No. 14-1094

In the Supreme Court of the United States

HARRY'S NURSES REGISTRY, INC., and

HARRY DORVILIEN,

Petitioners,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Second Circuit -in direct conflict with *McLaughlin v. Richman Shoe Co.*, 486 U.S. 128 (1988), and the decisions of other circuit courts- properly affirmed the district court's summary judgment on respondents' damages claim calculated according to a greater than three year limitations period for willful violations under FLSA § 255 (a) because petitioners did not "prove" at the summary judgment stage that they acted in good faith and because the presumption of liquidated damages under FLSA § 260 applied.

II. Whether the Second Circuit –in direct conflict with *McLaughlin v. Richman Shoe Co.,* 486 U.S. 128 (1988), and despite petitioners' reliance on state licensing protocol, prior dismissal of respondent class member's claim for wage violations, and reliance on Supreme Court precedent –properly held that respondents' failure to argue that petitioners willfully violated the FLSA was not relevant to the liquidated damages awarded respondents when liquidated damages were calculated according to a greater than the three year limitations period for willful violations, because of an unenforceable class precertification stipulation.

III. Whether the Second Circuit erred in refusing to find a triable issue of fact when, despite petitioners' reliance on state law and administrative action

dismissing respondent class member's claim for wage violations, and reliance on this Court's precedent, it held that respondent class was entitled to judgment as a matter of law on all of their overtime wage and damages claims under the FLSA and the New York State Labor Law (NYLL).

LIST OF PARTIES

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 MUKANDI, MARTHA OGUNJANA, 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,

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Harry Dorvilien and Harry's Nurses Registry, Inc. state that Harry's Nurses Registry, Inc., is a privately held New York Company. None of its shares is held by a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Harry's Nurses Registry, Inc., and Harry Dorvilien respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals of the Second Circuit.

OPINIONS BELOW

The summary order of the court of appeals is not published but is available at 2014 WL 6865431 and is reprinted here at Appendix (App.) pp. 1-9. The initial decision of the district court granting summary judgment to respondent Gayle is available at 2009 WL 605790 (App. pp. 67-96). The district court decision denying reconsideration and granting summary judgment for respondent Gayle on the question of damages is available at 2010 WL 5477727 (App. pp. 51-66). The district court decision granting certification of respondent class and summary judgment for the class as to liability is not published but is available at 2012 WL 686860 (App. pp. 27-50). The district court's damages decision as to respondents is unpublished but is available at 2012 WL 4174401 (App. pp. 12-26). The district court's amended judgment granting attorney's fees, costs, and awarding additional damages to various class members is unpublished but reprinted here at App. pp. 10-11.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2014. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Fair Labor Standards Act (FLSA) provides that a cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages "may be commenced within two years after the cause of action accrued, and 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." 29 U.S.C. § 255(a).

The FLSA provides that "if an employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation…the court may, in its discretion, award no liquidated damages…" 29 U.S.C. § 260.

A cause of action under the FLSA "shall be considered to be commenced on the date when the

complaint is filed; except that in the case of a collective or class action … it shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced. 29 U.S.C. § 256.

The FLSA exempts from the statute's minimum wage and maximum hour rules "any employee in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary of [Labor]." 29 U.S.C. § 213 (a)(15).

The Department of Labor's general regulations define domestic services employment as "services of a household nature performed by an employee in or about a private home ... of the person by whom he or she is employed ... such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen,

gardeners, footmen, grooms, and chauffeurs of automobiles for family use [as well as] babysitters employed on other than a casual basis." 29 CFR § 552.3.

Federal Rule of Civil Procedure 56(a) provides that a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

STATEMENT OF THE CASE

The Second Circuit affirmed the district court's September 18, 2012 summary judgment which followed four district court orders, and a fifth order yielding an amended judgment dated October 16, 2013, all in favor of respondents on their unpaid overtime and damages claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § § 201-219.

In its decision, the Second Circuit held that respondents' "failure to argue that defendants willfully violated the FLSA *has no bearing* on the entirely proper liquidated damages award" although liquidated damages were calculated according to a greater than the three year limitations period expressly reserved for willful violations under FLSA § 255(a). App. p. 8 (emphasis added), *see also* App. pp. 121, 122 (excerpt from CD submitted by respondents' counsel regarding claim for damages);

see also R.A809-819. The court held that because petitioners did not "prove" at the summary judgment stage that they acted in good faith and because the presumption of liquidated damages under FLSA § 260 applied, the liquidated damages award, predicated, as it was, on a greater than three year period of violations, was "entirely proper."

