

No.

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In the Supreme Court of the United States

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BARRY ACKERLEY, WILLIAM ACKERLEY, FULL HOUSE SPORTS &  
ENTERTAINMENT, INC., AND SEATTLE SUPERSONICS, INC.,  
PETITIONERS,

v.

LAURA A. LAMBERT, ESTHER ACKLEY, STEVE BELLING,  
PAT COOKE, LETITIA SELK, AND CHUCK VILTZ, RESPONDENTS.

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

In this case, the Ninth Circuit held the petitioner corporations and their chief corporate officers liable for compensatory and punitive damages for violation of Section 15(a)(3) of the Fair Labor Standards Act, which prohibits an employer from retaliating against an employee “because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to” the Act. The questions presented are:

1. Whether the Ninth Circuit correctly held, in conflict with the Second Circuit, that Section 15(a)(3) extends to an employee who complains only to her employer and not to a court or government labor-regulatory agency.

2. Whether the principal officers of large, solvent corporations may be held personally and separately liable for retaliation based solely on their authority to control the operating unit in which the complaining employee worked.

3. Whether the Ninth Circuit violated due process and deprived petitioners of their right to a jury trial by entering judgment for the respondents based on the sufficiency of the evidence supporting a legal theory that was never presented to the jury.

**PARTIES TO THE PROCEEDING**

All parties are listed in the caption. Petitioner Seattle SuperSonics, Inc. was formerly known as SSI Sports, Inc., and was so named in the complaint.

**RULE 29.6 STATEMENT**

Petitioners Full House Sports & Entertainment, Inc., and Seattle SuperSonics, Inc. are wholly owned subsidiaries of The Ackerley Group, Inc. The Ackerley Group, Inc. is a publicly traded corporation that was known as Ackerley Communications, Inc. until October 1, 1996.

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## **PETITION FOR A WRIT OF CERTIORARI**

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Barry Ackerley, William Ackerley, Full House Sports & Entertainment, Inc., and Seattle SuperSonics, Inc. respectfully petition 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 *en banc* court of appeals (App., *infra*, 1a-37a) is reported at 180 F.3d 997. The opinion of the court of appeals panel (App., *infra*, 38a-52a) is reported at 156 F.3d 1018. The opinions of the district court (App., *infra*, 53a-76a) are unreported.

### **JURISDICTION**

The judgment of the court of appeals was entered on June 10, 1999. App., *infra*, 1a. A timely petition for rehearing was denied on July 22, 1999. App., *infra*, 77a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED**

The pertinent statutes and constitutional provisions are reproduced in the Appendix. The statutes involved are 29 U.S.C. §§ 203(d), 215(a)(3), and 216(b). The constitutional provisions involved are the Fifth and Seventh Amendments.

### **STATEMENT**

This case presents questions of broad practical importance to the administration of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.* The Ninth Circuit effectively set aside the language of the relevant statutory provision in favor of policies that the court believed would better serve the goals of the Act. Its reading extends a prohibition on the discharge of an employee who “has filed any complaint or instituted or caused to be instituted any proceeding under or related to” the FLSA to employees who complain only to their employer.

The Ninth Circuit also permitted punitive damages to be imposed not only on the employing corporation but separately and additionally on individual corporate officers, based on their “significant control” over the company’s business operations. This ruling sustained \$2.8 million of personal punitive liability despite the fact that there was no jury finding (and, indeed, no evidence) that either defendant knew of, approved, or condoned any unlawful retaliatory discharge.

### **A. Statutory Background**

Congress enacted the FLSA in 1938 to serve four goals: (1) to provide workers a subsistence wage; (2) to eliminate exploitative child labor; (3) to minimize, through economic disincentives for overtime work, any deleterious effects of an overworked labor force; and (4) to increase employment by making it more attractive at the margin to hire an additional person than to require existing employees to work overtime. See generally 29 U.S.C. § 202(a); H. Conf. Rep. No. 2738, 75th Cong., 3d Sess. 21 (1938); H.R. Rep. No. 1452, 75th Cong., 1st Sess. 5-7 (reprinting President’s message to Congress), 6-8 (1937). The Department of Labor has primary responsibility to administer and enforce the Act.

The FLSA employed two means of ensuring an adequate flow of information to the Labor Department. First, Congress imposed recordkeeping obligations enforceable by injunction and criminal penalties. 29 U.S.C. §§ 211, 215(a)(5), 216(a). Second, it “chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied.” *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). As this Court explained, effective enforcement of this scheme “could \* \* \* only be expected if employees felt free to approach officials with their grievances.” *Ibid.* To prevent obstruction of the administration and enforcement of the FLSA, Section 15(a)(3) of the Act, 29 U.S.C. § 215(a)(3), intruded narrowly upon the traditional at-will employment relationship by forbidding employers to discharge or

otherwise discriminate against any employee who initiated or testified in a proceeding under the FLSA. See H. Conf. Rep. No. 2738, *supra*, at 33. This “prohibition \* \* \* against discharges and other discriminatory practices was designed to serve” the “end” of maintaining employee access to enforcement “officials.” *De Mario Jewelry*, 361 U.S. at 292.

Under the FLSA as originally enacted, employees could bring private actions to recover unpaid minimum wages and overtime; but only the Secretary of Labor could sue to preserve the interests in effective administration and enforcement of the FLSA protected by the retaliatory discharge prohibition of Section 15(a)(3). In 1977, however, the Secretary, concerned about limitations on the enforcement capabilities of the Department, proposed expanding the private right of action in Section 16(b) of the FLSA, 29 U.S.C. § 216(b), to include retaliatory discharge cases. “The kind of problem we are concerned about here,” the Solicitor of Labor told the Senate, “is where an employee complains to us \* \* \* [,] we bring a suit on his behalf and on behalf of his coworkers, and we win, \* \* \* but a month later that employee loses his job.” *Hearings on the Fair Labor Standards Amendments of 1977*, Senate Comm. on Human Resources, Subcomm. on Labor, 95th Cong., 1st Sess. 17 (1977). Congress agreed, and created a private action for retaliatory discharge by adding a sentence to Section 16(b).

