

No.

IN THE
Supreme Court of the United States

FRANK FAILLACE,
Petitioner,

v.

ZOE HOLLIS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fair Labor Standards Act (“FLSA”) prohibits retaliation by an employer or “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. §§ 203(d), 215(a)(3), 216(b). Section 216(b) only authorizes private civil actions to claims against an “employer.”

The questions presented are:

1. Whether 29 U.S.C. § 216(b) authorizes a private retaliation action against a person that did not employ the plaintiff?
2. Whether the FLSA authorizes adjudication of a time-barred misclassification claim to establish “employee” status for the secondary purpose of pursuing a third-party retaliation claim against a non-employer?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Frank Faillace was a defendant in the district court and an appellee in the court of appeals.

Respondent Zoe Hollis was the plaintiff in the district court and the appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual. No corporate disclosure statement is required.

LIST OF PROCEEDINGS

This case arises out of the following proceedings:

- *Hollis v. R&R Restaurants, Inc*, No. 3:21-cv-965-YY (Or. 2024) (judgment entered March 26, 2024)
- *Hollis v. R&R Restaurants, Inc*, No. 24-2464 (9th Cir. 2025) (judgment entered Nov. 18, 2025)

There are no related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Frank Faillace respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is published at 159 F.4th 677 (9th Cir. 2025) and is reproduced in the appendix to this petition at App. 1a-21a.

The district court's order adopting the magistrate judge's findings and recommendations and granting summary judgment is unreported but available at 2024 WL 1270896 and is reproduced in the appendix to this petition at App. 22a-23a.

The report and recommendations of the magistrate judge is unreported but available at 2023 WL 8605753 and is reproduced in the appendix to this petition at App. 28a-51a.

JURISDICTION

The Ninth Circuit issued its opinion on November 18, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 203(d) provides in relevant part:

“Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . .”

29 U.S.C. § 215(a)(3) provides in relevant part:

“... it shall be unlawful for any person—

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 ...”

29 U.S.C. § 216(a) provides in relevant part:

“Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both.”

29 U.S.C. § 216(b) provides in relevant part:

“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) or 218(d) shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) . . . including without limitation employment, reinstatement, promotion, and the payment of wages lost and 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.

STATEMENT OF THE CASE

For the first time in the 88-year history of the Fair Labor Standards Act (“FLSA”), an appellate court has authorized a private retaliation action brought by a non-employee against a non-employer. In doing so, it departed from the established interpretation of the FLSA’s text, eliminated well-established limits, and widened a direct and growing conflict with other circuits.

The statutory framework is straightforward. The FLSA prohibits “any person” from retaliating against an employee for invoking rights under the Act. 29 U.S.C. § 215(a)(3). But Congress limited a private cause of action to only an employer. 29 U.S.C. § 216(b). The statute separately defines “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.” § 203(d).

For decades, courts have understood a distinction between “any person” being liable for a violation, but only “employers” being liable for a private cause of action. While retaliation may be unlawful if committed by “any person,” an employee can only pursue a lawsuit against their current or former “employer.” To determine whether a defendant is an employer, courts apply the familiar “economic reality” or “operational control” test—asking whether the defendant exercised control over the terms and conditions of the plaintiff’s employment.

In two big steps, the Ninth Circuit moved away from that framework, and the majority circuit rule.

The first step came in *Arias v. Raimondo*⁸⁶⁰ F.3d 1185 (9th Cir. 2017), cert. denied, 138 S.Ct. 673 (2018). There, the court held that a non-employer

attorney acting on behalf of the plaintiff's employer could be liable under § 216(b) for retaliation. *Id.* The court understood that the authorizing statute required an employer relationship. § 216(b). But, the court held that the definition of "employer" referenced "any person" acting "directly or indirectly in the interest of an employer." The Ninth Circuit held that this broad definition of employer authorized employees to bring claims against "any person" that acted on the employer's behalf. Every other appellate circuit, however, disagrees.

The second big step came in the decision below on this matter, where the Ninth Circuit took the *Arias* holding further. In this case, Petitioner never employed the plaintiff, did not act on the employer's behalf, and did not participate in any employment relationship with plaintiff at any time. Despite this, the Ninth Circuit held that any person who indirectly benefits an employer can be sued for FLSA retaliation. The court did not indicate an overarching rule for what qualifies as an "indirect benefit" to an employer. Only that such benefit only needs to be a "lesser nexus" than direct benefit to the employer, like in *Arias*. App. 11a. The Ninth Circuit also dismissed any requirement that the defendant act under the employer's direction, control, or in collaboration. The ruling significantly expands the universe of potential defendants that plaintiffs may target for FLSA retaliation. To what extent, will depend on the parameters of the Ninth Circuit's "lesser nexus" requirement to qualify as an indirect benefit to an employer.

