No. 13-683

IN THE
Supreme Court of the United States

JOHN CATSIMATIDIS,
Petitioner,

v.

BOBBY IRIZARRY, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

There is a direct circuit conflict—acknowledged both by the decision below and by the Department of Labor—on the question whether an individual may be held personally liable for a company's violations of the Fair Labor Standards Act ("FLSA") even when the individual did not exercise "personal responsibility" over the relevant conduct. Pet. App. 19a; *see* DOL C.A. Amicus Br. 17 n.4.

Plaintiffs try to deny the existence and significance of the conflict, but their arguments are makeweight. Their principal objection to certiorari is not about the conflict at all, but the particulars of this case. Plaintiffs say the case is moot because the corporate employer satisfied the monetary obligations imposed by the final settlement with plaintiffs. The argument is meritless. The initial settlement provided for significant injunctive relief that involved ongoing monetary obligations, and under the existing judgment, plaintiffs could seek to hold petitioner personally liable should the company violate either the agreement or the FLSA itself. Petitioner's continuing interest in the decision below cannot be doubted.

Neither can the broader need for review of the question presented. Plaintiffs fabricate a judicial "consensus" on the standard for personal FLSA liability by simply ignoring the decisions they disagree with, and by misquoting the First Circuit decision they actually address. The dozens of appellate decisions addressing the issue bespeak its significance, as does DOL's participation in this case.

A. This Case Is Not Moot

Plaintiffs contend this case is not justiciable because the decision below has "no remaining practical effect on the petitioner." Opp. 9. Plaintiffs are incorrect.

1. Plaintiffs err in asserting that the district court dismissed this suit subject only to the condition that plaintiffs could reopen it upon nonpayment, and that no party preserved the right to appeal. *Id.* In fact, the district court entered its order on the settlement "without prejudice to Defendant John Catsimatidis in the event that the U.S. Supreme Court reverse[s] the Second Circuit's ruling." D.Ct. Dkt. 495 (Oct. 22, 2013).

Plaintiffs also ignore the 2010 agreement establishing a contingent resolution of their FLSA overtime and retaliation claims. That agreement provides for injunctive relief constituting "no less than" a mandate that Gristede's "pay all Co-Managers who do not meet the requirements to qualify for an exemption from overtime compensation under the FLSA … at a rate of one-and-one-half times their regular rate for all hours they work, record, and report in excess of 40 in a workweek" and "include in regular and overtime rate calculations, all legally required bonuses and premium payments." D.Ct. Dkt. 365, Exh. 6, at 27 (Dec. 6, 2010). In addition, plaintiffs retained the right to seek additional injunctive relief, and the district court "retain[ed] jurisdiction over this action for the purpose of enforcing the Settlement Agreement." *Id.*; D.Ct. Order, Dkt. 369 (Dec. 21, 2010). Under the decision below, therefore, plaintiffs could seek to hold petitioner per-

sonally liable for monetary liabilities incurred for violation of those minimum terms, as well as for any other relief plaintiffs might seek. Plaintiffs themselves confirmed below the continuing nature of the parties' dispute, advising the district court that, "if the Supreme Court reverses" the Second Circuit, plaintiffs will seek to prevail in an "ensuing individual liability trial." D.Ct. Dkt. 490, at 2 (Oct. 4, 2013). There is much at stake here for all parties.

The precedents on which plaintiffs rely are inapposite. None involved a situation where a settling defendant preserved his right to challenge a judgment—much less a situation where plaintiffs could seek to hold the defendant liable under the existing judgment. *See United States v. Balint*, 201 F.3d 928, 936 (7th Cir. 2000) (criminal restitution); *Union of Prof'l Airmen v. Alaska Aeronautical Indus.*, 625 F.2d 881, 884 n.4 (9th Cir. 1980) (payment of contempt fine mooted case where order lacked "collateral consequences"); *Schiller v. Penn Cent. Transp. Co.*, 509 F.2d 263, 266 (6th Cir. 1975) (under Ohio law certain claims moot where judgment satisfied pending appeal).

