No. 13-683

IN THE

Supreme Court of the United States

JOHN CATSIMATIDIS,

Petitioner,

v.

BOBBY IRIZARRY, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. After the court of appeals issued its decision, the parties entered into a final settlement of all remaining issues, the district court dismissed the case, and the petitioner's co-defendants fully satisfied the defendants' joint obligations under the settlement. Does this Court nevertheless have jurisdiction to decide whether the petitioner should have been held jointly and severally liable?

2. Every circuit to confront the issue has held that an individual with ownership and day-to-day, operational control of a business may be held jointly and severally liable as an "employer" for violations of the Fair Labor Standards Act. 29 U.S.C. § 203(d). The circuits apply a factbound, multi-factor analysis to determine "employer" status. No circuit requires proof that an individual have "exercised personal responsibility over the conduct that caused the violation," as petitioner proposes. Pet. i. Should this Court nevertheless grant certiorari to consider whether to adopt such a requirement?

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INTRODUCTION

As this case comes to the Court, there is no longer a live controversy between the parties. After the court of appeals issued its decision (but before the petition for certiorari was filed), the parties entered into a final settlement resolving all remaining issues. The district court then dismissed the case with the parties' consent and the petitioner's co-defendants fully satisfied the defendants' joint obligations under the settlement.

As a result, petitioner John Catsimatidis has no legitimate interest in continuing to litigate the hypothetical question he wants this Court to consider—namely, whether he should have been held jointly and severally liable with his co-defendants as an "employer" under the Fair Labor Standards Act (FLSA). Even if this Court were to grant certiorari and Catsimatidis were to prevail, the Court could not relieve him of an obligation that has already been extinguished. Because Catsimatidis accordingly lacks a "personal stake in the outcome of the lawsuit," this Court lacks the power to hear it. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 478 (1990) (citation omitted).

Even if a live controversy existed, this case would present no issue worthy of review. To determine whether an individual is an employer under the FLSA, the circuits apply a factbound, multi-factor analysis. The categorical rule that Catsimatidis advocates here—that a defendant's status as an "employer" should turn on his or her "personal responsibility over the conduct that caused the [FLSA] violation," Pet. i—has never been adopted by *any* circuit in the 75 years since Congress enacted the FLSA. And the case that forms the linchpin of Catsimatidis's purported split, *Baystate Alternative Staffing,*

Inc. v. Herman, 163 F.3d 668, 678 (1st Cir. 1998), in fact held just the opposite—that "it is the totality of the circumstances, and not any one factor, which determines whether a worker is the employee of a particular alleged employer." *Id.* at 676. Applying that "totality of the circumstances" approach, every federal circuit to consider the issue has held that an individual in Catsimatidis's shoes—with ownership and day-to-day, operational control of an entity—may be held jointly and severally liable as an employer under the FLSA.

Finally, even apart from the absence of any concrete controversy or circuit split, this Court should deny certiorari because the question presented is unimportant. The petition tries to raise the alarming specter of sweeping liability for "virtually every corporate officer and controlling shareholder" in the United States. Pet. 3. But the truth is that individual liability matters in only a very small subset of FLSA cases—where the entity teeters on insolvency, or where one individual so dominates the entity that he or she can shutter it to prevent collection of a judgment, as Catsimatidis threatened to do below. The community of legitimate, healthy businesses (let alone major corporations) is entirely unaffected. In the vast majority of FLSA cases involving business entities, the entities themselves can and do satisfy their obligations, as eventually occurred here, and individual liability is rendered academic. It is telling that neither the Chamber of Commerce nor any employer trade organization—nor anyone else, for that matter—has filed an amicus brief supporting the petition.

In short, the petition meets none of this Court's basic criteria for review: There is no jurisdiction, no circuit split, and no issue sufficiently important to merit this Court's attention. The petition should be denied.

STATEMENT

A. Statutory Background

In 1938, Congress enacted the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, to "protect[] all covered workers from substandard wages and oppressive working hours." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012) (citations omitted). The Act sets a minimum wage for non-exempt employees and requires payment of time-and-a-half for overtime.

In contrast to the common law and other federal statutes, Congress built individual liability into the FLSA's framework, defining "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). Congress concluded that a traditional definition of employment based on common-law concepts could be easily circumvented, and thus would not only be "ineffective" but would "penalize those who practice fair labor standards as against those who do not." *Roland Elec. Co. v. Walling*, 326 U.S. 657, 669-70 (1946). Congress modeled this language on child-labor statutes requiring individual owners to seek out and end such practices, even when traditional employer-liability principles might have allowed them to escape liability. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947).