Counsel for respondents justified the greater than three year period for calculating damages for *non-willful* violations on the basis of a signed stipulation between respondent Gayle and petitioners' former counsel executed four years prior to the certification of the class which tolled the statute of limitations only as to Gayle and petitioners, the parties to the action. *See* App. pp. 103-105.

Counsel's claim that the statutory limitations period could be enlarged so that all opt-in class members had a three year and forty-two day period of compensable damages was erroneous. A pre-class certification stipulation does not speak for those the named plaintiff purports to represent, and neither respondent Gayle nor petitioners' former counsel had the authority to stipulate on behalf of nonparties to Gayle's complaint four years prior to certification of the class. *See Standard Fire Insurance Company v. Knowles,* 133 S.Ct. 1345, 1349 (2013).

In any event, *assuming arguendo* that the stipulation was binding on nonparties to the action and petitioners, it did not relieve the district court of finding, and respondents of establishing, that

petitioners willfully violated the FLSA before employing a greater than three year period to encompass violations which are, according to statute, "*forever barred* unless commenced within two years after the cause of action accrued" (emphasis added) 29 U.S.C. § 255(a). The district court could not, without such a finding, increase the base amount of liquidated damages awarded respondents by a three year and forty-two day period instead of the two year period allowed for non-willful violations. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988).

Gayle's counsel claimed that the toll period, one year and forty-two days, because of the stipulation, could now be added to the required two year limitations period for non-willful violations, garnering for all respondents a full three years plus forty-two days limitations period for which they could claim damages. According to this formula, each respondent stood to gain more if they delayed in bringing an action until after the toll period expired. Indeed, Gayle's counsel stated to the court that certain individuals could not get the full benefit of the toll because they opted in prior to the toll's expiration (R.A804). Importantly, there was never a judicial order of an equitable tolling of the limitations period, nor did respondent Gayle move for or establish any need for a tolling.

Respondents thus received for violations that were not willful, a three year and forty-two day limitations period, exceeding the three years allowed

for willful violations by the FLSA without a court finding that petitioners willfully violated the Act. The calculation of damages for claims occurring during this expanded period was then doubled when the court presumed liquidated damages under FLSA § 260. Respondents were then awarded damages in excess of $600,000.

Respondents circumvented the FLSA's express pronouncement that every action for non-willful violations "… be forever barred unless commenced within two years after [the] action accrued" (emphasis added) 29 U.S.C. § 255(a), without establishing that petitioners willfully violated the Act. Respondents did not establish a right to the enlarged three year period of limitations under 29 U.S.C. § 255(a), or to a three year and forty-two day limitations period because they could not, as discussed below, establish that petitioners acted willfully.

1. Proceedings in the district court

Prior to any of the district court's rulings on damages for any respondent, and prior to its ruling on summary judgment for all respondents, petitioner Harry Dorvilien, a hard-working, highly motivated, and successful immigrant from Haiti, whose primary language was not English, believing that his counsel was not adequately representing his interests or the interests of Harry's Nurses Registry, appeared pro se.

In opposition to respondent Gayle's motion for damages, summary judgment and to protest any allegation of willfulness on his part, Harry expressed his reliance on state law and licensing protocol, prior state action dismissing respondent class member's claim of overtime wage violations, and reliance on Supreme Court precedent to establish his defense that respondents were not covered and/or exempt from FLSA overtime requirements, and that he did not willfully violate the law. App. pp. 106-120.

