private right of action. Here, when Congress enacted the Fair Labor Standards Act in 1938, it gave employees and their "representatives" the right to bring actions to recover unpaid compensation due pursuant to the Act. Hoffmann–La Roche v. Sperling, 493 U.S. 165, 173, 110 S. Ct. 482, 107 L.Ed.2d 480 (1989). In 1947, however, Congress enacted the Portal–to–Portal Act, Pub.L. No. 80–49, § 5(a), 61 Stat. 84, 87 (1947), which made changes to the FLSA's procedures. One such change was to abolish representative actions by plaintiffs not themselves possessing a claim. Id. "The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions." Id. Congress changed the language of the statute in response to "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome." Hoffmann-La Roche Inc., 493 U.S. at 173; Portal–to–Portal Act of 1947, Pub.L. No. 80–49, § 5(a), 61 Stat. 84, 87 (1947). Likewise, Congress inserted a requirement that similarly situated employees must affirmatively "opt in" to an ongoing FLSA suit by filing express, written consents in order to become party plaintiffs. This change in statutory language further restricted the private right of action provided by the FLSA. Id.

Congress has lessened the power of individual employees to enforce the minimum wage and overtime provisions of the FLSA, also, by making employees' enforcement powers dependent upon the actions of the Secretary of Labor. Under 29 U.S.C. § 216(b), an employee's right to bring an action for unpaid minimum wage or overtime compensation "terminate[s] upon the filing of a complaint by the Secretary of Labor in an action under section 217 ... in which ... restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation[.]" Similarly, under 29 U.S.C. § 216(c), an individual employee's enforcement right "terminate[s] upon the filing of a complaint by the Secretary in an action ... in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation [.]"

Private lawsuits by employees are secondary, Congress instructed, to government enforcement actions. Cf. E.E.O.C. v. Pan American World Airways, Inc., 897 F.2d 1499, 1505 (9th Cir.), cert. denied, 498 U.S. 815, 111 S. Ct. 55, 112 L.Ed.2d 31 (1990) ("private lawsuits are secondary in the statutory scheme"); San Antonio Metro. Transit Auth. v. McLaughlin, 876 F.2d 441, 445 (5th Cir. 1989) (FLSA "allows suits involving the Secretary to take precedence over employee actions involving the same employer."); Wirtz v. Robert E. Bob Adair, Inc., 224 F. Supp. 750, 755 (W.D. Ark. 1963) ("the filing of the suit [by the Secretary of Labor] terminates the section 16(b) rights of employees"). Congress inserted these provisions into the FLSA to "relieve the courts and employers of the burden of litigating a multiplicity of suits based on the same

violations of the act by an employer." 1961 U.S.C.C.A.N. at 1659. They also serve to "substantially reduce the possibility of inconsistent adjudications[.]" Donovan v. Univ. of Texas at El Paso, 643 F.2d 1201, 1207 (5th Cir. 1981); E.E.O.C., 897 F.2d at 1506.

Congress has provided for other limitations on private actions, too, which courts have recognized. Though one of the FLSA's main provisions is its recordkeeping requirements (per 29 U.S.C. §§ 206, 207, 211(c)), federal courts have held that the statute does not provide a private right of action to enforce claimed record keeping violations. See, e.g., Oral v. Aydin Corp., No. 98-CV-6394, 2001 WL 1735063, at *1 (E.D. Pa. Oct. 31, 2001) ("there is no private right of action to enforce the recordkeeping provisions of the FLSA"); Rossi v. Associated Limousine Servs., Inc., 438 F. Supp. 2d 1354, 1366 (S.D. Fla. 2006). Federal courts have held, also, that Congress did not empower an employee to maintain a private right of action under the FLSA for alleged unpaid non-overtime compensation for an employee who was paid at least the minimum wage, even if the employee was paid less than his or her hourly rate. Bros. v. Portage Nat. Bank, No. CIV A 306-94, 2007 WL 965835, at *5 (W.D. Pa. Mar. 29, 2007). "The vast majority of federal courts hold that" these so-called "gap-time" claims "do not come within the FLSA's purview." Id. (collecting cases).

This Petition presents a similar question of statutory construction. We submit that construing 29 U.S.C. § 216(b) to require as a condition precedent to a private action a finding that the employer has violated Section 206 or Section 207 is consistent with the

FLSA's purpose to "secur[e] to employees restitution of statutorily mandated wages" (Marshall v. Coach House Rest., Inc., 457 F. Supp. 946, 951 (S.D.N.Y. 1978)) but also the Act's primary emphasis of elevating governmental regulation and enforcement of employers over private claims of violation by employees. The FLSA ensures that individual employees will be compensated within the dictates of federal law. Under the statutory scheme, actions by the Secretary of Labor take precedence over actions by employees. The 1961 amendments to the FLSA (which granted more power to the Secretary of Labor) reflect that Congress changed the "governmental policy toward enforcement ... from reliance primarily on private enforcement to reliance on enforcement by the Secretary." Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971). Legal remedies to enforce federal statutes must stem from the legislatively enacted statute, not from court-created doctrines. The choice to provide "private rights of action to enforce federal law," like the choice to enact "substantive federal law itself," rests in Congress's hands. Alexander, 532 U.S. at 286. Federal courts may not create what Congress did not. Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc., supra, 552 U.S. at 164–65. The Court should grant this Petition to address the proper construction of Section 216(b) and, we submit, hold that Congress' language provides a private right of action to an affected employee to recover the "liability" of the employer under the Act only after the employer has first been found to have violated Section 206 or Section 207 of the FLSA.

## CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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