Under the FLSA's definition of employment, then, the liability of an individual who owns a company and exercises plenary operational control over that company does not turn on "technical concepts" derived from agency law, but instead on the "economic reality" of the individual's status as an employer. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (citations omitted). The statute thus covers "working relationships, which prior to [the FLSA], were not deemed to fall with-

in an employer-employee category." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) (citation omitted).

B. Factual Background

John Catsimatidis is the sole owner, President, CEO, and Chairman of the Board of Gristede's Foods and the sole owner of its parent company, Red Apple Group. Pet. App. 46a.

Although Catsimatidis presents himself as having a detached role in the management of his stores, he is widely known in New York as the face of the Gristede's stores. *Id.* 5a. And far from being a mere figurehead, Catsimatidis involves himself in multiple aspects of the business—including personnel matters. For example, Catsimatidis personally signed at least three collective bargaining agreements establishing employee wages, overtime premiums, and benefits. CA2 JA 496, 522, 539. He hired the key managerial employees. Pet. App. 51a. His signature appears electronically on workers' paychecks. *Id.* And although he denies continuing personal involvement in wage and hour decisions, he does not deny that he manages the executives making those decisions, and that he entrusts them with those tasks. *Id.* 52a, 59a, 62a. He keeps track of "payroll" as "a line item on accounting" and "a part of profit and loss," to know what percentage of Gristede's sales and expenses payroll consumes. *Id.* 34a.

According to Catsimatidis, Gristede's policy is that employees should be paid for the time they work. CA2 JA 855, 862. Gristede's director of payroll, whom Catsimatidis promoted to the position, testified that this policy "comes from the top down," and that "Catsimatidis's rules are if somebody works, they get paid." *Id.* 469. Catsimatidis testified that he knew workers were paid

correctly because "[t]he unions would call" if there were a problem. CA2 JA 879, 882. When asked whether Catsimatidis would have the power to stop payroll from doctoring records to avoid paying overtime, his vice president testified: "Mr. Catsimatidis owns the company. I guess he could do whatever he wanted." CA2 JA 383.

Catsimatidis also exercises pervasive control over the current and future operations of Gristede's. He controls banking, financial and real estate matters, reviews the finances, works daily at his office at company headquarters and generally presides over day-to-day operations. Pet. App. 26a, 27a, 52a. He negotiates with public agencies and vendors on the companies' behalf. *Id.* 26a. He "personally owns the building in which Gristede's headquarters is located." *Id.*

His control of the companies goes beyond managing business affairs. Catsimatidis, as owner of Gristede's, has the acknowledged power to close or sell Gristede's stores. *Id.* 49a, 51a. Opposing the plaintiffs' motion on individual liability, Catsimatidis personally appeared in court to declare that he "could shut down the business, declare bankruptcy, as well as provide the personal signature necessary for a bank letter of credit to be issued in favor of Gristede's." *Id.* 49a. And thus Catsimatidis, de facto, has authority to put hundreds of people out of work.

Catsimatidis also directs the details of Gristede's stores. During his twenty years with the operation, he has set prices for goods offered for sale, selected the décor for the stores, decided how to display goods, and made decisions about the stores' signage and advertising. *Id.* 29a, 49a. He makes big-picture merchandising decisions, such as whether "for the next six months, [Gristede's should] push Coca-Cola or push Pepsi-Cola,"

and "decisions on having pharmacies in [Gristede's] stores." *Id.* 27a. At one point, Catsimatidis made regular weekly visits to the individual stores on Saturdays to check merchandising, solve problems, and inform himself directly about how the stores operated. *Id.* 29a-30a. He also handles customer complaints directly himself. *Id.* 31a.

Employees recognize that he is the top boss. *Id.* 52a. "He does not report to anyone else at Gristede's." *Id.* 26a. An executive testified that he "has whatever privileges an owner of a company has" to "make ultimate decisions as to how the company is run," and there is "no reason to believe that if he chose to make a decision anybody there has the power to override him." *Id.* 28a. As the district court summarized the record,

> [I]t's clear that Mr. Catsimatidis has the power to supervise and control the employees. Indeed, he has a greater power, that is, the power to determine whether or not they're going to be employees at all because he raises the concern that he will have to go into bankruptcy and perhaps terminate employment.