Those two big steps, *Arias* and this case, cement the Ninth Circuit's conflict with the Second, Fourth, and Sixth Circuits on the scope of FLSA retaliation claims. Since 2011, each of those courts have confirmed the well-established rule that employees

can only bring a private cause of action under the FLSA against an employer. See *Kim v. Lee*, 2023 WL 2317248 (2d Cir. Mar. 2, 2023); *Dellinger v. Sci. Applications Int’l Corp.*, 649 F.3d 226 (4th Cir. 2011); *Diaz v. Longcore*, 751 F. App’x 755 (6th Cir. 2018). In this case, the Ninth Circuit declined to reconsider its position despite acknowledging an open conflict with other circuits. See App. 13a, fn. 4. The result is a direct and entrenched circuit split on the scope of private liability under the FLSA’s retaliation provision.

The practical consequences are significant. In the Ninth Circuit, private retaliation liability is no longer tethered to an employment relationship, operational control, or even agency. A defendant need not be an employer, act on an employer’s behalf, or participate in the employment relationship. A plaintiff that filed an FLSA claim may pursue retaliation claims against anyone they believe discriminated against them on that basis. Potential liability seems literally limitless.

A federal statute of the FLSA’s significance and nationwide application should not mean one thing in the largest circuit and something else entirely elsewhere. This case squarely presents the question whether § 216(b) authorizes private retaliation suits against unaffiliated third parties. It offers a clean vehicle to resolve the acknowledged circuit conflict and restore uniformity to the Act’s enforcement scheme.

A. Statutory Framework

Enacted in 1938, the Fair Labor Standards Act “covers more than 143 million workers at more than

9.8 million establishments nationwide.”¹ It regulates the relationship between employers and their employees to “correct and as rapidly practicable to eliminate” “the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” 29 U.S.C. § 202.

To this end, the Act establishes a minimum wage §206(a), and maximum working hours, 29 U.S.C. § 207(a). The Act imposes these duties on employers, with the intended beneficiaries being employees. The FLSA protects these substantive rights by prohibiting retaliation, which it defines as discrimination “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.” *Id.* § 215(a)(3). See also, *Dellinger*, 649 F.3d at 228.

The statute contains guardrails that direct the enforcement of retaliation. For example, the Act may be enforced by government action, including criminal prosecutions, § 216(a) and civil enforcement actions by the Secretary of Labor. *Id.* §§ 216(a), 216(c), and § 217. To protect their right to a minimum wage and maximum hours, employees are authorized to sue not only for violations of the Act's wage and hours provisions, but also for retaliation. The authorization for employee enforcement under § 216(b) provides in relevant part:

¹ U.S. Dep't of Lab., *Small Entity Compliance Guide to the Fair Labor Standards Act's Exemptions 2*, <https://www.dol.gov/agencies/whd/overtime/rulemaking/small-entity-compliance-guide>

Any employer who violates the provisions of section 215(a)(3) [prohibiting retaliation] of this title shall be liable for such legal or equitable relief as may be appropriate ... including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer ... 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.

§ 216(b). The statute authorizes “any one or more employees” to maintain an action against “any employer” that violates the retaliation provision of the Act. *Id.* The plain language of this portion of the Act’s application only to “employees” and their “employers” is bolstered by the remedies listed, including “reinstatement, and the payment of wages lost...” *Id.* Those remedies presuppose a direct employment relationship between the plaintiff and defendant to an action.

Moreover, the Act prohibits retaliation “against any employee” because the employee sued the employer to enforce a substantive right. § 215(a)(3). Under § 203(3)(e)(1) of the Act, an “employee” is defined as “any individual employed by an employer.” Based on this, the *Dellinger* court reasoned that: “by using the term ‘employee’ in the anti-retaliation provision, Congress was referring to the employer-employee relationship.” *Dellinger*, 649 F.3d at 228-

229. Therefore, “[t]he regulation of which underlies the Act as a whole, and was therefore providing protection to those in an employment relationship with their employer.” *Id.*

The Act also defines an “employer” only in relation to “an employee.” § 203(d). As relevant here, the statutory definition states that an Employer “includes any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). That definition broadens who may qualify as an employer within the employment relationship. It does not eliminate the requirement that the relationship be one of employer and employee, nor does it extend private enforcement rights beyond the limits set in § 216(b).

The relevant statutes limit private claims for retaliation to employees seeking redress from their employers. These key statutory guardrails ensure the Act maintains its core purpose of protecting employees from employer misconduct. This Court has recognized and enforced those statutory limits. It rejected the premise that the Act’s remedial purpose overrides its text, explaining that it is a “flawed premise that the FLSA pursues its remedial purpose at all costs.” *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89, 138 S. Ct. 1134, 1142, 200 L. Ed. 2d 433 (2018).

This Court also confirmed in *Falk v. Brennan* that the Act’s seemingly broad definition of “employer” refers to “any persons” acting on the employer’s behalf only with respect to the employment relationship itself. 414 U.S. 190, 192–95 & n.4 (1973). Based on the plain language of the Act, and this Court’s interpretation of the same, the majority of courts correctly hold that only employees may bring a private cause of action against an employer.