## **B. Factual Background**

1. Respondents were employed by petitioner Full House Sports & Entertainment, Inc., as ticket sales account executives (“AEs”) for the Seattle SuperSonics basketball team. Petitioner Seattle SuperSonics, Inc. (“Sonics”) previously employed some of the respondents, and at trial was treated collectively with Full House (“Corporations”). Petitioner Barry Ackerley was the CEO and Chairman of the Board of Ackerley Communications, Inc. (“ACI”), the publicly traded corporate parent of the Corporations. ACI had six operating subsidiaries and more than 1,000 employees in a

variety of businesses throughout the United States. CR 121, Ex. A:4-8 (Form 10-k).<sup>1</sup> Barry Ackerley also was CEO of the Sonics and Chairman of the Board of the Sonics and Full House. Petitioner William Ackerley was ACI's Chief Operating Officer, and vice-president and a director of both the Sonics and Full House. ER 356-357.

Respondents took telephone orders and made telephone solicitations for Sonics season tickets, multi-game packages, and group sales. App., *infra*, 2a. Beginning in 1991, ticket sales agents were paid a \$13,000 base salary, receiving most of their compensation by commission. *Id.* at 2a-3a. Under that arrangement, respondent Lambert earned \$91,438 for the 1993-94 year, and other respondents earned over \$60,000. ER 277; Ex. A-344.

Respondents' compensation included season tickets to the basketball games, but they also had occasional work assignments at the games. ER 189. Before each game and at intermission, two AEs staffed a season ticket information booth. ER 208-211. In 1991, the Sonics began paying AEs an allowance of up to \$2,000 for overtime work at basketball games and other special events. App., *infra*, 3a. At some point, the Sonics began paying routine semi-monthly \$166.67 installments during the basketball season, regardless of overtime actually worked. *Ibid.*

In March 1994, John Dresel, Sonics Executive Vice-President, authorized a restructuring of the sales operations to unify the ticket sales operation in which respondents were employed with the ticketing function, emphasize customer service, and rationalize the compensation system across different sales functions. ER 122-125. Concluding that, at \$60,000 to \$90,000 per year, the ticket sales AEs were overpaid, Senior Vice-President of Sales Laura Kussick

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<sup>1</sup> Record citations follow the abbreviations used in the court of appeals for the Excerpts of Record (ER), Supplemental Excerpts of Record (SER), Clerk's Record (CR), and Reporter's Transcript (RT).

decided to bring the AEs' compensation structure in line with that of other NBA teams, where salespersons performing similar functions earned no more than \$40,000. ER 152, 212-213. Kussick and ticket sales director Bob Boustead discussed the new compensation plan with each AE and had follow-up discussions with Lambert and Viltz, whom the ticket sales agents had chosen "to sort of represent the group." ER 287-288. Overtime issues were not raised during these talks. ER 195.

2. Basketball season ticket sales are, of course, highly seasonal. By December of the 1993-94 season, when Sonics tickets were largely sold out, the AEs had little to do beyond clerical follow-up on group sales. The AEs' work week was cut to 20 hours plus game nights. App., *infra*, 3a. Because AEs were working fewer than 40 hours per week, the Sonics discontinued the automatic \$166.67 overtime payments. *Ibid.*

Lambert eventually realized that, not having worked overtime throughout the season, she had not received the full \$2,000. On May 2, 1994, she left a note with Sonics controller Brian Dixon requesting a meeting about overtime payments. App., *infra*, 3a. She raised the matter with Boustead that day, and again at a ticket sales staff meeting on May 16. ER 166-170.

Two days later, Lambert telephoned the Department of Labor to ask for information. App., *infra*, 3a. Following that conversation, she spoke again with Boustead, who informed her that the overtime payments were a "dead issue." *Ibid.* Lambert then telephoned the Department again and asked for written information about overtime requirements. ER 174-175.

Lambert presented that information to Dixon on May 20. App., *infra*, 3a. Lambert was permitted to testify at trial that Dixon told her that he "knew the Sonics were breaking the laws" but that "his hands were tied [because] Bill Ackerley w[ould] not pay overtime and d[id not] believe" — or "care," depending on the retelling — "what the laws [were]." *Ibid.*; ER 176. Lambert

claimed that Dixon warned her that she would be fired if she pursued the overtime issue. App., *infra*, 3a-4a.<sup>2</sup>

On June 17, Lambert's attorneys sent Barry Ackerley a letter detailing her overtime complaints. ER 117-118. In the letter — which began, “We represent Laura Lambert” (ER 117) — the attorneys did not purport to represent anyone other than Lambert, although they did point out that the violations to which they referred affected other employees as well as Lambert. On the same day, Dresel wrote Barry Ackerley's name in his calendar, along with references to “Laura Lambert,” “season ticket sales/renewals,” and “new building sponsorships.” ER 141. About a week later, Dresel notified ACI's general counsel of Lambert's complaints; assuming that Barry Ackerley would be informed of this as well, Dresel wrote “Barry being told” on a notepad. ER 121, 254-255.

Lambert invited the other AEs to join her in a lawsuit, but they all declined. RT [2/8]:165-167. On July 6, 1994, Lambert delivered to the Sonics (but did not file) a draft complaint for unpaid overtime for herself alone, naming Barry Ackerley, William Ackerley, and the Sonics as liable parties. App., *infra*, 4a; RT [2/8]:150-151. On October 6, the Sonics settled this claim in exchange for a full release. App., *infra*, 4a. The Sonics also paid other employees (including respondents Ackley, Cooke and Viltz) amounts calculated to be due them for overtime, and obtained releases from them. *Ibid.*

3. Full House, with Dresel as president, took over the business operations of the Sonics on October 17, 1994. RT [2/16]:753. During the 1994-95 season, the Sonics played in the Tacoma Dome while a new arena was built in Seattle. ER 268A-270. Anticipating

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<sup>2</sup> Dixon flatly denied having made any such statement; he acknowledged having told Lambert she might be “jeopardizing her future with the organization,” but testified that this comment related to the “threatening approach” she was taking. ER 314-317.

another mid-season decline in AE work, Dresel had told William Ackerley shortly before the Full House conversion that there likely would be insufficient work to keep the AEs busy and that he planned to lay off the entire staff by November 30. ER 113. The Tacoma Dome group sales staff could handle the Sonics' light workload until the playoffs approached in the spring. See ER 243-244, 297-298.

Dresel discharged the ticket sales staff in early December 1994. App., *infra*, 4a. The discharged AEs were offered severance packages that included a lump sum payment and continued medical coverage for several months, but employees who wished to reserve the right to apply for the new post-restructuring positions were not eligible for severance compensation. ER 114-116. The six respondents each declined the severance package, although none in fact applied for the four restructured, narrower AE positions (or the three group sales jobs) that Full House began to fill in March 1995. ER 205, 223-224; RT [2/8]:212-213. Instead, they brought this action.