Id. 45a.

C. Proceedings Below.

1. District Court Proceedings and Initial Settlement. Plaintiffs filed an FLSA collective action against Gristede's. The district court granted summary judgment to the plaintiffs on their FLSA and New York Labor Law (NYLL) claims against Gristede's, holding that it had eliminated hours that employees recorded on their timesheets, misclassified them as exempt employees, illegally withheld overtime hours that had not been preapproved, and illegally retaliated against two of the plaintiffs with "completely baseless" counterclaims.

Torres v. Gristede's Operating Corp., 628 F. Supp. 2d 447, 461-63, 473 (S.D.N.Y. 2008).

The parties then reached a settlement of all claims, which the district court approved as fair, adequate, and reasonable under Federal Rule of Civil Procedure 23(e). The corporate defendants (Gristede's and Red Apple) thereafter defaulted on their payment obligations under the settlement. Pet. App. 6a. Under the terms of the settlement, this default triggered plaintiffs' right to seek summary judgment on Catsimatidis's individual liability as an "employer" under the FLSA and NYLL. The settlement provided, in the event Catsimatidis was determined by the court to be an "employer," he would then become personally liable for the unpaid balance of the settlement. *Id.*

The district court granted summary judgment for plaintiffs against Catsimatidis, holding him individually liable as an "employer" under the FLSA and NYLL. Pet. App. 53a. The court applied the Second Circuit's "economic realities" test of an individual's relationship to the company based on the "all the circumstances" of the operations. *Id.* Considering the undisputed record, the court found it "pellucidly clear that [Catsimatidis] is the one person who is in charge of the corporate defendant," and thus an "employer" under the FLSA and NYLL. *Id.* The court entered partial final judgment under Federal Rule of Civil Procedure 54(b), and Catsimatidis appealed. Pet. App. 56a–57a.

2. The Court of Appeals Decision. The Second Circuit affirmed. The court rejected Catsimatidis's argument that he could not be liable personally because he was merely a "high level employee who made symbolic or, at most, general corporate decisions." Pet. App. 16a. Synthesizing various circuits' decisions, the court held

that "operational control" referred to "an individual defendant … possess[ing] control over a company's actual 'operations' in a manner that relates to a plaintiff's employment." Pet. App. 21a. Such control need not mean coming "directly … into contact with the plaintiffs, their workplaces or their schedules." Pet. App. 23a.

Applying this standard and the non-exclusive factors set forth in *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984),[1] the Second Circuit held that Catsimatidis had operational control of the companies as a matter of law, and was therefore an "employer" under the FLSA. The decision did not turn on whether Catsimatidis was "responsible for the FLSA violations" or whether he "directly managed or otherwise interacted with the plaintiffs in this case" Pet. App. 36a. "There is no question that Gristede's was the plaintiffs' employer, and no question that Catsimatidis had functional control over the enterprise as a whole. His involvement in the company's daily operations merits far more than the symbolic or ceremonial characterization he urges us to apply." Pet. App. 35a. "Catsimatidis possessed, and exercised, 'operational control' over the plaintiffs' employment in much more than a 'but-for' sense. His decisions affected not only Gristede's bottom line but individual stores, and the personnel and products therein." Pet. App. 36a.

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[1] They are "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Carter*, 735 F.2d at 12 (internal quotations and citation omitted).

3. The Final Settlement, Dismissal, and Payment. Following the Second Circuit's decision, the parties entered into a final settlement agreement on September 19, 2013. Dist. Ct. Dkt. 484, 495. The defendants agreed in open court that payment of the then-outstanding attorneys' fees and costs was the "last remaining issue in this case and therefore the case will be totally closed." *Id.* Upon joint consent of the parties—and with no party reserving the right to appeal any prior order—the district court dismissed the case. Dist. Ct. Dkt. 484. The next day (September 20, 2013), Catsimatidis filed an application to extend his time to file a petition with this Court seeking review of the Second Circuit's decision affirming the holding he is an employer under the FLSA. On October 25, 2013, the amount due to the plaintiffs under the settlement was paid in full by Gristede's. Catsimatidis then filed a petition with this Court, without mentioning the final settlement or the payment.

REASONS FOR DENYING THE PETITION

I. There Is No Live Controversy.

This case comes to this Court in an unusual procedural posture: It is an attempt to obtain review of a decision that—as a result of a final, consummated settlement between the parties—has no remaining practical effect on the petitioner.

