No. 17-648

IN THE
Supreme Court of the United States

ANTHONY P. RAIMONDO, PETITIONER,

v.

JOSE ARNULFO ARIAS, RESPONDENT.

ON A PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

Amicus curiae, DRI–The Voice of the Defense Bar, respectfully submits that the petition for certiorari should be granted and the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae DRI–The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its members, their clients, and the judicial system. This is just such a case. The issue raised in the

[1] In accordance with this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and letters of consent are on file with the Clerk's Office.

petition implicates DRI's core concerns in seeking a fair and consistent civil justice system and promoting the role of defense attorneys.

This case involves an interpretation of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. The FLSA establishes minimum-wage and overtime-pay requirements. It allows employees to lodge complaints regarding FLSA violations and bring private actions against their employers to enforce their rights. 29 U.S.C. § 216. The FLSA further prohibits "any person" from discriminating or discharging an employee who has lodged such a complaint. 29 U.S.C. § 215(a)(3). And it allows an employee to bring a cause of action against an "employer" who violates Section 215(a)(3).

The Ninth Circuit's opinion interpreted the FLSA's use of the term "employer" to mean one thing with respect to minimum-wage and overtime-pay claims and another with respect to retaliation claims. This creates a clear circuit split. "Employer" now means one thing in every circuit but the Ninth Circuit. Moreover, the Ninth Circuit's decision exposes lawyers and others to FLSA-retaliation claims even though they are not "employers" as that term is defined in the FLSA and interpreted by this Court. By introducing an ersatz distinction between FLSA minimum-wage and overtime-pay claims and FLSA retaliation claims, the Ninth Circuit has undermined the basic fairness of the civil justice system. This is despite the FLSA's definition of "employer" giving the word a universal meaning throughout the statute. 29 U.S.C. § 203(d). This sort of arbitrariness undermines the rule of law.

The Ninth Circuit's decision also threatens the attorney-client relationship. In the Ninth Circuit, attorneys are now faced with the threat of suit, if not actual liability, for giving lawful advice about the FLSA to employer clients. Their advice might expose them to a FLSA-retaliation suit even though the advice was correct and given in good faith. And the threat of such lawsuits will do more than suppress good advice. Future FLSA lawsuits may pit clients and lawyers against each other, exacerbating the effect of the Ninth Circuit's incorrect reading of the FLSA.

SUMMARY OF ARGUMENT

For almost 80 years, the FLSA has been uniformly interpreted to provide a private cause of action for retaliation solely against *employers*. Whether a defendant is an employer is depends on the economic realities of the defendant's relationship to the plaintiff. The Ninth Circuit's ruling upends this settled law by imposing liability on Petitioner for alleged conduct undertaken when Petitioner was acting as the lawyer for Respondent's employer, defending against Respondent's FLSA action.

The Court should grant certiorari and review the question presented for at least two reasons.

First, the Ninth Circuit's decision disrupts the well-settled and uniform interpretation of the FLSA. Every circuit to have addressed the issue has determined that whether a defendant is an "employer," as that term is used in the FLSA provision creating a private right of action, requires consideration of whether the defendant exercises operational control over the employee as shown by the economic realities of the plaintiff's relationship to the defendant. The Ninth Circuit reversed the district court's ruling applying this straightforward analysis to Respondent's claims. And the Ninth Circuit did so without clearly explaining whether it was interpreting the FLSA to make Petitioner the Respondent's employer or implying a new, more expansive private anti-retaliation right. Neither approach is correct. The Court should grant the petition to restore uniformity to the law.

Second, the Ninth Circuit's decision will harm the ability of attorneys to provide candid,

professional advice to clients that are employers. Under the Ninth Circuit's analysis, an attorney who provides good faith, professional advice that results in an adverse action against an employee who has, in the past, raised complaints regarding the FLSA, is subject to suit based on that advice. Not only does this incentivize attorneys to self-censor their advice, consciously or unconsciously, but it also provides the opportunity for plaintiffs to create conflicts of interest between employers and their chosen counsel. Given the broader public-policy implications, the Ninth Circuit's decision merits the Court's review.

DRI strongly opposes threatening to expose a party's undocumented immigration status to federal authorities for the purpose of obtaining a more favorable outcome in litigation or employment-related disputes. But Petitioner's alleged misconduct does not warrant the Ninth Circuit's creation of a new or broader cause of action for retaliation. The Court should grant the petition and reverse the Ninth Circuit's decision.

ARGUMENT

I. The Court should grant certiorari to restore the uniform application of the FLSA.

The FLSA contains a single section that authorizes a private cause of action to enforce the FLSA's minimum-wage, overtime-pay, and anti-retaliation provisions. 29 U.S.C. § 215(a)(3). That provision authorizes claims against "any employer." *Ibid.* Congress defined "employer" for purposes of the FLSA to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

Given the tautological nature of the definition, this Court has noted that the FLSA has "no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 728 (1947). In light of these definitional difficulties, this Court has articulated an "economic reality" test to determine whether an employee-employer relationship exists. *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *Williams* v. *Henagan*, 595 F.3d 610, 620 (5th Cir. 2010) ("Because courts have found these definitions vague, the 'economic reality test' has arisen to determine FLSA coverage.") This test looks not to "isolated factors but rather to the circumstances of the whole activity" engaged in by the putative employers and employees. *Rutherford*, 331 U.S. at 730. After *Rutherford* and *Goldberg*, courts look to a variety of factors and judge the actual economic reality of whether a party is an employer.