### **C. Proceedings Below**

1. Respondents sued petitioners in state court for unpaid overtime compensation and for retaliatory discharge under the FLSA and Washington law. Petitioners removed the case to the Western District of Washington. The district court granted summary judgment to respondents on liability for unpaid overtime, and the parties deferred the determination of the aggregate amount (agreed to be between \$5,000 and \$15,000). ER 358-359; CR 103.

The retaliatory discharge claims were tried to a jury, which awarded damages of more than \$13,000,000: \$697,000 for lost earnings; \$450,000 for emotional distress (an even \$75,000 per respondent); and a whopping \$12,000,000 in punitive damages (\$5,000,000 against the Corporations, \$4,000,000 against Barry Ackerley, and \$3,000,000 against William Ackerley). See CR 203. The district court denied motions for judgment as a matter of

law on liability and damages, but remitted each of the punitive damage awards to \$1,394,000, for a total of \$4,182,000. App., *infra*, at 53a-76a.

2. A unanimous panel of the Ninth Circuit (Brunetti, Rymer, and Kleinfeld, JJ.) reversed in part. App., *infra*, 38a-52a. The panel agreed with the Second Circuit that the language of 29 U.S.C. § 215(a)(3) was “plain and unambiguous.” *Id.* at 45a (citing *Lambert v. Genesee Hospital*, 10 F.3d 46, 50 (2d Cir. 1993), cert. denied, 511 U.S. 1052) (1994)). That plain language, the panel held, “limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor.” *Ibid.* (quoting *Genesee Hospital*, 10 F.3d at 50). The panel explicitly rejected the approach of several courts of appeals that had “extend[ed] the language of § 215(a)(3) beyond its plain meaning so as to effectuate the broad remedial purposes of the FLSA.” *Id.* at 48a (internal quotation marks omitted). Because respondents had not engaged in any conduct enumerated in that section, the panel held that they had “failed to state a retaliation claim under the FLSA.” *Id.* at 47a.

The panel affirmed the portion of the judgment resting on Washington law because — unlike the FLSA — “Washington law prohibits retaliation against an employee who ‘has made any complaint to [her] employer.’” App., *infra*, 48a (quoting Wash. Rev. Code § 49.46.100(2)). Because Washington law does not allow for punitive damages in wrongful termination cases, the panel had no need to address punitive damages. The panel also vacated the identical awards of \$75,000 to each respondent in emotional distress damages as excessive and unsupported. *Id.* at 50a-51a.

3. Respondents sought rehearing *en banc*, which was granted. The Equal Employment Opportunity Commission supported the request, observing that “the scope of the anti-retaliation provision is an issue of exceptional importance on which national uniformity is vital.” EEOC C.A. Br. 2. (The EEOC enforces the Equal Pay

Act, 29 U.S.C. § 206(d) *et seq.*, which is an amendment to the FLSA.)

On rehearing — where respondents also attracted *amicus* support from the Secretary of Labor — the Ninth Circuit affirmed the judgment of the district court in an opinion written by Judge Reinhardt. App., *infra*, 1a-27a. Acknowledging that the language of the FLSA was “possibly subject to differing interpretations” (*id.* at 9a), the majority declared that “§ 215(a)(3) protects from retaliation employees who complain to their employer about alleged violations of the Act.” *Id.* at 17a. In assigning an expansive scope to the statutory prohibition, the majority relied on “the guiding purpose and design of the FLSA” (*id.* at 2a) and “the animating spirit of the Act” (*id.* at 8a).

Finding that respondents had stated a claim under the FLSA, the *en banc* majority addressed petitioners’ other arguments. The court ruled, *inter alia*, that it was permissible to impose separate, additive punishment on Barry Ackerley and William Ackerley because, as Judge Reinhardt put it, the statutory definition of “employer” should receive an “expansive interpretation in order to effectuate the FLSA’s broad remedial purposes.” *Id.* at 25a (quoting *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983)).

Judge Rymer dissented in part, joined by Judge Fernandez. She observed that “[w]hile the majority’s view that 29 U.S.C. § 215(a)(3) protects employees who complain to an employer about overtime may well modernize the FLSA, \* \* \* this is for Congress — not the courts — to do.” App., *infra*, 27a-28a. The dissent adopted and reproduced the bulk of the vacated panel opinion.

### **REASONS FOR GRANTING THE PETITION**

The Ninth Circuit has cut the FLSA loose from its moorings in important respects that warrant review by this Court. Although the

language of Section 15(a)(3) addresses only the formal administration and enforcement of the FLSA, the Ninth Circuit — in square conflict with the Second Circuit — held that the provision should be construed to cover complaints made only to employers. As the EEOC has acknowledged, national uniformity on the point is vital.

In addition, the Ninth Circuit held that individual officers of the corporate employer were separately liable for damages based on their routine exercise of executive authority over the employing corporation. The court of appeals did not require a finding or proof that the individual violated the Act — or, indeed, personally authorized, condoned, or even knew of the violation.

Finally, in an egregious violation of established procedures and of petitioners' jury trial rights, the court of appeals rejected petitioners' challenge to a jury instruction that eliminated a crucial element of liability on the ground that the evidence was sufficient to support liability.

This Court's review is warranted to resolve the circuit conflict and to forestall further distortion of the FLSA.

#### **I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE SCOPE OF THE FLSA ANTI-RETALIATION PROVISION**

Section 15(a)(3) of the FLSA prohibits retaliation against three seemingly clearly delineated categories of conduct. An employer may not discharge or discriminate against an employee because that employee (1) “filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter,” (2) “testified or is about to testify in any such proceeding,” or (3) “served or is about to serve on an industry committee.” 29 U.S.C. § 215(a)(3). Only the first category is even arguably applicable here.<sup>3</sup> The Ninth Circuit, in square conflict with the Second Circuit,

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<sup>3</sup> The “industry committee[s]” that once helped determine wage and hour standards

extended the first category beyond its plain terms by ruling that the statute covers “employees who complain to their employer about alleged violations of the [FLSA].” App., *infra*, 17a. This Court should resolve the conflict.