Two months after the Second Circuit's decision, the parties settled all remaining claims in the district court, including the plaintiffs' claim for attorneys' fees for their successful defense of the appeal. Dist. Ct. Doc. 484. Upon consent of the parties, the district court then dismissed the case (subject only to the condition that the plaintiffs could reinstate the action if the defendants did not make full payment under the settlement within 90 days). *Id.* The defendants' obligations under the settlement were

timely paid in full—not by petitioner Catsimatidis, but by his corporate co-defendants. In a letter to the district court concerning that payment, counsel for all of the defendants stated: "Delivery of the check should end the current dispute." Dist. Ct. Doc. 497.

Now that the parties have settled the case and fully consummated the settlement, the hypothetical question whether Catsimatidis should have been held jointly liable is of merely academic interest. It is well established that, under these circumstances, "[i]f a codefendant satisfies a judgment, appeals are mooted as between the plaintiff and any other defendant." 13B Wright & Miller, *Federal Practice and Procedure* § 3533.2.1 (3d ed., 2013). Even if this Court were to grant certiorari and Catsimatidis were to prevail, this Court could not "relieve [him] of an obligation that has already been extinguished by another party." *United States v. Balint*, 201 F.3d 928, 936 (7th Cir. 2000) (holding appeal moot under these circumstances); *see also Union of Prof'l Airmen v. Alaska Aeronautical Indus.*, 625 F.2d 881, 884 (9th Cir. 1980) (where a corporation and its president were both held jointly liable in an unfair-labor practices case, the corporation's full payment "relieved [the president] of any liability," after which his individual appeal was moot); *Schiller v. Penn Cent. Transp. Co.*, 509 F.2d 263, 266 (6th Cir. 1975) ("satisfaction of the judgment pending appeal" by a co-tortfeasor mooted the other defendant's appeal).

As the case comes to the Court, then, Catsimatidis no longer has a "personal stake in the outcome of the lawsuit." *Lewis*, 494 U.S. at 477-478 (internal quotation marks and citation omitted). Because the Constitution's "case-or-controversy requirement subsists through all stages of federal judicial proceedings," this Court lacks

the power "to decide questions that cannot affect the rights of litigants in the case before them." *Id.* This Court's only function "is to decide actual controversies," not to "give opinions upon moot questions or abstract propositions." *Mills v. Green*, 159 U.S. 651, 653 (1895). Because there is no live controversy here, this case is manifestly unsuitable for this Court's review.

Although it is Catsimatidis's burden to demonstrate "that he is a proper party to invoke judicial resolution of the dispute," *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990), his petition makes no mention of the final settlement, the district court's order of dismissal, or his co-defendants' satisfaction of the settlement. Given these developments, it is apparent that he cannot carry his burden. To be sure, the plaintiffs will have the right to seek attorney's fees under the FLSA for having to respond to Catsimatidis's petition. Dist. Ct. Dkt. 495. But, as this Court has recognized, "the mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III." *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986) (rejecting standing based on attorneys' fees).

Nor could Catsimatidis manufacture jurisdiction by speculating about the decision's future collateral-estoppel effect. This case resulted in a class action settlement, under which the class members released their claims against the defendants. And leaving aside the possibility of fees for the time incurred opposing this petition, "[t]here is no indication of a presently existing dispute" concerning individual liability, "and if such a dispute were to arise it would not be between the parties to this case." *Burke v. Barnes*, 479 U.S. 361, 364 (1987); *see also In re Burrell*, 415 F.3d 994, 999 (9th Cir. 2005)

(hypothetical "specter of continuing legal harm from res judicata or collateral estoppel" is no exception to mootness); *Alabama Mun. Distrib. v. FERC*, 312 F.3d 470, 474 (D.C. Cir. 2002) ("[N]either standing nor ripeness could properly grow out of a harm predicated on a potential collateral estoppel effect."). Moreover, as discussed below, individual FLSA liability is a factbound determination that depends on the defendant's operational control at a particular point in time. Because there is no longer any "present right" at issue here, this Court lacks jurisdiction. *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977). Accordingly, the petition should be denied.[2]