Demonstrating good faith, and the absence of a reckless disregard for the law, Harry, however imperfectly, detailed his understanding of the obscure, and conflicting state and conflicting federal law applicable to the business of third party placements in the field of home and domestic care. Harry explained his understanding of the decisions of the courts of appeals and the U.S. Supreme Court including *Fazekas v. Cleveland* 204 F.3d 673 (6th Cir. 2000), and *Long Island Care at Home, Ltd.,* v*. Coke,* 551 U.S. 158 (2007). He explained his good faith belief that Harry's Nurses Registry, duly licensed under Article 36 of the New York Public Health Law, was a third party registry assisting in placement of nurses who provided professional services as well as domestic or home care services in private homes. These placements were not like the placements involved in *Brock v. Superior Care,* 840 F.2d 1054 (2nd Cir. 1988), as Superior Care was agency licensed

under Article 28 of the New York Public Health Law, placing skilled nurses in nursing facilities and hospitals. Harry asserted in good faith that the facts in his case were like the facts in *Long Island Care at Home, Ltd., v. Coke,* 551 U.S. 158 (2007) involving the Long Island Care placement agency that was also licensed under Article 36 of the New York Public Health Law and referred private home placements for companionship services.

In *Long Island Care at Home*, this Court considered the FLSA Amendments of 1974 which exempted from its minimum wage and maximum hours rules persons "employed in domestic service employment to provide companionship services for individuals … unable to care for themselves." 29 U. S. C. §213(a)(15). The Court addressed a conflict between DOL regulation, 29 CFR § 552.3, that defined domestic services employment as "services of a household nature performed by an employee in or about a private home ... of the person by whom he or she is employed .." such as, among other employees, "nurses," *id.,* and a DOL regulation which stated that the companionship exemption included employees "employed by an… agency other than the family or household using their services." 29 CFR § 552.109(a)

This Court then upheld the statutory exemption for "companionship services" performed by workers engaged in domestic service employment paid by third-party agencies such as Long Island Care.

Importantly, the statute considered by the Court, 29 U. S. C. §213(a)(15), exempted any employee employed in "domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)," and the regulation, 29 CFR § 552.3, listed "nurses" as those who could perform domestic services of a household nature, and who could, Harry believed, qualify for the companionship exemption if the precise nature of all or part of the work they performed was "companionship services."

This was Harry's good faith belief, and however imperfect his submission, the district court was compelled to view the facts in the light most favorable to Harry, the nonmoving party at the summary judgment stage.

Significantly, Justice Stevens at oral argument in *Long Island Care at Home*, remarking upon the importance of the litigation, correctly stated that there was a safe harbor provision in the FLSA when employers rely in good faith on conflicting DOL regulations, and if there was such reliance "the damage liability just doesn't exist." Chief Justice Roberts later pronounced that the two regulations at issue in that case were not only seemingly conflicted, but did in fact conflict. In response to Justice Stevens' point and in concluding his argument,

counsel for Long Island Care, Farr, stressed that his client was in fact being sued for "will[ful] damages." *See Long Island Care at Home, Ltd., v. Coke*, cause 06-593, Appellant's original oral argument, transcript page 20, lines 11-23, page 21, lines 1-24, page 50 lines 10-13. (App. pp. 123).

As petitioner cited *Long Island Care at Home* at the summary judgment stage, the district court was compelled to infer that the nonmoving petitioner, however imperfectly, expressed his reliance upon the case, the statute 29 U. S. C. §213(a)(15), and regulation 29 C.F.R. § 552.3 which states that nurses could be engaged in "domestic service employment" performing "services of a household nature … in or about a private home," consistent with 29 C.F.R. § 552.6, which states that companionship services includes household work related to the care of the aged or infirm…"

29 C.F.R. §552.6, however, states that nurses are not exempt under the companionship exemption because "companionship services" does not include services which require and are performed by trained personal, such as a "nurse." As Harry interpreted this to mean that nurses engaged in domestic service employment performing domestic services like household work related to the care of an aged or infirm person such as meal preparation, bed making, and other similar services, and not exclusively services that require that they employ their medical

training, then Harry did not willfully violate the FLSA. The nurses, Harry believed, were engaged, in whole or in part, in companionship services.

Nurses, Harry believed, could and do perform companionship services and do qualify for the exemption if all or part of the work they performed did not require the training of a skilled nurse. That is, if, instead of conducting medical procedures or work which requires special training, they are performing duties of a "household nature… in or about a private home" (29 C.F.R. 553.3), including "household work related to the care of the aged or infirm person." 29 C.F.R. 552.6. If Harry relied upon 29 C.F.R. 552.3, whether reasonably or unreasonably, believing that nurses performed domestic work as described in 29 C.F.R 552.6 and were exempt under the companionship exemption then he did not violate the act willfully. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988)

Harry's belief was supported by Gayle's deposition testimony that she did not really speak to the client's about their medical condition unless there was something to be discussed (R.A376), and that "Harry's Nurses Registry is a home-care agency." R.A410.