**A. The Circuits Are Divided On The Scope Of Section 15(a)(3)**

The Ninth Circuit acknowledged (App., *infra*, 6a-7a, 11a) that its decision conflicts with the decision of the Second Circuit in *Lambert v. Genesee Hospital*, 10 F.3d 46 (2d Cir. 1993), cert. denied, 511 U.S. 1052 (1994). The current EEOC *Compliance Manual* also recognizes the conflict among the Circuits. U.S. EEOC, *Compliance Manual*, Section 8-II (B)(1), at 8–3 n.12 (1998). In *Genesee Hospital*, the Second Circuit held that informal complaints to a supervisor do not qualify as protected conduct under the FLSA’s anti-retaliation provision. *Id.* at 55-56.<sup>4</sup> That court began and ended its statutory analysis with the unambiguous language of Section 15(a)(3), which “on its face prohibits retaliation based on ‘three expressly enumerated types of conduct.’” *Id.* at 55 (quoting *EEOC v. Romeo Community Schools*, 976 F.2d 985, 990 (6th Cir. 1992) (Surheinrich, J., dissenting)). Accordingly, the Second Circuit held, “[t]he plain language of this provision limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor.” *Ibid.*

Several federal courts have followed that common sense interpretation. In addition to the unanimous Ninth Circuit panel that originally heard this case and “adopt[ed] the Second Circuit’s

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for certain industries now exist only in some overseas territories.

<sup>4</sup> *Genesee Hospital* addressed a complaint under the Equal Pay Act, but that difference is immaterial because that Act “is an amendment to the FLSA and is codified under the same chapter,” making Section 15(a)(3) applicable equally to both categories of cases. 10 F.3d at 55.

analysis,” see App., *infra*, 45a, three district courts in the Fourth Circuit have recognized that Section 15(a)(3) “could scarcely be clearer \* \* \*. [T]he well-defined universe of protected activities does not encompass \* \* \* informal, unofficial protests.” *O’Neill v. Allendale Mutual Ins. Co.*, 956 F. Supp. 661, 664 (E.D. Va. 1997); see *Ball v. Memphis Bar-B-Q Co.*, 34 F. Supp.2d 342, 346 (E.D. Va. 1999); *Clevinger v. Motel Sleepers, Inc.*, 36 F. Supp.2d 322, 324 (W.D. Va. 1999).

A number of other circuits, like the *en banc* Ninth Circuit in this case, have preferred to subordinate the narrow language of Section 15(a)(3) to their view of the “animating spirit” of the FLSA. App., *infra*, 8a; *Valerio v. Putnam Associates Inc.*, 173 F.3d 35, 43 (1st Cir. 1999). Those courts have held, notwithstanding the clear language of the FLSA’s anti-retaliation provision, that informal complaints to an employer also qualify as protected conduct. See *EEOC v. Romeo Community Schools*, 976 F.2d 985 (6th Cir. 1992); *Brennan v. Maxey’s Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975); *Love v. Re/Max of America, Inc.*, 738 F.2d 383 (10th Cir. 1984); *EEOC v. White & Son Enterprises*, 881 F.2d 1006 (11th Cir. 1989).

The Eighth Circuit, which began the process in *Maxey’s*, has forthrightly explained that these “courts, in an effort to further the goals of the FLSA, have extended § 15(a)(3)’s application to employee conduct not expressly covered in the act.” *Saffels v. Rice*, 40 F.3d 1546, 1548 (8th Cir. 1994); see also *White & Son*, 881 F.2d at 1011 (courts have extended Section 15(a)(3) to protect employees who “did not perform an act that is explicitly listed in the FLSA’s anti-retaliation provision”).

Indeed, the Third and Eighth Circuits have gone so far as to hold that there need not have been any protected conduct at all, only a (mistaken) belief by the employer that such conduct occurred. See *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987); *Saffels*, 40 F.3d at 1549-1551; see *id.* at 1551 (Hansen, J.,

dissenting) (viewing courts as “not authorized \* \* \* to amend the statute by effectively adding \* \* \* words”). Those courts did not attempt to reconcile their view with Congress’s decision *not* to prohibit retaliation based on the fact that an “employer *believes*” an employee had taken any of the enumerated acts. S. 2475, § 22(c), 83 Cong. Rec. 1577 (1937).

The conflict among the circuits is ripe for resolution.

**B. The Scope Of Section 15(a)(3) Is An Important And Recurring Question Of Federal Law On Which Uniformity Is Important**

There can be no question that the issue presented in this case is recurrent. The cases cited above are only a fraction of the recent cases presenting the issue in the federal courts.<sup>5</sup>

The importance of the issue is equally clear. The EEOC, which administers the Equal Pay Act amendments to the FLSA, advised the Ninth Circuit that “the scope of the anti-retaliation provision is

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<sup>5</sup> *E.g.*, *Conner v. Schnuck Markets*, 121 F.3d 1390 (10th Cir. 1997); *McKenzie v. Renberg’s, Inc.*, 94 F.3d 1478 (10th Cir. 1996); *Booze v. Shawmut Bank, Connecticut*, \_\_ F. Supp.2d \_\_, 1999 WL 613313 (D. Conn. July 23, 1999); *Johns v. Cianbro Corp.*, 1999 WL 200699 (D. Conn. March 29, 1999); *Laird v. Chamber of Commerce*, 4 Wage & Hour Cas.2d (BNA) 1629, 1998 WL 240401 (E.D. La. 1998); *Wittenberg v. Wheels, Inc.*, 963 F. Supp. 654 (N.D. Ill. 1997); *Bevins v. Dollar General Corp.*, 952 F. Supp. 504, 509 n.4 (E.D. Ky. 1997); *Kowalski v. Kowalski Heat Treating Co.*, 920 F. Supp. 799 (N.D. Ohio 1996); *Booth v. Intertrans Corp.*, 68 Fair Emp. Prac. Cas. (BNA) 433, 1995 WL 324631 (E.D. La. 1995); *Elbaz v. Congregation Beth Judea, Inc.*, 812 F. Supp. 802 (N.D. Ill. 1992); *Jones v. Westside-Urban Health Center, Inc.*, 760 F. Supp. 1575 (S.D. Ga. 1991); *Cuevas v. Monroe Street City Club, Inc.*, 752 F. Supp. 1405 (N.D. Ill. 1990); *Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560 (W.D. Mo. 1990); *Sandt v. Holden*, 698 F. Supp. 64 (M.D. Pa. 1988); *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57 (N.D. Ga. 1985); *Hayes v. McIntosh*, 604 F. Supp. 10 (N.D. Ind. 1984); *Fry v. Iowa City*, 538 N.W.2d 302 (Iowa App. 1995). See also *Knickerbocker v. City of Stockton*, 81 F.3d 907, 910, 912 n.3 (9th Cir. 1996) (noting that district court had reached the issue).

an issue of exceptional importance on which national uniformity is vital.” EEOC C.A. Br. 2.