II. There Is No Circuit Split.

1. Catsimatidis wants this Court to hold that an individual defendant's status as an "employer" under the FLSA depends on the defendant's "personal responsibility over the conduct that caused the [FLSA] violation." Pet. i. In the seventy-five years since Congress adopted the FLSA, not a single court of appeals has adopted the position Catsimatidis urges the Court to adopt here. Indeed, the principal case on which Catsimatidis relies, *Baystate*, 163 F.3d at 678, held just the opposite. The First Circuit in *Baystate* held that "it is the totality of the circumstances, and not any one factor, which determines whether a worker is the employee of a particular alleged employer." *Id.* at 676. As court explained, "Congress intended the FLSA's reach to transcend traditional

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[2] Because the mootness is a result of the parties' joint settlement rather than action on the plaintiffs' part, vacatur is inappropriate. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994); Gressman, et al., *Supreme Court Practice* 942 (9th ed. 2007). Accordingly, this Court may either dismiss or simply deny the petition.

common law parameters of the employer-employee relationship," and to include officers of a corporation who would otherwise have escaped liability. *Id.* at 677.

The decision below did not, as Catsimatidis contends, "expressly acknowledge" a disagreement with *Baystate*. To be sure, the Second Circuit wrote that *Baystate* went further than other circuits when it included a defendant's "personal responsibility for making decisions about the conduct of the business that contributed to the violations of the Act" as a relevant factor to the defendant's status as an employer. *Id.* at 678. But *Baystate* did not limit its analysis to that factor. Rather, the court looked to *all* the circumstances bearing on the "economic reality" of the defendant's relationship to a company's employees, including those factors the Second Circuit held to be controlling here: the defendant's "ownership interest" in a business and "operational control of significant aspects of the corporation's day to day functions." *Id.* at 677. Even if a defendant is not personally responsible for FLSA violations, these factors remain "important to the analysis because they suggest that an individual controls a corporation's financial affairs and can cause the corporation to compensate (or not to compensate) employees in accordance with the FLSA." *Id.* at 678.

As sole owner of Gristede's with "absolute control" over its operations, Catsimatidis unquestionably held both the authority and the responsibility to require the company's compliance with the FLSA. Under these circumstances, *Baystate* leads to the same result reached by the Second Circuit below. Indeed, the First Circuit—in a case Catsimatidis ignores—itself applied *Baystate* in upholding FLSA claims against a corporate President and CEO. *Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 48, 50–51 (1st Cir. 2013). Where an individual defend-

ant is in a "position to exert substantial authority over corporate policy relating to employee wages," the court held, plaintiffs are not required to allege that the defendant "made a specific decision or took a particular action that directly caused the plaintiffs' undercompensation." *Id.* at 48. And both *Baystate* and *Manning* cited with approval cases from other circuits holding corporate officers liable for FLSA violations under similar circumstances—including the same Second, Fifth, Sixth, and Ninth Circuit decisions that Catsimatidis argues arrayed against *Baystate* in a circuit split.[3]

2. Turning further afield, Catsimatidis attempts to cobble together the impression of a split by citing a smattering of decisions from other circuits that he claims support his interpretation of *Baystate*. None of these cases hold that a corporate officer must be personally responsible for an FLSA violation to face liability under the Act.

The Eighth Circuit's decision in *Wirtz v. Pure Ice Co.*, 322 F.2d 259 (8th Cir. 1963), for example, held that a defendant's ownership of stock in a company was not, standing alone, enough to show that the stockholder was an "employer" under the FLSA. But the court also noted that, if the case had involved "a combination of stock ownership, management, direction and the right to hire

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[3] *See Manning*, 725 F.3d at 48 (citing *Lambert v. Ackerley,* 180 F.3d 997, 1012 (9th Cir. 1999); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 140 (2d Cir. 1999)); *Baystate*, 163 F.3d at 678 n.13 (citing *United States Dep't of Labor v. Cole Enters. Inc.*, 62 F.3d 775, 778–79 (6th Cir. 1995); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965–66 (6th Cir. 1991); *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 971–72 (5th Cir. 1984); *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194–95 (5th Cir. 1983)).

and fire employees, then a contrary conclusion would be well supported." *Id.* And, indeed, the same court, in *Chambers Construction Co. v. Mitchell*, 233 F.2d 717, 724 (8th Cir. 1956), had previously affirmed FLSA liability against a company owner who managed the company and exercised authority over its operations.