2. This suit instead falls squarely within the categories of cases this Court has held justiciable. For instance, the Court has repeatedly rejected claims that cases were moot where petitioners apparently remained subject to trial court injunctive orders. *See Tory v. Cochran*, 544 U.S. 734, 737 (2005) ("ongoing federal controversy" where petitioners apparently were bound by injunction limiting speech about respondent, even after respondent died); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 569 (1984) (case not moot in part be-

cause it appeared from "terms" of injunction that it was "still in force" and "unless set aside must be complied with").

The Court has also held that the "personal stake" required by Article III is satisfied by a party's "concern that [its] success in some unspecified future litigation would be impaired by *stare decisis* or collateral-estoppel application" of a lower-court judgment. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 336 (1980) (discussing *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939)). And in *Camreta v. Greene*, 131 S. Ct. 2020 (2011), the Court held that a case remains justiciable if the defendant could "gain clearance to engage in the [challenged] conduct in the future" only "by overturning the [lower court] ruling on appeal" and the plaintiff "who initially brought the suit" could "again be subject to the challenged conduct." *Id.* at 2029.

So it is here. Short of selling the company, it is only by overturning the Second Circuit's judgment that petitioner can escape personal liability for the company's FLSA violations. And plaintiffs "may again be subject to the challenged" conduct, which was never proved illegal. Indeed, that presumably was the reason plaintiffs sought injunctive relief in the first place. The controversy between the parties persists, as does the need for review and reversal of the decision below.

3. If the Court nonetheless concludes that the case has become moot on appeal, the Court should at least follow its "established … practice" and "vacate the judgment below." *Id.* at 2034-35 (quotation omitted). Here, as the district court's order recog-

nizes, petitioner actively sought to preserve his right to challenge the court of appeals' erroneous judgment, which holds him personally liable for millions in damages and subjects him to future liability as a purported FLSA "employer." He "ought not in fairness be forced to acquiesce in" that judgment. *Id.*

B. The Circuits Are In Conflict

Plaintiffs next contend that there is no conflict over the question presented. Plaintiffs again are incorrect.

1. Plaintiffs falsely assert that every circuit to have addressed the issue agrees with the Second Circuit that personal responsibility is not required for personal liability under the FLSA, and that an individual may be held liable merely so long as he has "financial and day-to-day control over an enterprise." Opp. 15. To support that assertion, plaintiffs cite *only* those cases on the Second Circuit's side of the conflict. *Id.* (citing *Lambert* (9th Cir.); *RSR* (2d Cir.); *Dole* (6th Cir.); *Donovan* (5th Cir.)). Plaintiffs ignore multiple precedents from other circuits holding—in direct conflict with the Second Circuit—that personal FLSA liability turns on whether the individual "had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation." *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987); *see Luder v. Endicott*, 253 F.3d 1020, 1022 (7th Cir. 2001) (a "supervisor who uses his authority … to violate [employees'] rights under the FLSA is liable for the violation"); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1314 (11th Cir. 2013) ("primary concern" in determining personal liability is individ-

ual's "role in causing the FLSA violation"; operational control relevant only when "both substantial and related to the company's FLSA obligations").[1]

Although plaintiffs do not ignore the First Circuit's decision in *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1998), they may as well have, because their discussion quotes from *the wrong part of the opinion*. According to plaintiffs, *Baystate* "held that 'it is the totality of the circumstances, and not any one factor, which determines whether a worker is the employee of a particular alleged employer.'" Opp. 12 (quoting 163 F.3d at 676). That passage, however, was describing the test for determining whether the workers at issue were employees of a staffing agency, its clients, or both. 163 F.3d at 675-76. The court's discussion of personal liability came later in the opinion, and it explicitly "focused on the role played by the corporate officers in causing" the violation—"in particular, the *personal responsibility* for making decisions about the conduct of the business that contributed to the violations of the Act." *Id.* at 678 (emphasis added). *Baystate* thus adopts exactly the kind of personal responsibility requirement mandated by the cases plaintiffs ignore.

The First Circuit's subsequent decision in *Manning v. Boston Medical Center Corp.*, 725 F.3d 34, 48-

[1] Plaintiffs at least mention the Eight Circuit's decision in *Wirtz v. Pure Ice Co.*, 322 F.2d 259 (1963), *see* Opp. 14-15, but they cannot escape its holding that the defendant there could not be held personally liable because he "left the matter of compliance … up to the []managers" and "had nothing to do with the hiring of the employees or fixing their wages or hours." 322 F.2d at 262-63.