As the EEOC aptly observed (Br. 2-3), differing interpretations of Section 15(a)(3) “give [some] employers an unfair advantage over other employers who are subject to broad prohibitions against retaliation.” That is because Section 15(a)(3) effectively determines significant aspects of the employment-at-will doctrine in any given jurisdiction. The Ninth Circuit and the other courts reaching the same result have made it practically impossible to terminate employees who have invoked state or federal overtime laws in complaining to their employers about overtime pay. It is intolerable for federal law to subject employers in California to stringent limitations on the discharge of employees when employers in New York encounter no such federal limitation. In light of this Court’s emphasis on appropriate employer compliance policies, *e.g.*, *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998), the split of authority produces an additional and inappropriate burden on multistate employers, who must vary their policies according to the site of each facility.

Moreover, as the Secretary of Labor pointed out to the Ninth Circuit (Secretary of Labor C.A. Br. 2), the importance of Section 15(a)(3) transcends the FLSA:

Principles at issue here could also affect antiretaliation provisions in other statutes the Secretary administers. See, *e.g.*, 29 U.S.C. 660(c) (Occupational Safety and Health Act); *id.* § 1140 (Employee Retirement Income Security Act); *id.* § 1855(a) (Migrant and Seasonal Agricultural Worker Protection Act); 33 U.S.C. 1367(a) (Clean Water Act); 49 U.S.C. 31105(a) (Surface Transportation Assistance Act).

Because the scope of the FLSA’s anti-retaliation provision is an important and recurring question as to which there should be a uniform national rule, further review is warranted.

**C. The Ninth Circuit Violated Virtually Every Principle Of Statutory Construction In Allowing Its Misreading Of The “Animating Spirit” Of The FLSA To Override The Ordinary Meaning Of The Statutory Language**

Review by this Court is appropriate for the additional reason that the Ninth Circuit exacerbated the error of other circuits in extending the FLSA anti-retaliation provision beyond its plain language. Those decisions fly in the face of this Court’s modern jurisprudence of statutory construction. They also fail to consider the statutory context and legislative history of the FLSA.

1. Undefined statutory terms must bear their “ordinary, contemporary, common meaning.” *Walters v. Metropolitan Educational Enterprises*, 519 U.S. 202, 207 (1997). “[T]he law uses familiar legal expressions in their familiar legal sense.” *Bradley v. United States*, 410 U.S. 605, 609 (1973) (quoting *Henry v. United States*, 251 U.S. 393, 395 (1920) (Holmes, J.)). The “familiar legal sense” of “file any complaint” is to submit a formal claim with a court or enforcement authority. That point is not fairly subject to dispute.<sup>6</sup>

The Ninth Circuit instead relied on its vision of the “animating spirit” (App., *infra*, 8a) of the FLSA in deciding that Section 15(a)(3), despite its terms, was “designed to prevent” employees from being “unprotected by the FLSA against retaliatory discharge when they complain to their employers.” App., *infra*, 9a. But this Court has squarely disapproved judicial efforts “[t]o draw on some unexpressed spirit outside the bounds of the normal meaning of the

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<sup>6</sup> Indeed, the materials that the Department of Labor provides to the public straightforwardly state that Section 15(a)(3) forbids retaliation against “an employee for *filing a complaint or for participating in a legal proceeding* under FLSA.” U.S. Dep’t of Labor, *Handy Reference Guide to the Fair Labor Standards Act* 13 (Oct. 1996) (emphasis added). There is no hint that griping to employers is protected.

words” of the FLSA. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944). And, more recently, it has described as flatly “impermissibl[e]” a court’s reliance on “its understanding of the broad purposes” of a statute to expand the meaning of statutory terms whose meanings are already “sufficiently clear in \* \* \* context.” *Rodriguez v. United States*, 480 U.S. 522, 525, 526 (1987) (internal quotation marks omitted).

In a legal or administrative context — which is the context of the FLSA — the terms “file any complaint” and “institute any proceeding” have clear and precise meanings that connote formal involvement of the courts or the regulatory agency whose investigative and prosecutorial efforts Section 15(a)(3) was enacted to protect. This Court made clear that Section 15(a)(3) was intended to protect employees in their “[r]esort to *statutory remedies*.” *DeMario Jewelry*, 361 U.S. at 293 (emphasis added). The limited intrusion on the at-will employment relationship described by the language of Section 15(a)(3) reflects Congress’s focused purpose: to prohibit conduct that might “obstruct [the] administration” of the FLSA. H.R. Conf. Rep. No. 2738, *supra*, at 33. As this Court has recognized, Section 15(a)(3) was “designed to serve” the goal of “effective *enforcement*” by freeing employees “to approach *officials* with their grievances.” *DeMario Jewelry*, 361 U.S. at 292 (emphasis added). Indeed, even the Ninth Circuit had to admit that “Congress intended the anti-retaliation provision of the FLSA to provide an incentive for employees to *report* wage and hour violations *by* their employers,” App., *infra*, 7a (emphasis added), not to complain about them *to* their employers.

That limitation accords with the statutory scheme of the FLSA. Rather than encouraging private, informal resolution of overtime disputes, the FLSA “is designed to *prevent* consenting adults from transacting about minimum wages and overtime pay.” *Walton v. United Consumer Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986) (Easterbrook, J.) (emphasis added). The FLSA places so much emphasis on government involvement that employees cannot validly

settle minimum-wage or overtime disputes with their employers without the approval of either the Department of Labor or a court. See *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982); 1 M. ROTHSTEIN, *et al.*, EMPLOYMENT LAW 373 (1994); see also *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946) (invalidating private settlements); see generally *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 740-745 (1981). “The idea” of the FLSA “is that federal supervision replaces private bargaining.” *Walton*, 786 F.2d at 306. In that context, interpreting Section 15(a)(3) according to its terms to channel employees into formal enforcement procedures makes perfect sense — far more so than the Ninth Circuit’s construction, which embraces informal complaints to an employer about overtime that “need not refer to the statute by name.” App., *infra*, 17a.

2. Although statutory construction properly “begins with ‘the language of the statute,’” *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 760 (1999), the Ninth Circuit instead began with its preferred result and worked backwards. The court did conclude, almost as an afterthought, that the language of the statute was “fully consistent” with its interpretation. App., *infra*, 9a. But it could do so only by employing a strained and artificial method of linguistic analysis that has been specifically disapproved by this Court.