At best, the cases on which Catsimatidis relies hold that the individual defendants *in those cases* were not employers under the FLSA. None challenges the consensus among the circuits that an individual with financial and day-to-day control over an enterprise is a proper defendant in an FLSA case. *See, e.g., Lambert*, 180 F.3d at 1012 (record "strongly supports the jury's determination that both Ackerleys exercised economic and operational control over the employment relationship with the sales agents, and were accordingly employers within the meaning of the Act."); *RSR Security Servs.*, 172 F.3d at 141 (finding liability for "a 50 percent stockowner; he had direct involvement with the security guard operations from time to time and was generally involved with all of RSR's operations"); *Dole*, 942 F.2d at 966 (individual who was CEO, had a significant ownership interest in the corporation, and controlled significant day-to-day functions of the business was "employer"); *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984) (individual defendant was "top man" in hotel company who "held [the hotels'] purse-strings and guided their policies" and that the hotels "speaking pragmatically, … functioned for the profit of his family"). As with any multi-factor test whose application is highly fact-intensive, the outcomes will necessarily differ from case to case. But absent some actual disagreement on a point of law, there is no circuit split for this Court to address.

III. The Issue Is Unimportant and Factbound.

In an effort to make the issue appear important, Catsimatidis's petition (at 3, 25-26) hyperbolically suggests that the decision below "exposes virtually every corporate officer and controlling shareholder" in the United States to FLSA liability. But the reality is far different. Although many FLSA cases are litigated, and although individual liability has been part of the statute for over seventy years, *Fleming v. Palmer*, 123 F.2d 749, 762 (1st Cir. 1941), the specter of sweeping officer liability has never materialized in all that time and the occupants of corporate boardrooms have nothing to fear.

In truth, individual liability under the FLSA "has little or no effect on … solvent firms." Timothy P. Glynn, *Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations*, 32 Berkeley J. Emp. & Lab. L. 279, 325 (2011). In the vast majority of cases, individual officers never realistically face personal liability because the corporate entities satisfy their obligations (as the corporate defendants eventually did in this case) and because "employer-provided indemnification … assures that the enterprise will cover the individual's liability in the run of cases." *Id.* "For this reason, plaintiff employees often do not include officers as defendants, despite the availability of potential claims against them." *Id.*

Instead, FLSA individual liability nearly always arises in one of two narrow contexts: where an entity is truly insolvent or where its owners can credibly threaten bankruptcy, dissolution, or insolvency to avoid paying workers. *See* Pet. App. 49a, CA2 JA 3619-20 (Catsimatidis's statements threatening to declare bankruptcy, which would result in a loss of jobs for "[m]y … employees"); *RSR Security Servs.*, 172 F.3d at 140 (where individual

"controlled the company financially, it was no idle threat when he testified that he could have dissolved the company"); *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983) (principals "knowingly undertook a calculated risk to keep the plant open, in spite of layoff recommendations from the bank, the union, and their own managers, and in spite of the company's inability fully to fulfill its statutory obligations to its employees"). Where FLSA individual liability really matters is "in the context of fly-by-night labor contractors and other undercapitalized firms, since recovery against such firms is unlikely." Glynn, *Self-Regulation*, 32 Berkeley J. Emp. & Lab. L. at 325. This fact helps explain the absence of any amicus briefs from mainstream business groups (or anyone else) in support of the petition. Ultimately, "as a practical matter, the F.L.S.A.'s supervisory liability regime" addresses a very specific problem: it "counteracts the moral hazard of limited liability by holding supervisors accountable for wage and hour violations when the firm is insolvent." *Id.*[4]

Nor is that policy of counteracting moral hazard at odds with traditional corporate law, as the petition sug-

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[4] *See also* Peter M. Gilhuly & Ted A. Dillman, *Officers' and Directors' Personal Liability for Wages*, 29-FEB Am. Bankr. Inst. J. (Feb. 2010) 56 (real significance of personal liability under the FLSA arises when companies "reach a liquidity crisis or insolvency"); Jill Garcia, *Personal Liability of Corporate Agents*, 17-NOV Nevada Lawyer 12 (Nov. 2009) (FLSA personal liability is a "concern when a company files for bankruptcy or is insolvent and has outstanding wage and overtime obligations"); Hina B. Shah, *Broadening Low-Wage Workers' Access to Justice: Guaranteeing Unpaid Wages in Targeted Industries*, 28 Hofstra Lab. & Emp. L.J. 9, 39 (2010) (suits are "relatively scarce" and corporate officers have "little to fear").

gests (at 1-2, 18). To the contrary, the corporate law of several states explicitly "hold[s] shareholders accountable for unpaid wages." *Id.* at 325 n.243. For example, for over a century New York's corporate law has included a provision making the "ten largest shareholders" of a private New York corporation "personally liable for all ... wages or salaries due and owing to any of its laborers, servants or employees." N.Y. Bus. Corp. Law § 630. Although not applicable here, this statute shows that corporate law itself has long recognized the need for "a safeguard for employees who would otherwise be left without recourse in the event of the corporation's insolvency." *Sasso v. Vachris*, 484 N.E.2d 1359, 1360 (N.Y. 1985).