B. Facts

Respondent performed as an exotic dancer at Sassy's, an adult-entertainment venue operated by R&R Restaurants, Inc. App. 2a. Respondent danced at Sassy's from June 2017 until March 2019 pursuant to a written independent contractor agreement. *Id.* During that period, Respondent worked multiple shifts per week. *Id.* When not at Sassy's, Respondent performed at other clubs. *Id.* While dancing at Sassy's, Respondent did not challenge or question the parties' agreed upon contractor classification. Two years after their last performance at Sassy's, Respondent filed the underlying lawsuit alleging misclassification and unpaid wages. *Id.*

Petitioner has an ownership interest in Sassy's. App. 10a. Petitioner's limited management of Sassy's meant that Respondent did not target him personally in the first complaint, which did name two other managers and owners. App. 5a. Moreover, it is undisputed that Petitioner did not employ Respondent in any capacity at the time of the alleged retaliation. App. 29a.

Separate from Sassy's, Petitioner is a part owner and active manager of Dante's, a Portland live-performance venue that hosts music and variety shows. App. 43a. Dante's is not affiliated with Sassy's operations and offers a greater variety of live performance-based acts. *Id.* For over twenty years, Dante's has hosted a once-weekly show known as "Sinferno Cabaret," featuring short acts that include fire shows, burlesque performances, contortion, juggling, pole dancing, and more. App. *Id.*

Respondent had performed two prior Sinferno shows, with each being a one-off event. 48a. Several years after Respondent's last dance at Sassy's, they

received an email confirming a five-minute, one-song, performance slot at a future Sinferno event. App. 44a. The overall show lasted more than two hours and featured at least nine other performers. *Id.*

Six days later, on June 28, 2021, Respondent filed a collective action under 29 U.S.C. § 216(b) against Sassy's and individually named managers and owners. App. 5a. The complaint alleged that Sassy's had misclassified Respondent and other dancers as independent contractors and sought wage-and-hour damages under the FLSA. *Id.* Respondent did not initially name Petitioner in the lawsuit and did not allege that Petitioner managed or controlled Respondent's work at Sassy's.

On July 19, 2021, Petitioner emailed Respondent to cancel the upcoming Sinferno performance. App. 44a. In the email, Petitioner explained that he was a partner at Sassy's and Respondent's lawsuit created legal complications. *Id.* Specifically, he stated that because the lawsuit challenged independent contractor classifications, allowing Respondent to perform at Dante's under a contractor arrangement could expose that separate business to litigation risk. *Id.* The email further stated that counsel had advised against permitting the short upcoming performance in light of the pending lawsuit. *Id.*

Shortly thereafter, Respondent amended the complaint to add Petitioner as a defendant. App. 45a. As relevant here, the amended claim alleged that Petitioner unlawfully retaliated against Respondent for filing an FLSA complaint by terminating the Sinferno performance. *Id.*

C. Proceedings

After discovery and summary judgment briefing, the assigned magistrate judge issued detailed findings and recommendations. App. 28a-52a. The magistrate judge concluded that Respondent's FLSA misclassification and wage-and-hour claims against Sassy's were time-barred by the Act's statute of limitations. App. 37a.

The magistrate judge separately addressed the retaliation claim. After concluding that the retaliation claim was timely, the magistrate judge held that it "fail[ed] as a matter of law" because the undisputed evidence showed that Respondent was "not an employee of Dante's or Faillace's at the time of the alleged retaliation." *Id.* Based on that, the court applied the plain language of the Act to dismiss the retaliation claim because "plaintiff was not an employee" of Petitioner or Dante's at the time of the alleged retaliation. *Id.*

The district court adopted the findings and recommendations in full. App. 24a-27a. Judge Simon granted summary judgment on all federal claims, entered final judgment dismissing Respondent's FLSA claims with prejudice, and dismissed the remaining state-law retaliation claim without prejudice. *Id.*

On appeal, Respondent did not challenge the dismissed wage-and-hour claims. App. 2a. Respondent only appealed the retaliation claim related to the cancellation of Respondent's one-off performance at Dante's, and whether that constituted a basis for a private right of action for retaliation under the FLSA. *Id.*

The Ninth Circuit reversed. App. 2a. Relying on *Arias v. Raimondo*, the panel signaled it would "further clarify the boundaries of the FLSA's private

right of action for retaliation.” App. 3a. 860 F.3d 1185 (9th Cir. 2017). In *Arias*, the Ninth Circuit permitted a retaliation claim against an employer’s attorney for conduct undertaken during pending wage-and-hour litigation by the plaintiff. App. 3a, citing *Arias*, 860 F.3d at 1192.