Significantly, Gayle testified that she desired a break from the "skilled nursing facility" setting like the "White Glove" agency where, in contrast to

Harry's, she worked exclusively as a "skilled nurse" taking care of over 40 patients, (*see* R.A323). According to Gayle, at agencies like the "White Glove facility," she performed the work of a skilled nurse like medication administration, wound care, trach care, etc… while tending to over 40 patients (R. A324).

Gayle's deposition testimony also established that she chose to remain taking placements from Harry's Registry, agreeing to be paid less money because she preferred being referred to one client at home through a home care registry unlike the "White Glove" agency that required the services of a "skilled nurse" servicing over 40 patients at a busy facility (R-A363, lines 2-10); Gayle's preference for Harry's Nurse's Registry's home care referrals, unlike the hospital placements in *Brock v. Superior Care*, was that it was easier work and at the time she "needed to be off her feet" (R.A364, lines 9-11). Moreover, according to Gayle, there was no difference between an employee and an independent contractor (R.A368, lines 13-21).

The district court was compelled to consider all of Harry's arguments about the exemptions and to consider the prior state finding of no violations presented by Harry in his pro se affidavit in the light most favorable to Harry when determining at the summary judgment stage whether there were any triable issues of fact concerning the alleged violations

and whether any violation was willfully committed.

Harry relied upon 29 U.S.C. § 213(a)(15) and regulation 29 CFR § 552.3 cited in *Long Island Care at Home* and upon the regulation's inclusion of the term *nurses* who could be, Harry believed, exempt employees under 29 C.F.R. 552.6 if they provided "fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs," *id.*, in other words*, companionship services* in private home care settings.

Viewing the evidence in the light most favorable to Harry in considering the exemption, the work of the nurses in individual client homes entailed companionship and home care services, in part, if not in whole. This called into question Harry's alleged violations with respect to Gayle and whether they were in fact willful violations when considering damages.

Additionally, in his affidavit, Harry stated expressly how the New York State Department of Labor conducted an investigation of Harry's Nurse's Registry and found that respondents were exempt from federal overtime regulations and the FLSA. *See* App. p.114. Harry also stressed that he was provided with a decision from the Unemployment Insurance Appeal Board in 1999 that held that the nurses were independent contractors and not entitled to contributions. *See* App. p.p. 97-102. He

also argued how Harry's Nurses Registry was never found in violation of the FLSA and, on the contrary, that claims for overtime wage violations had been dismissed against him by the state agency reviewing the claims. App. p. 115.

Harry also asserted that the workers, who purchased their own equipment and insurance, described themselves as independent contractors, and received 1099 tax statements, were, in fact, independent contractors, and that, alternatively, Respondent Gayle was exempt under the professional employment exemption to the FLSA. Harry also stressed that in *Brock v. Superior Care* the employer was found to be in prior violation of the FLSA whereas Harry's Nurses Registry was never found in violation. (R.A680-700.) Significantly, *Brock v. Superior Care*, relied upon by both district court and court of appeals, was not decided on summary judgment but after a bench trial.

Moreover, while in 1974 Congress amended the FLSA to include workers placed by licensed home care agencies, such as Harry's Nurses Registry and Long Island Care at Home, as exempt from the FLSA, it was only in January 1, 2015 that the DOL amended its regulations to do away with this exemption. See DOL Fact Sheet # 25, *The Home Health Care Industry Under the Fair Labor Standards Act*, http:// www.wagehour.dol.gov. Indeed, at all times prior to January 1, 2015, Harry

had a multitude of reasons to believe that respondents were exempt. Harry could have relied upon the then existing companionship exemption, the professionals' exemption, official state communications and adjudications, and upon respondents' status as independent contractors.

In sum, viewing the facts in the light most favorable to petitioners as non-movants, and resolving all ambiguities and drawing all reasonable inferences against respondents, Harry raised genuine issues of material fact to preclude the granting of summary judgment as to the question of whether petitioners violated the FLSA, whether they demonstrated good faith assuming any such violation, and whether they willfully violated the FLSA.