51 (1st Cir. 2013), is in accord. Although the court there observed that a plaintiff need not plead "particular facts showing that an individual made a specific decision or took a particular action that directly caused the plaintiffs' undercompensation," the court declined to dismiss only because the complaint "raise[d] a reasonable expectation that discovery will reveal evidence that [the defendant] played a role in causing the corporation to violate the FLSA." *Id.* at 49 (quotation omitted).

2. Both DOL and the Second Circuit reject plaintiffs' view of a "judicial consensus" (Opp. 15) on the standard for personal FLSA liability. Plaintiffs have no response to DOL's brief, which described the First Circuit as requiring "not only that the individual [defendant] have operational control of significant aspects of the company's functions," "but also that the individual have been personally involved in causing the company to violate the FLSA." DOL C.A. Br. 17 n.4. DOL urged the Second Circuit to reject that standard, and so it did, explicitly observing—contra plaintiffs (Opp. 12)—that no other circuit had "gone as far as" the First Circuit in requiring "personal responsibility" for liability. Pet. App. 20a. The Second Circuit followed the other circuits and held petitioner personally liable for the company's FLSA violations even though he "was not personally responsible for" them. *Id.* at 37a.

That holding perfectly crystallizes the legal disagreement among the circuits. Plaintiffs do not (and on this record, in the summary-judgment posture, could not) contest the court's factual premise that petitioner was *not* personally responsible for the company's FLSA violations. In the First, Seventh,

Eighth, and Eleventh Circuits, that fact alone would conclusively absolve an individual of personal liability under the FLSA. In the Second, Fifth, Sixth, and Ninth, it would not. The circuit conflict, in other words, does not reflect factbound differences in the application of a commonly recognized legal standard (Opp. 15), but reflects a fundamental dispute about the standard itself. And this case presents that conflict for resolution in an outcome-determinative posture, without any cloud of disputed facts or contestable inferences: there is simply the purely legal question whether petitioner can be held personally liable for FLSA violations that he "was not personally responsible for." Pet. App. 37a.[2]

C. The Court of Appeals' Decision Is Wrong

The answer to the foregoing question is no. Plaintiffs' merits arguments merely confirm the extent to which those circuits adhering to the Second Circuit's standard—requiring overall operational control of the enterprise, rather than personal responsibility for FLSA compliance—have departed from the FLSA's text and underlying principles.

Plaintiffs do not dispute that "a basic tenet of American corporate law is that the corporation and its shareholders are distinct entities," *Dole Food Co.*

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[2] To the extent petitioner argued below that the question of individual liability was fact-intensive (Opp. 18), it was only because the leading precedent *in the Second Circuit* enunciated a fact-intensive totality-of-the-circumstances standard, which did not turn on whether petitioner exercised personal responsibility over the FLSA-violating conduct. *See Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). The question before this Court, in contrast, is the purely legal one of whether such responsibility is a prerequisite for liability.

v. Patrickson, 538 U.S. 468, 474 (2003), and that "[o]nly under exceptional circumstances" may liability be imposed upon an individual owner for corporate debts, *Burnet v. Clark*, 287 U.S. 410, 415 (1932). Nor do they object to this Court's unanimous rejection of "personal liability without fault" under the Fair Housing Act ("FHA"). *Meyer v. Holley*, 537 U.S. 280, 282 (2003).

Plaintiffs instead argue that the Court should disregard those precedents on two grounds. First, plaintiffs argue the decision below is reconcilable with "traditional corporate law" principles because "the corporate law of several states" holds "shareholders accountable for unpaid wages." Opp. 17-18. But the heterodox law of unspecified states cannot trump this Court's own repeated pronouncements that individual liability normally is limited to circumstances not present here. *Dole*, 538 U.S. at 474.