In this case, the Ninth Circuit went further down that road. It determined that a defendant may act “indirectly in the interest of an employer” without “an agency relationship with the actual employer or the conferral of any direct benefit to the employer.” App. 3a, citing § 203(d). Applying that guidance, the panel concluded that Petitioner’s email cancelling the *Sinferno* performance “constituted an indirect effort to minimize any liability of Sassy’s as well as Dante’s.” App. 12a. The panel determined that the cancelled performance “penalized Hollis for filing the lawsuit and would dissuade a reasonable person in Hollis’s position from filing a lawsuit in the first place.” *Id.*

The panel did acknowledge that the Act requires an underlying employment relationship. But, allowed that “[a]s long as Hollis can show that their work at Sassy’s satisfied the economic realities test, then it is no obstacle to their retaliation action that any misclassification claim is time-barred.” App. 14a. In summary, the Ninth Circuit removed a guardrail subjecting only an “employer” to a retaliation lawsuit and, at the same time, bolstered a plaintiff’s opportunities to retroactively re-classify an employment relationship on time-barred claims.

The panel remanded with instructions for the district court to determine whether Respondent was an employee of Sassy’s under the economic-realities test and, if so, whether Petitioner’s cancellation of the single *Sinferno* performance constituted actionable retaliation under the Act. App. 14a-16a.

REASONS FOR GRANTING THE PETITION

This case presents a clean and outcome-determinative question regarding the scope of private retaliation liability under the FLSA. The material facts are undisputed. The statutory provisions are fixed. The question is purely legal. And the courts of appeals are badly divided.

The Ninth Circuit stands alone in holding that a plaintiff with a time-barred misclassification claim may sue a non-employer defendant under the Act. By contrast, the Second, Fourth, and Sixth Circuits have concluded that the Act's private right of action remains confined to the employment relationship Congress repeatedly referenced in 29 U.S.C. §§ 203(d), 215(a)(3), and 216(b). That conflict concerns the threshold question of who may be sued under what circumstances in a private FLSA retaliation action.

The decision at issue here departs from the statutory guardrails Congress enacted. Section 215(a)(3) protects "any employee." Section 216(b) authorizes a private action only against an "employer." And § 203(d) defines employer to include persons acting "directly or indirectly in the interest of an employer in relation to an employee." Those provisions establish interlocking limits: the plaintiff must be an employee, and the defendant must be an employer within the employment relationship.

The Ninth Circuit here removed those plain text constraints. The panel held that a defendant may act "indirectly in the interest of an employer" without an agency relationship and without acting on behalf of the employer. It further concluded that conduct satisfies the statute so long as it could be potentially viewed as serving some interest of a prior employer. In doing so, the court reduced the statutory definition

of “employer” to a generalized inquiry untethered from the employment relationship itself.

Unaddressed, that interpretation expands private retaliation liability beyond the boundaries Congress established. It permits claims against third parties who never employed the plaintiff, based solely on an asserted connection to a prior employer’s interests. That construction exposes businesses and individuals to retaliation suits despite the absence of any contemporaneous employment relationship.

The Ninth Circuit also loosens the rule limiting the right to sue on FLSA retaliation claims to an “employee.” Here, Respondent’s wage-and-hour claims are time-barred. The Ninth Circuit nevertheless held that a plaintiff may litigate employee status years after the working relationship ended and the statute of limitations prohibits continuing wage claims or recovering damages from the alleged employer. The plaintiff may (and sometimes must) allege a case-within-a-case against a potential past employer, solely to revive an otherwise expired retaliation claim against a different non-employer entity. The statute of limitations exists to mitigate the difficult guesswork of piecing someone’s past work history together years later. That reasoning for a firm time limit to bring claims applies equally to determining misclassification questions. Regardless, the Act simply does not contemplate such a free-standing cause of action.

The resulting rule departs from Congress’s decision to confine private suits to “employers” and risks transforming the FLSA’s retaliation provision into a broad vehicle for litigation against unaffiliated third parties with no obvious guardrails. Because the circuit courts are divided and the issue implicates the scope of federal statutory liability on a highly utilized FLSA

framework, expediting a resolution to the circuit split is imperative to prevent undue harm and confusion.

A. The Ninth Circuit Rule: “Employer” Optional

In *Arias v. Raimondo*, 860 F.3d 1185 (9th Cir. 2017), the Ninth Circuit took the step of extending private FLSA retaliation liability beyond direct employers. The decision put the Ninth Circuit at odds with several other circuits to consider the matter. The year after *Arias*, the Sixth Circuit considered the same issue—whether an employee could bring FLSA retaliation claims against a non-employer—and took the opposite position. See *Diaz v. Longcore*, 751 F. App’x 755, 758–59 (6th Cir. 2018). No other appellate court has adopted *Arias*’s reasoning.