In response to Harry's pro se affidavit, respondents' counsel moved unsuccessfully to strike it forever from the record.

After retaining new counsel as per the district court's direction to represent the corporate defendant, counsel for petitioners reiterated many of the assertions in petitioner Harry's pro-se affidavit in a motion to reconsider the granting of summary judgment as to liability in favor of respondent Gayle. The motion for reconsideration was denied, and Gayle, not having moved for damages was granted leave to move for summary judgment as to damages.

Retained counsel then objected to the court's

"blanket finding of lack of good faith," and asserted that petitioners were in compliance with the FLSA, because respondents were independent contractors and or otherwise exempt from the Act. R.A1189. Petitioners argued that respondents did not meet their burden at the summary judgment stage to prove liability and damages and stressed that there was insufficient evidence to decide as a matter of law the issue of petitioners' liability to opt-in plaintiffs and damages. R.A1074.

In a final grant of summary judgment, without testimony, for all respondents who opted-in after Gayle, as to liability and damages, the district court found no genuine issue of material fact as to liability to respondents, including Willie Evans the claimant in the prior overtime wage claim dismissed by the state agency despite time cards showing 60 hours worked for each of two weeks by Evans in December 2006 (R.A719, 723, 739). The court also granted summary judgment as to damages, and awarded damages calculated on the greater than three year period proposed by respondents' counsel without a finding that Harry acted willfully.

2. Proceedings in the Second Circuit

On appeal to the Second Circuit, Harry argued that there existed genuine issues of material facts as to whether the FLSA applied to respondents,

including Willie Evans, as they were independent contractors, or otherwise exempt employees, and that summary judgment should not have been granted respondents. Petitioners also argued that the district court's actions with respect to the required willfulness finding for the purposes of the expanded limitations period was in direct conflict with this Court's ruling in *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128 (1988). Petitioners claimed that the statute of limitations for the damages calculation which resulted in more than three years of damages was impermissible absent a finding of willfulness. R. Petitioners' Brief on Appeal Point III.

Petitioners also again submitted on appeal how the nurses were exempt, because, among other exemptions, the companionship services they performed rendered them exempt from the FLSA overtime requirements.

The Second Circuit, citing *Brock v. Wilamowsky,* 833 F.2d 11, 19 (2d Cir. 1987), affirmed the district court's granting of summary judgment as to the district court's award of damages because petitioners did not "prove" at the summary judgment stage that they acted in good faith, because the presumption of liquidated damages under FLSA § 260 applied, and because any assertions by petitioners that there was no showing by respondents that any violations were willful "had no bearing on the entirely proper liquidated damages award." App. 8. It thus upheld

the district court award of liquidated damages calculated on a limitations period expanded by over three years.

The Circuit court's reliance on the reasoning of *Brock v. Wilamosky* which relied on the reasoning of *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971), a case overruled by this Court in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), and its conflation of the distinct willful and good faith analyses required under the FLSA for calculating the applicable limitations period conflicts directly with this Court's decision in *Richland Shoe Co.,* and with plain language of the FLSA. A finding that petitioners failed to show good faith, does not mean that the respondents showed that the defendant willfully violated the statute and should be exposed to damages for violations occurring three years and forty-two days since the accrual of each respondents' cause of action.

The court of appeals' decision allows the circumvention by counsel of the plain language of the FLSA and incorporates an expansive definition of the term willfulness which disregards an employer's expressed justifications and reasonable reliance on DOL general and interpretive regulations, state law and protocol, and reliance on Supreme Court precedent. The decision equates a district court's finding that an employer has not established good faith with an employees' obligation to prove that the employer knew the conduct violated the FLSA, or

showed reckless disregard of such a determination.

Even worse, the decision relieves respondents of their burden of establishing, at the summary judgment stage, that there are no genuine issues of material fact regarding petitioner's willfulness and that the three year limitations period as to damages under FLSA § 255(a) is, as are liquidated damages under FLSA § 220, presumed, despite the plain language of the statute. The Second Circuit's decision should be reversed.