Plaintiffs next argue the Court should disregard *Meyer* because that case applied "common-law rules of agency" under the FHA, and Congress supposedly has "eschewed common-law agency rules in determining who is an employer under the FLSA." Opp. 20. But the cases cited by plaintiffs eschew common-law rules only for determining who may be an *employee* under the FLSA. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319, 326 (1992) (construing "employee" in observing that FLSA covers "some parties who might not qualify as such under a strict application of traditional agency law principles"); *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947) ("common law employee categories … are not of controlling significance" "in determining who are 'employees'").

As petitioner has explained (Pet. 22 n.1), it may be true that Congress wanted the FLSA to encompass more workers than the common-law master-servant concept of "employee." But that does not mean Congress also meant to disregard hundreds of years of corporate-law precedent and hold individual officers and owners personally liable for corporate wrongs. As the Court held in *Meyer*, if Congress means to impose such "unusually strict rules" of liability, it must say so clearly. 537 U.S. at 287; Pet. 23-24. Congress did no such thing in the FLSA. Just the opposite: Congress adopted a definition of "employer" that, as construed in a related context, means only that "courts would apply the tort rule of respondeat superior" to unfair labor practices, thereby holding *the employing entity* vicariously liable for the wrongful acts of its individual agents. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 489 (1947); *see* Pet. 22-23. The Second Circuit's rule flips that meaning on its head, holding the individual vicariously liable for the acts of the employer principal. Nothing in the FLSA supports that reverse vicarious liability standard. Pet. 19-21.

D. The Case Presents A Recurring Issue Of National Importance

Finally, plaintiffs suggest review is unwarranted because the question presented is unimportant and raised in a "relatively scarce" number of cases. Opp. 16-17 & n.4.

That contention is belied by the involvement of DOL, which considered the issue important enough to merit filing an amicus brief and participating in oral argument below. It is also belied by plaintiffs'

own response brief, which combines with the petition to cite *twenty* published circuit decisions addressing the issue of personal FLSA liability. And the certiorari papers do not exhaust the cases presenting the issue.[3] Although employees may not always "include officers as defendants" (Opp. 16) in the several thousand FLSA cases filed annually (Pet. 25 n.2), the glut of applicable decisions shows that they frequently do, even when there is no apparent threat of company insolvency. *See*, *e.g.*, *Johnson*, 651 F.3d 658.

Plaintiffs also accuse petitioner of exaggerating the effect of the Second Circuit's personal liability standard. Opp. 16. But the warning comes not from petitioner, but the First Circuit: If "the significant factor in the personal liability determination is simply the exercise of control by a corporate officer or corporate employee over the 'work situation,'" then "almost any supervisory or managerial employee of a corporation could be held personally liable for the unpaid wages of other employees and the civil penalty related thereto." *Baystate*, 163 F.3d at 679.

Plaintiffs' brief highlights that danger, arguing that petitioner should be held personally liable simply because he is the "face of the Gristede's stores," manages Gristede's "business affairs" and high-level executives, and has "power to close or sell Gristede's stores." Opp. 3-4. If no more is necessary to be an

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[3] *E.g., Johnson v. Hix Wrecker Service, Inc.*, 651 F.3d 658, 664 (7th Cir. 2011); *Reich v. Am. Driver Serv., Inc.*, 33 F.3d 1153, 1157 (9th Cir. 1994); *Zas v. Canada Dry Bottling Co. of New York, L.P.*, 2013 WL 6189731, at *2-*3 (D.N.J. 2013); *Cavallaro v. UMass Memorial Health Care, Inc.*, 2013 WL 360405, at *9 (D. Mass. 2013).

FLSA "employer," then almost any corporate officer or controlling shareholder could qualify.

It is surely true that in "the vast majority of cases," corporate employers "satisfy their [FLSA] obligations" (Opp. 16), but that hardly makes the standard for personal liability unimportant. Legal standards matter most *at the margins*. One could just as accurately say the "vast majority" of companies do not commit mail fraud or violate the RICO statute, yet the articulation of the legal standards governing those statutes has not escaped this Court's attention, precisely because those standards matter *when a violation is alleged*. The standard for personal FLSA liability likewise matters *when such liability is alleged*, as it all too frequently is.

CONCLUSION

The petition should be granted. Alternatively, if the Court believes the case is moot, the judgment below should be vacated.

Respectfully submitted,

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