In *Arias*, the Ninth Circuit addressed whether an employer’s attorney could be held personally liable for retaliation under the Fair Labor Standards Act (“FLSA”). 860 F.3d 1185 (9th Cir. 2017). The employee had filed state wage-and-hour claims against his employer. *Id.* at 1187. The employer’s attorney then contacted U.S. Immigration and Customs Enforcement in an alleged effort to have the employee detained and deported before trial. *Id.* at 1187–88. The district court dismissed the retaliation claim, holding that because the attorney was not the plaintiff’s “employer,” he could not be liable under 29 U.S.C. § 216(b). *Id.* at 1189. The Ninth Circuit reversed. The panel noted that § 215(a)(3) makes it unlawful for “any person” to retaliate, and § 203(d) defines “employer” to include “any person” so long as they are “acting directly or indirectly in the interest of an employer in relation to an employee.” 860 F.3d at 1190–92 (quoting 29 U.S.C. §§ 203(d), 215(a)(3)). The court held that the anti-retaliation provision extends beyond actual

employers and that courts should not import the “economic realities” control test into the retaliation context. *Id.* at 1190–93.

The panel correctly framed *Arias* as a case involving extraordinary and unique allegations. The attorney at issue allegedly sought to use federal immigration enforcement to derail a pending wage action. *Id.* at 1187–88. The court stressed the FLSA’s “remedial and humanitarian” purpose. *Id.* at 1192 (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)). It relied on Title VII precedent to conclude that retaliation need not be limited to traditional employment actions. *Id.* at 1191–92 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)). Still, the decision had its limits. *Arias* involved an undisputed employment relationship and an ongoing wage dispute. The alleged retaliator was the employer’s retained counsel charged with defending the FLSA lawsuit.

Arias constituted a big step away from the traditional understandings of who—besides an actual employer—could be personally liable for an FLSA retaliation claim.

The decision in this case extends the unique and specific holding of *Arias* far further. App. 1a-18a. Unlike *Arias*, this case involves no agency relationship, no ongoing wage claim, and no action taken on behalf of an employer in the employment relationship. The Ninth Circuit here nonetheless allowed a retaliation claim to proceed against a non-employer who never employed Respondent and did not act in any apparent way as an employer’s agent. *Id.* at 10–14. The panel acknowledged that this decision and *Arias* create an open conflict with other circuits. App. 13a fn. 1, citing *Kim v. Lee*, 576 F. Supp. 3d 14, 27–28 (S.D.N.Y. 2021), *aff’d*, No. 22-61, 2023 WL 2317248 (2d

Cir. Mar. 2, 2023). The breadth and consequences of that conflict, however, are greater than the Ninth Circuit suggested in the opinion.

The Ninth Circuit then went further still. Although it acknowledged that a plaintiff must be an “employee” to bring an FLSA retaliation claim, Respondent had not established any employment relationship with any defendant. To overcome that defect, the panel permitted Respondent to reopen time-barred misclassification claims against a previously dismissed entity, Sassy’s, solely to establish the employment element necessary to pursue a retaliation claim against Petitioner. App. 8a-10a. With that holding, the court effectively held that a non-employee of any party could maintain a retaliation claim against a defendant who is not an alleged employer to plaintiff in any way.

Having eliminated employer status, agency, and operational control as prerequisites, the Ninth Circuit sought to articulate a new limiting principle for retaliation claims. It focused on the definition of “employer” and its reference to any person acting “directly or indirectly” in the interest of an employer. § 203(d). The Ninth Circuit reasoned that acting “directly” in the employer’s interest— such as the attorney’s conduct in *Arias*, was straightforward. But, the panel held that acting “*indirectly*” must “capture some lesser nexus” between the defendant and the employer. App. 11a (emphasis original). The court further held that this employment nexus need not have “an agency relationship with the actual employer or the conferral of any direct benefit to the employer.” *Id.*

The court identified no boundary for what constitutes a “lesser nexus.” It offered no example of conduct that would fall outside the rule and cited no

statutory interpretation principles, legislative history, or precedent from the FLSA's 88-year history to support its expansion of the Act's longstanding terms authorizing private causes of action for retaliation.

What is more, the Ninth Circuit's interpretation conflicts with this Court's precedent. In *Falk v. Brennan*, 414 U.S. 190 (1973), the Court explained that § 203(d) reaches persons who act on behalf of the employer in the employment relationship itself: those who hire, supervise, pay, or otherwise exercise substantial control over working conditions. *Falk*, 414 U.S. at 192–95. The defendant in *Falk* qualified as an employer because he exercised “substantial control of the terms and conditions of the work.” *Id.* at 195. Nothing in *Falk* suggests that § 203(d) extends to individuals who do not act on the employer's behalf in the employment relationship, or who exercise no economic or managerial control.

Prior to *Arias*, Ninth Circuit precedent seemed to follow this Court's reasoning in *Falk*. It held that employer status turns on whether the individual exercises “control over the nature and structure of the employment relationship,” or asserts “economic control” over it. *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009) (quoting *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999) (en banc)). Those decisions treat “directly or indirectly” as expanding liability within the employment relationship—not eliminating the requirement that the defendant act on the employer's behalf.

The Ninth Circuit's expanded rule deepens the circuit conflict and dramatically broadens FLSA exposure within the largest circuit court in the country. As discussed, *infra*, most other courts have rejected this expansion. Even some district courts within the Ninth Circuit have declined to follow *Arias*.