REASONS FOR GRANTING THE PETITION

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH *MCLAUGHLIN V. RICHLAND SHOE*, 486 U.S. 128 (1988), ADDS TO THE CONFLICTING STANDARDS AMONG LOWER COURTS FOR AWARDING DAMAGES IN FLSA CASES, SHIFTS THE BURDEN TO THE EMPLOYER TO DISPROVE WILLFULNESS AT THE SUMMARY JUDGMENT STAGE, AND RENDERS THE QUESTION OF WILLFULNESS IRRELEVANT TO THE QUESTION OF WHETHER A VIOLATION IS WILLFUL IN DETERMINING THE LIMITATIONS PERIOD AND, CONSEQUENTLY, DAMAGES UNDER THE FLSA.

Under the FLSA, a violation is "willful" if the employer either "`knew or showed reckless disregard for . . . whether its conduct was prohibited by the statute.'" *Singer v. City of Waco, Tex.,* 324 F.3d 813,

821 (5th Cir. 2003) (quoting *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133 (1988)). The burden of showing that an FLSA violation was "willful" falls on the plaintiffs. *See id.*; *see also Samson v. Apollo Res., Inc.,* 242 F.3d 629, 636 (5th Cir. 2001) ("A plaintiff suing under the FLSA carries the burden of proving all elements of his or her claim."). On the other hand, an employer who violates the FLSA is liable for liquidated damages equal to the unpaid overtime compensation unless, after concluding that the employer acted in "good faith" and had "reasonable grounds" to believe that its actions complied with the FLSA, the district court declines to award liquidated damages (or reduces the amount). 29 U.S.C. § 260. Demonstrating good faith and reasonable grounds is a "substantial burden" borne by the *employer. Bernard v. IBP, Inc. of Neb.,* 154 F.3d 259, 267 (5th Cir. 1998). And courts have previously refused to read the "good faith" and "willful" provisions together. *See Nero v. Indus. Molding Corp.,* 167 F.3d 921, 929 & n.4 (5th Cir. 1999)(using FLSA to interpret similar provision in Family and Medical Leave Act); *Peters v. City of Shreveport,* 818 F.2d 1148, 1167-68 (5th Cir. 1987), abrogated on other grounds by *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). A finding that a defendant failed to show good faith, therefore, does not mean that the plaintiffs showed that defendants willfully violated the statute and should be exposed to a three year statute of limitations.

Examining the district court's orders and court of

appeals' affirmance here, the district court and court of appeals applied the incorrect legal standard and misplaced the burden of proof. The district court's findings specifically examine whether petitioners established good faith and reasonable grounds, and relieve respondents of their obligation to show that petitioners willfully violated the FLSA.

The district court examined Harry's affidavit and concluded that it was basically irrelevant. In granting summary judgment to Gayle on the question of damages, the district court concluded that because liability was found on Gayle's prior motion, liquidated damages were presumed and that petitioners failed to establish good faith and reasonable grounds to avoid liquidated damages. Yet, nowhere in its orders does the district court find that respondents established the Harry acted willfully or "knew or showed reckless disregard for" whether he was violating the FLSA. This, of course, is required to support a finding that petitioners willfully violated the FLSA.

To meet this burden, respondents would have had to address Harry's effort to understand the law, including obscure state law provisions, and DOL regulations that do at times, as noted by Chief Justice Roberts, quite plainly conflict. Most importantly, the district court would have to look at what evidence respondents put forward to support a finding of willfulness.

Rather, the district court orders conduct a good faith/reasonable grounds analysis—properly placing

the burden on Harry—and, at the same time, summarily conclude that Harry's actions were willful. Neither the district court nor the court of appeals applied the correct legal standard to the plaintiffs' claim that petitioners willfully violated the FLSA. (See R. A65)(Respondent Gayle's complaint alleging willful violations of the FLSA.)

The Second Circuit's standard has effectively shifted the burden of proof by presuming willfulness in the absence of a showing of non-willfulness. Until now, the plaintiff has borne that burden of proof. But under the Second Circuit's standard, if a company violates the FLSA, the company can only avoid a willfulness finding if it proves good faith to rebut the presumption of liquidated damages, which replaces the explicit willfulness requirement of 29 U.S.C. § 255(a). The Second Circuit's standard places a burden on companies that was never intended under FLSA. A finding that petitioners failed to show good faith, does not mean that the plaintiffs showed that the defendant willfully violated the statute and should be exposed to a three year statute of limitations.