Unlike the decision below, every circuit that has addressed the definition of employer under the FLSA has applied the economic-reality analysis to address whether a party is an FLSA employer. And every Court that addressed the definition of employer as used in § 215(a)(3) has applied the same economic-reality test regardless of whether the asserted claims were for wage violations or retaliation. Employers, third parties, and their counsel could predict with relative certainty who is potentially liable under § 215(a)(3).

As Petitioners correctly identify, the Ninth Circuit's decision conflicts with every other circuit that has interpreted the term "employer" under the FLSA. In addition to the decisions from the First, Second, Sixth, and Eleventh Circuit Courts of Appeals identified by Petitioners, the Third, Fourth, and Fifth Circuits have also applied the economic-reality test to determine whether an individual or entity is an employer under the FLSA. Ultimately, these factors drive at a central consideration: Does the individual or entity have "operating control" over a company's employees? *Gray* v. *Powers*, 673 F.3d 352, 357 (5th Cir. 2012) ("The dominant theme in the case law is that those who have operating control over employees within companies may be individually liable for FLSA violations committed by the companies.").

The Third Circuit examines whether "the alleged employer" has "(1) authority to hire and fire employees; (2) authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (3) day-

to-day supervision, including employee discipline; and (4) control of employee records, including payroll, insurance, taxes, and the like." *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 469 (3d Cir. 2012). The Third Circuit noted that its "factors are not materially different than those used by our sister circuits." *Id.*

The Fourth Circuit considers "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Kerr* v. *Marshall Univ. Bd. of Governors*, 824 F.3d 62, 83 (4th Cir. 2016) (internal quotation marks and citation omitted).

The Fifth Circuit has stated that in determining "whether an individual or entity is an employer, the court considers whether the alleged employer: '(1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" *Gray*, 673 F.3d at 355 (quoting *Watson* v. *Graves*, 909 F.2d 1549, 1556 (5th Cir. 1990)). *See also Orozco* v. *Plackis*, 757 F.3d 445, 448 (5th Cir. 2014) (same).

The Tenth and District of Columbia Circuits have adopted similar multi-factor economic-reality tests to determine the closely related question whether an employer-employee relationship exists. *E.g.*, *Morrison* v. *Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001) (employing four-factor

employer-test in determining whether plaintiff was an employee under the FLSA); *Baker* v. *Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998). And district courts in the remaining circuits routinely apply the economic-reality analysis, relying on decisions from other circuits. See, *e.g.*, *Hugler* v. *Legend of Asia, LLC*, No. 16-CV-00549, 2017 WL 2703577, at *3–4 (E.D. Mo. June 22, 2017); *Roeder* v. *DIRECTV, Inc.*, No. 14-4091, 2015 WL 5603050, at *5 (N.D. Iowa Sept. 22, 2015); *Cardenas* v. *Grozdic*, 67 F. Supp. 3d 917, 923 (N.D. Ill. 2014); *Braddock* v. *Madison Cty.*, 34 F. Supp. 2d 1098, 1107 (S.D. Ind. 1998).

The Ninth Circuit reversed the district court's straightforward application of this well-settled analysis to introduce an artificial distinction between the FLSA's "substantive economic provisions" and its retaliation provision. (App. 16a.) The Ninth Circuit acknowledged the universal judicial interpretation given to the term "employer." (App. 12a.) The Ninth Circuit simply believed that the purposes of the FLSA's anti-retaliation provision would not be "served by importing an 'economic control' or an 'economic realities' test as a line of demarcation into the issue of who may be held liable for retaliation." (App. 11a–12a.) Accordingly, the Ninth Circuit concluded that "*non-actual employers* like Raimondo" can be liable for retaliation claims. (App. 18a (emphasis added).)

The Ninth Circuit adopted its new, broader retaliation theory without clearly explaining its reasoning. The Ninth Circuit suggested that the word "employer" should be given very different

meanings in the first and second sentences of § 216(b) (App. 11a). But giving the same statutory term in the same statutory provision different meanings is highly disfavored. See *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994); *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990). The Ninth Circuit also suggested that perhaps there is an implied private cause of action to enforce the FLSA's anti-retaliation provision against non-employers (App. 16a). But where Congress expressly creates a limited private right of action for retaliation under the FLSA, it suggests that Congress intended to preclude a broader private right of action, especially where it would entirely subsume the private right of action that Congress created. *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001); *Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

Thus, the Ninth Circuit's decision in this case not only departs from every other circuit to have addressed the question, it does violence to the statutory text. It creates an artificial distinction between the scope of the FLSA's wage and hour protections and its anti-retaliation protections. Unsurprisingly, the Ninth Circuit pointed to no cases—in this Court or any of the other circuits—that have concluded that "employer" means one thing for the FLSA's wage and hour provisions and another thing for its retaliation provision. The Court should grant certiorari and restore the uniform application of the economic-reality test.