See *Cramton v. Grabbagreen Franchising LLC*, No. CV-17-04663-PHX-DWL, 2019 WL 7048773, at *25 (D. Ariz. Dec. 23, 2019), *aff'd*, No. 21-17122, 2023 WL 5036489 (9th Cir. Aug. 8, 2023); *Evans v. Dart*, No. 20 C 2453, 2021 WL 2329372, at *11 (N.D. Ill. June 8, 2021); *Leo v. Sarasota Cnty. Sch. Bd.*, No. 8:16-CV-3190-T-30TGW, 2019 WL 2453440, at *9 (M.D. Fla. Feb. 7, 2019).

The Ninth Circuit rule dismantles one of the Act's core limiting principle and replaces it with no discernible standard, just a "nexus," leaving private FLSA retaliation liability untethered to the employment relationship and without meaningful constraint.

B. The Majority Rule: 216(b) is for Employers Only

In direct contrast to the Ninth Circuit, the Second, Fourth, and Sixth Circuits adhere to the plain language of § 216(b) and limit private FLSA retaliation actions to defendants who qualify as an "employer." Those courts reject the view that the definition of employer in § 203(d) (relating to "directly or indirectly in the interest of an employer") overrides or renders superfluous Congress's deliberate use of the term "employer" in section 216(b). Instead, they read the provisions together to preserve the statutory boundary Congress drew between unlawful retaliation by "any person" and private civil liability imposed only on employers.

The most analogous decision is *Dellinger v. Science Applications International Corp.*, 649 F.3d 226 (4th Cir. 2011). There, the Fourth Circuit held that the FLSA's private retaliation remedy under 29 U.S.C. § 216(b) is limited to an "employer" and does not extend to entities that never employed the

plaintiff. There, the plaintiff alleged that a prospective employer rescinded a job offer after learning that she had previously filed an FLSA wage claim against a different employer. *Id.* at 228. The Fourth Circuit affirmed dismissal, explaining that although § 215(a)(3) broadly prohibits retaliation by “any person,” § 216(b) authorizes a private suit only against an “employer,” and § 203(d)’s definition reaches only those acting on behalf of an employer within the employment relationship. *Id.* at 230–31. Because the defendant had never employed the plaintiff, the statute did not permit a private retaliation action.

The parallels here are on point. As in *Dellinger*, Respondent seeks to impose FLSA retaliation liability on a separate business entity that never employed them, based on an alleged adverse decision made after learning of prior or pending FLSA litigation against a different employer. In *Dellinger*, the defendant declined to hire the plaintiff; here, Petitioner cancelled a brief performance engagement. In both cases, the alleged retaliation arose from an independent business decision made outside any employment relationship. And in both cases, the limitations of § 216(b) forecloses a private retaliation claim.

Dellinger leads in confirming the majority rule: § 216(b) does not authorize a free-floating retaliation cause of action against third parties who never employed the plaintiff. The “directly or indirectly in the interest of an employer” language of § 203(d) expands who may qualify as an employer within an employment relationship; it does not erase the requirement that the defendant be the plaintiff’s employer in the first place. By contrast, the Ninth Circuit’s rule would invite the type of claim the

Fourth Circuit declined. That is, private retaliation liability against a separate business actor based solely on a business decision made after learning of prior FLSA activity.

The Second Circuit recently affirmed that understanding in *Kim v. Lee*, 576 F. Supp. 3d 14, 25 (S.D.N.Y. 2021), *aff'd*, No. 22-61, 2023 WL 2317248 (2d Cir. Mar. 2, 2023). As in *Arias*, the plaintiff sought to assert FLSA retaliation claims against the employer's attorney—there, based on the attorney's filing of counterclaims in response to the plaintiff's wage suit. *Id.* In considering a motion to dismiss by attorney defendant, the district court noted that FLSA retaliation claims under § 216(b) must be against an “employer.” It then turned to the definition of employer under § 203(d).

The district court in *Kim* did not cite *Arias*. Rather, it relied on this Court's reasoning in *Falk v. Brennan* to reach the opposite conclusion and determine that the definition encompasses only those who act on behalf of the employer within the employment relationship itself. *Id.* at *25-26, citing *Falk v. Brennan*, 414 U.S. 190, 192–95 & n.4, 94 S.Ct. 427, 38 L.Ed.2d 406 (1973). That is, the “directly or indirectly” language relates to actions involving the employment relationship, not possible third-party actions outside of the employment context. The Second Circuit affirmed on different grounds, but without disturbing the district court's reasoning on that issue. *Id.*

The Sixth Circuit likewise declined to adopt the Ninth Circuit's expansion of employer liability in *Arias*. In *Diaz v. Longcore*, 751 F. App'x 755, 758–59 (6th Cir. 2018), the plaintiff sought to bring FLSA retaliation claims against the attorneys representing his employer in a wage dispute. *Id.* at 757. The court

underscored that Congress “knows how to create broader liability when it wishes to,” and did so in § 216(a) by imposing criminal liability on “any person.” *Id.* at 759. The court further explained that § 203(d)’s definition “expands, but does not purport entirely to displace” the ordinary meaning of employer. *Id.* at 757. The court continued “[i]n contrast to the way the FLSA comprehensively defines most of its statutory terms...[it] merely adds another category of “person[s]” to those ordinarily considered employers.