Finally, practically speaking, perhaps as significant as any problem created by the Second Circuit's standard is that it is completely unworkable. Companies now have no idea how to avoid being punished with liquidated damages increased by an expanded limitations periods after the finding of one violation on summary judgment. The Second Circuit's standard states that whether

an employee asserts willfulness has no bearing on a liquidated damages award calculated according to a greater than three year limitations period and that an employer can only avoid a willfulness finding if it proves good faith and reasonable grounds sufficient to overcome the presumption of liquidated damages after the finding of a violation. Under this standard, a company can only avoid a willfulness finding if it can overcome the presumption of liquidated damages by proving good faith, *and* that it "had reasonable grounds for believing that [its] act or omission was not a violation…" 29 U.S.C. § 260. A district court would then have the discretion to relieve it of the increased damages if it chose to. But this is not a practical standard nor is it the law.

To fully appreciate this point, the Court need only look to its own precedent in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111 (1985). In *Thurston*, the Court held that a "knew or showed reckless disregard" standard was an acceptable way to define willfulness under the Age Discrimination in Employment Act ("ADEA"). *Id.* at 125-26. Despite holding that one of the defendant's defenses was not only incorrect but was also "meritless," Id. at 124, this Court held that the defendant did not act in reckless disregard of its obligations because it in good faith tried to determine its obligations. *Id.* at 129-30. Importantly, the Court did not hold that the defendant acted in reckless disregard of the law because it and/or its lawyer relied on a "meritless" interpretation of the ADEA. Instead, the Court's

inquiry centered on the *defendant's* actions and mens rea (or lack thereof) - not the quality of the advice the defendant received from counsel.

Companies must be given clear standards so that they can comply with the law and know how to avoid being faced with increased damages because of an expanded three year limitations periods. Harry persisted in his defense despite an initial ruling against him which, as he explained in his pro se affidavit, he, in good faith, believed was legally erroneous and promptly appealed. This was his right, and his good faith belief in his position continues today. The district court, in finding a failure to show good faith, found that Harry continued with his pay structure while he appealed the court's ruling, as he continued to assert his belief in the legality of his conduct. This may or may not have been unreasonable on Harry's part. But as this Court stated in *Richland Shoe*, "unreasonableness … [does not] suffice as proof of knowing or reckless disregard." *Mclaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n. 13 (1988).

The district court's findings of fact on the issue of willfulness were made under an erroneous view of controlling legal principles. Moreover, the Second Circuit's opinion conflicts with *Cook v. United States,* 855 F. 2d 848 (Fed. Cir. 1988), *Fowler v. Land Mgmt. Groupe, Inc.,* 978 F.2d 158 (4th Cir. 1992), and *Stokes v. BWXT Pantex LLC,* 17 WH Cas. (BNA) 1035 (5th Cir. 2011), which all follow this Court's precedent and correctly place the burden on a

plaintiff to show willfulness. The district court's determinations all relate to what petitioners did not prove—rather than what respondents did prove—and do not address whether petitioners either knew or showed reckless disregard for whether they were violating the FLSA.

Petitioners respectfully request that this Court grant this petition, vacate the final judgment of the court of appeals and remand the case for additional factual findings so that the issue regarding petitioners' willfulness, and monetary penalties, can be decided under the correct legal standard which places the burden of proof on respondents to prove willfulness.

II. THE SECOND CIRCUIT ERRED IN REFUSING TO FIND A TRIABLE ISSUE OF FACT AS TO LIABILITY, DAMAGES, OR WILLFULNESS WHEN PETITIONERS' COMPLIANCE WITH ALL STATE AND FEDERAL REGULATORY PROTOCOLS, PRIOR STATE ACTION DISMISSING RESPONDENT'S CLAIM FOR WAGE VIOLATIONS, AND ITS RELIANCE ON FEDERAL LAW, INCLUDING THIS COURT'S DECISION IN *LONG ISLAND CARE AT HOME, LTD. V. COKE*, 551 U.S. 158 (2007), POSED GENUINE ISSUES OF MATERIAL FACTS WARRANTING RESOLUTION BY A TRIER OF FACT.