II. The Ninth Circuit's decision will harm attorneys' ability to advise and represent employers.

This Court should also grant certiorari because the Ninth Circuit's decision threatens to have a grave effect on the attorney-client relationship in FLSA cases. Indeed, the Ninth Circuit's opinion effectively means that Section 216(b) grants an employee the right to sue *any person* who is alleged to have had a hand in discharging or discriminating against the employee. And the specific application of the Ninth Circuit's analysis demonstrates the grave threat to the bedrock relationship between attorney and client in FLSA-related matters.

The Ninth Circuit's analysis most directly applies where an attorney reports suspected criminal activity such as embezzlement by a client's employee to law enforcement even though the employee has made an FLSA complaint at some time in the past. Given the constitutional right to petition all branches of the government, the FLSA should not be construed to impose liability unless the report was objectively baseless and made without a genuine intent to obtain favorable government action (i.e., a sham). *Prof'l Real Estate Invs., Inc.* v. *Columbia Pictures Indus., Inc.,* 508 U.S. 49, 57, 60–61 (1993); *BE & K Constr. Co.* v. *NLRB*, 536 U.S. 516, 526 (2002). The Ninth Circuit's reinterpretation of the FLSA's anti-retaliation private cause of action encompasses constitutionally protected petitioning, and thus should be rejected.

Of greater concern is the application of the Ninth Circuit's expansive reading of the FLSA antiretaliation provision to attorneys more generally. Under the Ninth Circuit's analysis, an attorney could be liable under the FLSA if he or she takes any action that is materially adverse to an employee who has made a complaint, including internal complaints to an employer, regarding the FLSA. 29 U.S.C. § 215(a)(3); *Lambert* v. *Ackerley*, 180 F.3d 997, 1003–05 (9th Cir. 1999) (collecting cases). Material adversity in this context means actions that "well might have dissuaded a reasonable worker from making or supporting" a complaint related to the FLSA. *Mullins* v. *City of New York,* 626 F.3d 47, 53 (2d Cir. 2010) (quoting *Burlington N. & Sante Fe Ry.* v. *White*, 548 U.S. 53, 68 (2006)) (internal quotations omitted). This threatens attorneys who provide employment-related advice as well as attorneys representing employers in FLSA litigation.

The Ninth Circuit's analysis puts attorneys at risk for simply fulfilling their duty to "exercise independent professional judgment and render candid advice." Model Rules of Prof'l Conduct R. 2.1. In DRI's members' experience, employers retain counsel to provide a broad range of employment advice and services, including:

- Counsel regarding the application of the FLSA's salary exemptions from minimum-wage and overtime-pay requirements;

- Advice regarding employee complaints about FLSA-related issues;

- Responding to employees' complaints to the Department of Labor regarding alleged FLSA violations;

- Investigations into allegations of wrongdoing; and

- Advice and recommendations before taking adverse employment actions.

Thus, it is not unusual for an attorney to advise an employer to fire or take other adverse action against an employee who the attorney knows has raised FLSA-related complaints. If an attorney, exercising all appropriate care and expertise, advises his or her employer client to take an adverse action against an employee who has raised FLSA complaints in the past, the attorney is potentially liable for retaliation in the Ninth Circuit. This risk is likely to cause attorneys to provide more self-censor to their advice, whether consciously or unconsciously, to clients based on attorneys' awareness of their own potential liability.

A similar risk arises for counsel representing employers in defense of FLSA claims. For instance, suppose an employee files a lawsuit alleging a wage-and-hour violation. The employer's outside counsel determines that the employer has a valid, good-faith counterclaim against the employee. The employer directs counsel to file the counterclaim. Under the Ninth Circuit's logic, counsel has just opened herself up to a potential retaliation claim from the employee. The employee can claim that the employer and its counsel have taken adverse action against the employee—it has discriminated—simply "because

[the] employee has filed any complaint or instituted or caused to be instituted any proceeding" under the FLSA. 29 U.S.C. § 215(a)(3). By ditching the economic-reality test, the Ninth Circuit has made the counsel potentially liable. Despite the fact that the counsel has no operative control over the employee, counsel is subject to a potential retaliation suit simply because the attorney advised the employer of a potential counterclaim and then filed it. That cannot be right.

The potential issues do not end there. Suppose such a retaliation lawsuit is brought against the employer's attorney. The attorney's ability to defend against retaliation lawsuits is compromised because the communications with the client are privileged. This problem is exacerbated if the attorney actually provided a recommendation that the employer did not follow. Not only can the attorney not disclose the communication, but the attorney's position is actually adverse to the employer.

The Ninth Circuit's anti-retaliation analysis incentivizes counsel to self-censor their advice out of the conscious or unconscious fear of suit. And savvy employees can also use retaliation lawsuits to strategically disqualify employers' chosen counsel. Limiting private FLSA retaliation claims, under § 216(b), to employers as defined by the well-established economic-reality test eliminates this problem. This is all the more reason for this Court to grant the petition.

CONCLUSION

For the reasons given above, the petition should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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