The Ninth Circuit first dismembered the common phrase “file any complaint” into its constituent parts “file,” “any,” and “complaint” — ignoring the well-established meaning of those words when they are used together. See App., *infra*, 9a-10a. It then selected a tertiary definition of the word “file” and the non-legal definition of “complaint.” *Ibid.* The court also inferred unlimited breadth from the word “any,” *ibid.*, deciding that “any complaint” must include complaints made to employers — not merely unmeritorious as well as meritorious complaints “under or relating to [the FLSA]” that were actually “filed,” as the statutory context suggests. And it interpreted the term “under or related to [the FLSA]” to encompass private complaints on the ground that “or related to”

otherwise would be “superfluous.” *Id.* at 10a. That effort reads too much into boilerplate that applies both to “complaint[s]” and “proceeding[s].” Moreover, private lawsuits, particularly in state court, might be filed under state law but still “relate to” FLSA violations. Indeed, an employee who files a formal minimum wage or overtime complaint with the labor department of a State clearly does not file a complaint *under* the federal FLSA, but just as clearly files a complaint that is *related to* that Act. See, e.g., *Sapperstein v. Hager*, \_\_\_ F.3d \_\_\_, 1999 WL 623907 (7th Cir. Aug. 17, 1999).

The Ninth Circuit’s dissecting approach contravenes well-established principles of statutory construction. There is no room for judicial alteration of “a phrase that \* \* \* has a clearly accepted meaning in both legislative and judicial practice.” *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 98 (1991). In the context of a statute setting forth legal obligations or remedies, the phrase “filed any complaint” has a “clearly accepted meaning” — *i.e.*, filed a formal complaint, regardless of merit, with a court or administrative agency — that cannot be obscured by artificially parsing each word. See *Textron Lycoming Division, Avco Corp. v. UAW*, 118 S. Ct. 1626, 1629 (1998) (“It is not the meaning of ‘for’ we are seeking here, but the meaning of ‘[s]uits for violation of contracts.’”).

The proper interpretation of Section 15(a)(3) becomes even clearer when the language of that provision is contrasted with the language used in the anti-retaliation provisions in other federal statutes. When Congress wanted to draft an expansive anti-retaliation provision, it knew how to do so. In Title VII and in the Age Discrimination in Employment Act, for example, Congress forbade employers from retaliating against any employee who “has opposed any practice” those laws make illegal. 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); see also 29 U.S.C. § 2615(a)(2) (Family and Medical Leave Act) (“for opposing any practice”). That language — not the very different FLSA language

at issue here — aims at protecting all “employees [in] asserting their rights” to their employers. App., *infra*, 9a. Other anti-retaliation provisions trace the language of Section 15(a)(3) but additionally protect employees who “participate in any manner \* \* \* in any other action to carry out the purposes” of a statute. *E.g.*, 42 U.S.C. §§ 300j-9(i)(1)(c) (drinking water pollution), 5851(a)(1)(F) (nuclear facilities), 7622(a)(3) (air pollution). Congress has not seen fit to add similar language to the FLSA.

3. To the contrary, in enacting the FLSA Congress in fact **rejected** a proposal that would have removed the requirement of actual, formal invocation of enforcement procedures. The Senate version of the FLSA would have prohibited discharges “because such employer **believes** that such employee has done or **may do** any of” the acts specified in Section 15(a)(3). S. 2475, § 22(c), 83 Cong. Rec. 1577 (1937) (emphasis added). This language would plainly have reached the conduct of respondent Lambert in this case. But the language of the Senate bill was rejected in conference, and it was the House version, which required the actual filing of a complaint, that was enacted into law. Neither the Ninth Circuit nor any other court reaching the same result has even acknowledged, let alone addressed, this legislative history.

The narrow scope of Section 15(a)(3) is confirmed by the understanding expressed in subsequent legislation, an understanding that is “entitled to great weight.” *Loving v. United States*, 517 U.S. 748, 770 (1996). In 1985, after this Court upheld application of the FLSA to state and local government employees, Congress perceived a special need to protect such employees during the initial period of adjustment to FLSA requirements. It accordingly enacted a temporary statute broadening the retaliation prohibition to protect public employees who merely “asserted [FLSA] coverage” to their employers. Pub. L. No. 99-150, § 8, 99 Stat. 791 (1985). If the Ninth Circuit were correct that Section 15(a)(3) already covers employees who complain to their employers about “an alleged

FLSA violation” (App., *infra*, 17a), the 1985 enactment would have been superfluous.

Section 8 of the 1985 law further specified that, once it expired in August 1986, protection against retaliation would extend “only” to “an employee who *takes an action described in*” Section 15(a)(3) (emphasis added). That provision too would have been entirely unnecessary if informal complaints to employers were already covered by Section 15(a)(3). The Ninth Circuit’s response, distinguishing assertions of coverage from complaints of violations (App., *infra*, 12a n.4), makes no sense: an assertion of FLSA coverage, made to an employer being faulted for not complying with the FLSA requirement, is *ipso facto* an informal complaint that the employer is not complying with the FLSA.

This Court has warned that, in interpreting the FLSA, courts “must avoid that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.” *Addison*, 322 U.S. at 618 (internal quotation marks omitted). What the Ninth Circuit and other, like-minded courts have done is “not a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.” *West Virginia Hospitals*, 499 U.S. at 101 (quoting *Iselin v. United States*, 270 U.S. 245, 250-251 (1926) (Brandeis, J.)). Such an effort “[t]o supply omissions \* \* \* transcends the judicial function.” *Ibid*.

## **II. THE NINTH CIRCUIT COMPOUNDED ITS ERROR BY CONSTRUING THE FLSA TO RENDER CORPORATE OFFICERS PERSONALLY LIABLE FOR THEIR SUBORDINATES’ RETALIATION**

The Ninth Circuit distorted the FLSA in another respect. It not only upheld nearly \$1.4 million in punitive damages against the corporation that was respondents’ employer under any conventional analysis, but it sustained an additional \$2.8 million in punitive damages imposed on two corporate officers personally, without

requiring a jury finding — or, indeed, any evidence — that the individuals undertook, authorized, or condoned an action prohibited by Section 15(a)(3). Instead, the officers’ personal liability was based solely on their supposed status as “employers” of the respondents, defined with exceptional breadth as any “individual [who] exercises ‘control over the nature and structure of the employment relationship,’ or ‘economic control over the relationship’” (App., *infra*, 25a).

The Ninth Circuit’s analysis would render the CEO or other top-level executives of any large, publicly traded corporation separately and individually liable for virtually any violation of the FLSA committed by a subordinate with respect to a function that falls within the executives’ ultimate area of responsibility, even though the executive did not participate in or even know of the violation. The sweeping implications of this ruling make it one that warrants further review.