Petitioners submitted evidence and testimony which posed genuine issues of material fact as to whether respondents were covered by or exempt from

the FLSA and as to whether petitioners willfully violated the FLSA. Significantly in his pro se affidavit, Harry raised genuine issues of fact that in other circuits, including the Federal and Fifth Circuits, would have precluded the finding of summary judgment both as to his liability and as to whether any violations were willful.

Indeed, in the Fourth Circuit "the issue of willfulness under § 255(a) is a question of fact for the jury not appropriate for summary disposition." *Soto v. McLean,* 20 F.Supp.2d 901, 913 (EDNC 1998) (citing *Fowler v. Land Mgmt. Groupe, Inc.,* 978 F.2d 158, 162-63 (4th Cir.1992)) (holding in the context of § 255(a), "there is no reason issues of willfulness should be treated any different from other factual determinations relating to application of a statute of limitations that are routinely submitted to the jury."); *see also Pabst v. Oklahoma Gas & Elec. Co.,* 228 F.3d 1128, 1137 (10th Cir. 2000); *McGuire v. Hillsborough County, FL,* 2007 WL 141129, (M.D.Fla. Jan.17, 2007) ("whether a defendant committed a willful violation is a jury question"); *Acosta Colon v. Wyeth Pharm. Co.,* 363 F. Supp. 2d 24, 29-30 (D.P.R.2005).

Reviewing the evidence, affidavits and deposition testimony, the district court was compelled to conclude that issues of fact existed which should have been determined as fact questions by a trier of fact. The district court's orders as well as the court of appeals' decision conflicts with decisions of other circuit courts as note above. *See Cook v. United*

States, 855 F. 2d 848 (1988); *see also Stokes v. BWXT Pantex LLC,* 17 WH Cas. (BNA) 1035 (5th Cir. 2011).

Moreover, several courts of appeals hold that the employee/independent contractor finding should ultimately be made by a trier of fact, and this should have been considered by the district court in the first instance. Significantly, *Brock v. Superior Care*, 840 F.2d 1054 (2nd Cir. 1988), relied upon by both district court and Second Circuit to dispense summarily with the liability and damages question was not decided on summary judgment, without testimony, but after a bench trial.

Indeed, courts of appeals conflict with respect to whether these issues are for the trier of fact. Compare *Kirsch v. Fleet St., Ltd.,* 148 F.3d 149, 170-71 (2d Cir.1998) (expressing uncertainty as to whether the employee/independent contractor question is a question for the jury or the judge), with *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 605 (2d Cir.2006) (noting that hostile work environment claims are "`mixed question[s] of law and fact' that are `especially well-suited for jury determination'") (quoting *Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 437 (2d Cir. 1999)). *See also Garcia v. Copenhaver, Bell & Assoc., M.D.'s, R.A.*, 104 F.3d 1256, 1263 (11th Cir. 1997) ("[T]he ultimate conclusion reached by our holding that whether or not one is an `employer' is an element of a[[discrimination] claim, is the belief that the jury, rather than the judge, should decide the

disputed question."); *Herr v. Heiman*, 75 F.3d 1509, 1513 (10th Cir. 1996) (noting, in ERISA context, that "[w]hether an individual is an employee or an independent contractor is generally a question of fact for the jury to decide"); *Worth v. Tyer*, 276 F.3d 249, 263-64 (7th Cir. 2001) (holding, in Title VII context, that "there was sufficient evidence for the jury to conclude that Worth was an employee"). But see *Schwieger v. Farm Bureau Ins. Co. of Nebraska,* 207 F.3d 480, 484-85 (8th Cir.2000) (appearing to assume that the question is a threshold matter for the court to decide).

In a case of sharply contested facts, Harry's case was never tried. Because the resolution of genuine issues of material fact necessary to a proper determination of the questions of whether respondents were employees or independent contractors, whether an exemption to the FLSA applied in their particular case, and whether Harry willfully violated the FLSA should have been tried and if the result was appealed, reviewed by the court of appeals "pursuant to Rule 52(a), like the facts in other civil bench-tried litigation in federal courts." *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, at 713 (1986); *Walling v. General Indistries Co.*, 330 U.S. 545 (1947); Federal Rule of Evidence 52(a). Summary judgment without testimony and without a trial for Harry, in a case of a multitude of genuinely disputed material facts as to liability, damages and willfulness, should not have been granted.

CONCLUSION

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

Respectfully submitted,

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March 9, 2015