The plaintiff in *Diaz* urged the court to recognize a broader definition of employer, presumably akin to the Ninth Circuit. *Id.* In response, the panel cited this Court’s decision in *Encino Motors*, for the proposition that “it is a flawed premise that the FLSA pursues its remedial purpose at all costs.” *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1142, 200 L.Ed.2d 433 (2018) (internal quotation and citations omitted). The panel then quoted this Court in describing the challenge of reading statutory definitions in isolation, finding that “cases from the Supreme Court and this court, combined with the FLSA’s structure, lead us to conclude that the correct reading is not so broad.” *Id.* The *Diaz* court then cited this Court’s decision in *Kasten*, for the proposition that “[t]he language of the provision, considered in isolation, may be open to competing interpretations. But considering the provision in conjunction with the purpose and context leads us to conclude that only one interpretation is permissible.” *Id.* citing *Kasten v. Saint-Gobain Performance Plastics Corp.* 563 U.S. 1, at 7 (2011).

The *Diaz* court also grounded its holding that the definition of employer in § 203(d) does not expand liability to non-employers by noting that it serves more

to define who may be liable *within the employment relationship*, explaining:

The Supreme Court has once interpreted the language of section 203(d), and that case indicates that “any person acting directly or indirectly *in the interest of an employer in relation to an employee*” encompasses only persons acting on behalf of the actual employer (in the ordinary sense of the word) *with respect to the employment relationship*, such as by hiring, supervising, paying, and managing employees on behalf of the actual employer.

See Falk v. Brennan, 414 U.S. 190, 192–93 & n.4, 195, 94 S.Ct. 427, 38 L.Ed.2d 406 (1973) (emphasis original). In summary, based on its reliance on this Court’s precedent, *Diaz* sided with the majority of circuits holding that the FLSA’s definition of employer relates exclusively to individuals acting on behalf of the actual employer.

Put another way, the seemingly broad definition of employer contained in § 206(d) does not create a new class of non-employer defendants for retaliation claims. Rather, it serves to structure who may be personally liable under the statute. For example, the Fair Labor Standards Act permits individual liability because Congress defined “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.”. § 203(d). That language intends to capture owners, officers, and managers who exercise operational control and act on behalf of the actual

employer—whether their authority is exercised directly or through delegation.

The phrase “directly or indirectly” thus expands liability vertically within the employer’s enterprise; it ensures that those who control the employment relationship cannot evade responsibility by operating through layers of management. It does not expand liability horizontally to unaffiliated third parties who never employed the plaintiff and did not act in the interest of the plaintiff’s employer in relation to that employee. Reading § 203(d) otherwise would sever the definition from the relational limitation embedded in the statute and collapse the distinction Congress preserved in § 216(b), which authorizes private suit only against an “employer.”

In summary, every circuit court that has considered the matter—besides the Ninth Circuit—has adhered to this Court’s precedent and interpretation of the statute to limit the definition of “employer” to individuals within the employment relationship. A clear majority of courts consider that the reasonable approach. The importance of this circuit split and litigious conflict it will bring cannot be overstated.

Whether § 216(b) permits suits against non-employers determines the outer boundary of civil exposure under one of the Nation’s most frequently litigated statutes. In three circuits, liability is confined to employers acting within the employment relationship. In the Ninth Circuit, it is not. That geographic divergence creates different federal rights and liabilities under identical statutory text. This Court’s review and decision on the matter is needed.

C. Time Barred Misclassification Claims

Based on the Ninth Circuit's decision, a plaintiff may pursue a retaliation claim even after losing, through the passage of time, any opportunity to challenge their alleged classification or recover wages. In effect, the ruling permits a plaintiff to reopen litigation against a dismissed party solely to allege misclassification, for the limited purpose of pursuing a retaliation claim against an entirely different defendant. That is precisely what occurred here. Respondent did not appeal the dismissal of their misclassification claims. Those claims are now barred by the applicable statute of limitations.

The FLSA establishes a uniform limitations period for private actions. *See* 29 U.S.C. § 255(a). Under § 255(a) "every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." Once that period expires, the claim is extinguished. The Act does not contemplate a regime under which time-barred misclassification allegations may nonetheless be litigated years later to establish employee status for some other purpose.

Here, the district court concluded that Respondent's misclassification and wage-and-hour claims against Sassy's were time-barred. App. 37a. The court further found that the undisputed evidence showed Respondent was not an employee of Petitioner or Dante's at the time of the alleged retaliation. *Id.* On that basis, the court entered final judgment dismissing all federal claims with prejudice. App. 22a-23a.