Finally, even apart from its infrequency and irrelevance to the mainstream business community, the issue is unworthy of this Court's review because, as Catsimatidis repeatedly emphasized in his briefing to the Second Circuit, FLSA individual liability is highly factbound. *See* Catsimatidis CA2 Br. at 40-41 (emphasizing that the inquiry is "highly 'fact-intensive,'" such that summary judgment is "rare") (citing *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 144-45 (2d Cir. 2008)). And because no circuit has ever adopted the direct-personal-responsibility test that Catsimatidis urges here, the factual issues relevant to that novel test are unexplored. This Court should not become the first to adopt it. Rather, at the very least, the Court should wait until at least one court has experimented with the standard urged by the petition before rushing in.

IV. The Decision Below Is Correct on the Merits.

The decision below is a correct, factbound application of settled law, which adheres to a "flexible," "case-by-case review of the totality of the circumstances." Pet. App. 10a. Based on the totality of the circumstances here, the court of appeals correctly concluded that Catsimatidis was the plaintiffs' employer under the FLSA. Those factors included his ownership interest; his status as president and CEO; his day-to-day control of management and finances; his minute involvement in the management of the stores; and his hiring and control of the executives making personnel decisions. Catsimatidis so commanded the workforce, in the most immediate sense, that he threatened in open court to leverage his power to close the business and throw Gristede's employees out of work, all to avoid fulfillment of the settlement. Pet. App. 49a. Any definition of "employer" faithful to the FLSA would lead to the same bottom-line result: Catsimatidis would remain individually liable. There is no reason for this Court to grant certiorari to redo this highly factbound inquiry for itself.

Although it is unclear whether it would actually lead to a different outcome on this record, Catsimatidis asks this Court to upend decades of settled law by erecting a new rule, recognized by no circuit, that an individual employer must have had "responsibility over the [FLSA] conduct that caused the violation." Pet. i. That novel proposal collides with the FLSA's text, purpose, and history. In adopting a broad definition of "employer," Congress did not intend to tether individual liability to a common-law definition of employment that could be easily circumvented so as to render the Act's protections "ineffective." *Roland*, 326 U.S. at 669-70. It intended just the opposite. Congress modeled 29 U.S.C. § 203(d) on child-

labor statutes that required individual owners to take active steps to end oppressive practices, even where common-law principles might have allowed them to escape liability. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947).

Catsimatidis (at 2, 18, 23, 24) relies heavily on *Meyer v. Holley*, 537 U.S. 280 (2003), to limit individual FLSA liability, but that case nowhere addresses the FLSA's broad definition of "employer." *Meyer* involved a statute (the Fair Housing Act) concerned primarily with intentional discrimination, and held that common-law rules of agency apply to the relationship between a corporation and an individual owner. *Id.* at 286–87. Yet this Court, in keeping with Congress's intent, has long eschewed common-law agency rules in determining who is an employer under the FLSA. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 at 326 (1992) (FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles"); *Walling*, 330 U.S. at 150–51 ("This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category."). There is no reason to depart from that settled approach now.

Finally, Catsimatidis speculates (at 26) that the FLSA's definition of "employer" might migrate to other statutes not governed by 29 U.S.C. § 203(d), particularly the Employee Retirement Income Security Act (ERISA). But the petition cites no evidence that this has occurred, and this Court has already distinguished the two statutes' definitions of employment. *Darden*, 503 U.S. at 326 ("While the FLSA, like ERISA, defines an

'employee' to include 'any individual employed by an employer,' it defines the verb 'employ' expansively to mean 'suffer or permit to work' … ERISA lacks any such provision, however, and the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA's concept of 'employee.'").

Because the decision below is faithful to the text and history of the FLSA, because the federal circuits are in harmony, and, above all, because this case no longer presents a live controversy, this Court's review is manifestly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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