A. The court of appeals relied (App., *infra*, 25a) on Section 3(d) of the FLSA, 29 U.S.C. § 203(d), which includes in the definition of “employer” “any person acting directly or indirectly in the interest of an employer in relation to an employee.” Broad as that language is, it is doubtful that it was intended to make an officer of a large corporation the *personal* and *separate* employer of those employees whose activities the officer is empowered to direct or supervise.<sup>7</sup>

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<sup>7</sup> As the First Circuit has observed, “[i]t is difficult to accept, \* \* \* as some courts have apparently held, that Congress intended that any corporate officer or other employee with ultimate operational control over payroll matters be personally liable.” *Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983). See also *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 679 (1st Cir. 1998). Cases sustaining personal liability for back wages or damages — none of which involved punitive damages — have generally concerned individuals who dominated the affairs of a partnership or closely held corporation. *E.g.*, *Herman v. RSR Security Services Ltd.*, 172 F.3d 132 (1st Cir. 1999); *United States Department of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775 (6th Cir. 1995);

Whether or not corporate officers may be the employers of corporate employees for some purposes under the FLSA, Section 16(b) of the Act, 29 U.S.C. § 216(b), imposes liability for damages only on “[a]ny employer who violates the provisions” of Section 15(a)(3) by discharging or otherwise retaliating against an employee because the employee engaged in protected activity. In this case, neither the district court nor the Ninth Circuit required any jury finding that the individual defendants in this case had personally “discharge[d]” any of the plaintiffs, or authorized or approved their discharge, as a retaliation for activity protected by the FLSA.

Instead, in instructions approved by the court of appeals, the jury was charged that any “corporate officer or director with significant control of \* \* \* a corporation” that employed respondents was “liable if you find in favor of the plaintiffs on their FLSA claims.” ER 361-362.<sup>8</sup> Thus, petitioners Barry and William Ackerley could be found individually liable so long as (1) respondents had been discharged in violation of the FLSA and (2) the officers had “significant authority” over the company that employed respondents. ER 361-362; SER 25. Given the individual petitioners’ positions in the companies, the instruction effectively directed verdicts against them if the corporation was found liable.

The Ninth Circuit’s recitation of the meager evidence supporting punitive liability (App., *infra*, 26a) shows how little it requires to find a corporate official personally liable for retaliation. The court relied on (1) evidence that the Sonics had not paid

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*Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962 (6th Cir. 1991); *Donovan v. Grim Hotel Co.*, 747 F.2d 966 (5th Cir. 1984).

<sup>8</sup> Contrary to the Ninth Circuit’s retelling (App., *infra*, 25a), the various factors included in the instruction were explicitly identified as “[e]xamples” (ER 361, SER 25), most emphatically not as prerequisites to a finding of “employer” status. All the jury had to find was that the individuals had “significant control,” which sufficed under the instructions to render them, like the corporate employer, vicariously liable for the actions of John Dresel.

overtime until 1990 — four years before the events at issue here — when a new manager implemented an overtime system (see SER 279-280); (2) a prior FLSA lawsuit *resolved in the Sonics' favor* as time-barred (ER 86; RT [2/26]:183-184); (3) evidence that Barry Ackerley was made aware of Lambert's overtime concerns five months before the discharges (ER 121); and (4) the double hearsay statement that allegedly, six months before the discharges, attributed to William Ackerley an unwillingness to pay overtime (see p. 5, *supra*).<sup>9</sup>

In the Ninth Circuit's view, the items it identified represented "extensive testimony that both Ackerleys \* \* \* were involved in the decision to terminate the sales staff." App., *infra*, 26a. But whatever these circumstances establish, they plainly do not show personal involvement in a decision to discharge the AEs *in retaliation for an act protected by Section 15(a)(3)*. There was not a shred of evidence that Barry Ackerley even knew of the plans to discharge the AEs, or that William Ackerley had the slightest idea that Dresel's action was being taken to retaliate for Lambert's overtime complaint (see pp. 6-7, *supra*; see also ER 113), which to all appearances had been fully resolved some weeks earlier. Even the Ninth Circuit shied away from explicitly resting liability on William Ackerley's receipt of Dresel's memo stating plans to "layoff the entire ticketing staff" because the "seasonal" workload left them with "insufficient work to keep [them] busy." ER 113.

Thus, in the Ninth Circuit, being informed of a termination decision beforehand (in the case of William Ackerley), or even afterward (in the case of Barry Ackerley), is sufficient to hold an

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<sup>9</sup> The Ninth Circuit did not identify any evidence supposedly providing "strong[] support[]" for "the jury's determination that both Ackerleys actually exercised economic and operational control over the employment relationship with the sales agents." App., *infra*, 25a-26a. No wonder: William Ackerley had not even *met* most of the AEs (ER 329-330, 338-340), and Barry Ackerley had still less involvement with them.

individual liable for retaliation — and for separate, individual punitive damages exacted in addition to those imposed on the corporate employer — without any evidence that the individual ordered the termination of any employee, much less did so “because such employee” had engaged in activity that is protected under Section 15(a)(3). Incredibly, the Ninth Circuit relied on these factors to exact millions of real dollars from real people.

The imposition of vicarious liability on individual corporate officers is especially problematic in the context of an award of separate and additional punitive damages. To date, other courts have concluded only that an individual “deemed an employer under the FLSA \* \* \* may be jointly and severally liable for damages.” *Lee v. Coahoma County*, 937 F.2d 220, 226 (5th Cir. 1991); see, e.g., *Fegley v. Higgins*, 19 F.3d 1126, 1131 (6th Cir. 1994) (individual held “jointly liable for all damages”); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991); *Patel v. Wargo*, 804 F.2d 632, 637-638 (11th Cir. 1986); *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983). The Ninth Circuit’s significant expansion of the liability of individual co-employees of FLSA plaintiffs appears to be unprecedented.<sup>10</sup>

The problems created by the Ninth Circuit’s decision are particularly troubling because the issue will most often arise in a private cause of action, such as that here. In such circumstances, one simply cannot rely upon the exercise of sound prosecutorial

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<sup>10</sup> The unfairness of imposing personal punitive liability in this case is especially pronounced when (1) no prior decision had given notice that individual corporate officers may be held vicariously liable for punitive damages under the FLSA, and (2) the language of Section 15(a)(3) gave no express indication that its protections are activated by informal “complaints” that are “filed” with the employer; the Labor Department’s *Handy Reference Guide* likewise suggested that only formal legal or administrative complaints are protected (see p. 15 n.6, *supra*), and the courts themselves could not agree on the scope of the provision. Under such circumstances, constitutionally required notice of potential punitive consequences has not been afforded. See *BMW v. Gore*, 517 U.S. 559, 574 (1996).

discretion to curb abusive or vindictive suits against individual corporate officers.<sup>11</sup> Further review is warranted to remedy promptly the gross distortion of the FLSA that this decision approves.