The Ninth Circuit reversed by holding that the time-barred status of Respondent’s misclassification claims did not preclude the district court, on remand, from determining, whether Respondent’s past work at Sassy’s satisfied the “economic realities” test for employee status. App. 8a. That determination—concerning work performed entirely outside the limitations period—is now required solely to assess whether Petitioner’s cancellation of a single five-minute performance at an unrelated venue could constitute actionable retaliation. *Id.*

The decision seemingly conflicts with the court’s holding in *Arias* itself. *Arias* expressly rejected importing the “economic control” or “economic realities” test into the retaliation context when determining who may be held liable under § 203(d). *Arias*, 860 F.3d at 1190. Instead, *Arias* emphasizing that retaliation is “a different animal altogether,” designed to ensure that workers may invoke the legal process without interference. *Id.* (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997)). For that reason, *Arias* declined to apply wage-and-hour liability standards to retaliation claims.. *Id.*

The panel’s decision here does the opposite. After relying on *Arias* to expand the class of potential retaliation defendants beyond employers, it required the district court to apply the economic-realities test, reserved by *Arias* for wage-and-hour claims, to adjudicate a time-barred misclassification dispute. That move collapses the distinction *Arias* itself sought to draw and forces courts to litigate expired employment relationships solely to sustain a novel retaliation theory against non-employers.

Because no precedent supports such a claim, the panel was required to construct a new legal

framework. No authority under the FLSA suggests how a non-employee may pursue a retaliation claim against a non-employer, much less by resurrecting time-barred misclassification allegations. Rather than clarifying existing boundaries, the court created an entirely new structure to support its expansion of liability.

The panel justified its approach by noting that § 215(a)(3) protects employees from retaliation for “fil[ing] any complaint,” regardless of whether the complaint ultimately succeeds. App. 15a-16a. But that principle addresses the form of protected activity, not the temporal limits Congress imposed on adjudicating the underlying employment relationship. Nothing in the statute authorizes courts to adjudicate claims Congress has made conclusively time-barred.

The Ninth Circuit’s reliance on *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011), is misplaced. *Kasten* held that oral complaints may qualify as protected activity under § 215(a)(3). *Kasten*, 563 U.S. at 14 (holding “that a fair notice requirement does not necessarily mean that notice must be in writing.”). This Court did not consider—let alone endorse—the resurrection of expired wage-and-hour claims to establish employee status years later for the purpose of retaliation liability. The Ninth Circuit’s reliance on *Kasten* extends that decision well beyond its holding.

The practical consequences of the Ninth Circuit’s rule are significant. It requires defendants to litigate stale employment relationships long after Congress decided they should be extinguished. It deprives third parties of repose by tethering ordinary business decisions to time-barred allegations involving different entities and different venues. And it creates incentives for plaintiffs to repackage expired

wage-and-hour claims as retaliation predicates against any non-employer third-party alleged to have taken adverse action.

This Court's review is warranted to restore the limits Congress enacted. The FLSA's statute of limitations reflects a legislative judgment about finality and repose. The Ninth Circuit's decision requires courts to adjudicate time-barred misclassification issues as a prerequisite to imposing retaliation liability—an outcome the statute does not authorize.

D. Expanding Conflict and Exposure

Although a deep and persistent circuit conflict is reason enough for this Court's intervention, the importance of the questions presented here independently warrants review. *See* Sup. Ct. R. 10. Under the Ninth Circuit's rule, a venue owner, contractor, lender, or vendor may face federal retaliation liability for declining to do business with a current or former FLSA litigant—despite never employing that individual.

This case presents a clean vehicle for resolving both questions presented. The issues are purely legal, dispositive, and preserved. The district court entered final judgment on the merits, and the Ninth Circuit reversed solely as a matter of statutory interpretation. There are no jurisdictional defects, alternative grounds, or factual disputes that would impede review.

Absent review, the Ninth Circuit's interpretation will govern FLSA retaliation claims across the Nation's largest circuit, exposing businesses and individuals to private liability beyond the limits Congress enacted.

E. Conclusion

The FLSA's anti-retaliation provisions reflect deliberate congressional choices about the scope of private enforcement. Congress limited who may be sued for retaliation by authorizing private actions only against an "employer," and it limited what may be litigated by imposing a statute of limitations that forecloses adjudication of stale wage-and-hour claims.

The decision below disregards both limits. It extends private retaliation liability to persons who never employed the plaintiff and did not act on an employer's behalf. And it requires courts to adjudicate a misclassification theory dismissed as time-barred.

These departures stem from an interpretive approach that treats statutory boundaries as malleable rather than controlling, an approach that conflicts with decisions of other courts of appeals and with this Court's repeated instruction that remedial statutes must be enforced according to their text and structure.

This Court's review is necessary to restore the limits Congress enacted, resolve the circuit conflicts, and provide clear guidance on the scope of private retaliation liability under the FLSA.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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