### **III. THE NINTH CIRCUIT VIOLATED PETITIONERS' JURY TRIAL RIGHT BY AFFIRMING A FINDING ON A DISPUTED, ESSENTIAL ELEMENT OF LIABILITY ON A BASIS NOT FOUND BY THE JURY**

Section 15(a)(3) imposes liability only for retaliation against “any employee because *such employee* has filed any complaint or instituted or caused to be instituted any proceeding under or related to” the FLSA (emphasis added). The analogous provision of Washington law similarly applies only to “such employee” as takes enumerated action. Wash. Rev. Code § 49.46.100(2).

The only one of the six respondents who actually communicated with the company regarding the subject of overtime was Lambert. Petitioners accordingly resisted the claims of respondents Ackley, Belling, Cooke, Selk, and Viltz on the ground that none of them had taken an action to which the anti-retaliation provision applies (even under the expansive reading given it by the courts below). Over petitioners' objection, however, the jury instructions read the words “such employee” out of the statute:

It is *not* necessary to show that each plaintiff engaged in protected activity. A showing that one plaintiff engaged in protected activity is sufficient so long as there is a showing that

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<sup>11</sup> For example, in *Digiore v. State of Illinois*, 962 F. Supp. 1064, 1078-1079 (N. D. Ill. 1997), the court, having expansively defined “employer” under Section 3(d) and having found the State of Illinois immune from FLSA liability, permitted the lawsuit to proceed against the Illinois Secretary of State and Director of the Department of Police, aimed solely at those officers' personal assets. See 172 F.3d 454 (7th Cir. 1999) (affirming later grant of summary judgment for individuals on other grounds).

adverse employment action was taken against each plaintiff and that the protected activity was a substantial motivating factor in the adverse employment action as to that plaintiff.

ER 360 (emphasis added). This instruction effectively directed a verdict on this element for all plaintiffs so long as the jury found that “one plaintiff engaged in protected activity.” *Ibid.*

The Ninth Circuit affirmed the judgment in favor of all six plaintiffs. It did so not because the instruction was correct, but because there was sufficient evidence to support a finding that “Lambert complained on behalf of the named plaintiffs and that sufficient evidence was therefore presented to support a retaliation claim with respect to all the plaintiffs.” App, *infra*, at 22a.<sup>12</sup> The court was not deterred by the fact that *the jury had not been asked to make any such finding*. Rather, in its haste to affirm the judgment, the Ninth Circuit arrogated to itself the role of factfinder.

That the court of appeals’ disposition of this issue violated petitioners’ constitutional rights to due process and to a jury trial can hardly be subject to fair dispute. The Seventh Amendment provides that “the right of trial by jury shall be preserved.” Under this Amendment, together with the Fifth Amendment’s Due Process

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<sup>12</sup> In fact, this conclusion rested on the slimmest of foundations. The June meetings in which Lambert and Viltz had been chosen “to sort of represent the group” (ER 287-288; see SER 265) concerned the restructuring of AE compensation, not overtime (ER 195, 212-213, SER 201-204). The very first sentence in the letter from Lambert’s attorney to Barry Ackerley — on which the Ninth Circuit relied heavily (App., *infra*, 22a) — declared: “We represent Laura Lambert” and not anyone else. ER 117. Likewise the complaint delivered to the Sonics (but never filed) was solely on behalf of Lambert (RT [2/8]:150-151). Indeed, when Lambert asked the other AEs to join with her in the contemplated lawsuit, every one of them refused. RT [2/8]:165-167. The scantiness of the evidence is apparent from the Ninth Circuit’s need to include a snippet from Dresel’s trial testimony commenting that “the whole group [wa]s now lumped together” in a press release issued *after the lawsuit was filed* (see ER 264), as well as a reference to Lambert as a “ringleader” in petitioners’ opening statement. See App., *infra*, 22a-23a.

Clause, findings of liability require jury determinations of every reasonably disputed element of the cause of action. Appellate courts cannot take that function upon themselves.

As this Court has explained, “the Seventh Amendment provides a right to a jury trial on *all* issues pertinent to” liability. *Feltner v. Columbia Pictures Television, Inc.*, 118 S. Ct. 1279, 1281 (1998) (emphasis added). Accord *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 508 (1959) (ensuring that mixed issues of law and fact be tried first to the jury, to “giv[e] \* \* \* a full jury trial of every \* \* \* issue.”). The Court had to remind the lower courts of this principle in a criminal case only four years ago. See *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (Fifth Amendment and Sixth Amendment “require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged \* \* \*.”). The Ninth Circuit apparently needs to be reminded that the same safeguards apply to disputed issues of fact in civil cases tried to a jury.

It is beyond dispute that whether a plaintiff has engaged in protected behavior under the FLSA is an essential element of a claim for retaliation. A claim under Section 15(a)(3) requires proof that “the plaintiff engaged in statutorily protected activity,” as well as that “his employer thereafter subjected him to an adverse employment action” that was “a reprisal for having engaged in the protected activities.” *Blackie v. Maine*, 75 F.3d 716, 722 (1st Cir. 1996). Similarly, Washington law requires proof that “the particular employee’s activity” was protected and caused the plaintiff’s discharge. *Lins v. Children’s Discovery Centers*, 976 P.2d 168, 172 (Wash. App. 1999).

If these statutory requirements may be satisfied by showing that one plaintiff complained on behalf of others, then it was incumbent on plaintiffs to prove that this is indeed what occurred, and it was essential that the jury be charged on that theory of liability. That did not happen here. The fatal defect in the

instructions may not be overcome by *post hoc* judicial factfindings that the jury never made and that were far from conclusively established by the evidence.

This issue was repeatedly called to the court of appeals' attention (see Pet. Reh'g at 1-5; Appellants' Opening Brief at 23-25; Reply and Answering Brief at 9-13) but simply swept under the rug in Judge Reinhardt's opinion. It involves millions of dollars of liability for petitioners. The court of appeals' handling of it "so far depart[s] from the accepted and usual course of judicial proceedings" (Sup. Ct. R. 10(a)) and from settled law that it calls for correction through the exercise of this Court's power — indeed, responsibility — to supervise the actions of the lower federal courts.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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