No. 12-511

IN THE

Supreme Court of the United States

JOHN T. MARTIN, JOHNATHON R. MARTIN,
BRADLEY D. KEYES AND MARTY BOGER,

Petitioners,

v.

SPRING BREAK '83 PRODUCTIONS, L.L.C., *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a group of corporate executives and managers are "employers" under the Fair Labor Standards Act if they have delegated the employment duties amongst themselves so that no one person has complete control over the working conditions or wages of the employees.

Whether a settlement agreement executed by a union and an employer relating only to collectively bargained for rights can preclude union members from filing individual claims for minimum wage and overtime under the Fair Labor Standards Act.

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners are John T. Martin, Jonathan R. Martin, Bradley D. Keyes, and Marty Boger.

Respondents are Spring Break '83 Production, LLC, Spring Break '83 Distribution, LLC, Big Sky Motion Pictures, LLC, Spring Break '83 Louisiana, LLC, George Bours, John Heremansen, Mars Callahan, and Randy Chortkoff. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, IATSE Local Union 478, and IATSE Local Union 798.

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The opinion of the United States court of appeals appears in Appendix A to the petition and is reported at *Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247 (5th Cir. La. 2012).

The opinion of the United States district court appears in Appendix B to the petition and is reported at *Martin v. Spring Break '83 Prod., LLC*, 797 F. Supp. 2d 719, 721 (E.D. La. 2011).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on July 24, 2012. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 203(d).

"Any cause of action under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to May 14, 1947, or any action (whether instituted prior to or on or after May 14, 1947) to enforce such a cause of action, may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer

to his employee; except that no such action or cause of action may be so compromised to the extent that such compromise is based on an hourly wage rate less than the minimum required under such Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate." 29 U.S.C. § 253(a).

"(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions. The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages...." 29 U.S.C. § 216(c).

STATEMENT OF THE CASE

This case is about unionized crew members who worked on a film production that went "belly up," leaving the employees unpaid for the last couple weeks of work. The employees are suing for minimum wage and overtime due under the Fair Labor Standards Act and named the film production company and four of its managers as individual defendants. Defendants claim that the production company executed a settlement agreement with the union that precludes all FLSA claims and that the individual defendants are not "employers," so they cannot be personally liable for unpaid wages of the production company.

Facts relating to the Settlement Agreement

Petitioners J. T. Martin, J. R. Martin, Keyes, and Boger ("Grips") were employed as grips—lighting and rigging technicians in the filmmaking and video production industries—with Spring Break Louisiana ("Production") for the filming of *Spring Break '83* – a feature film comedy. Filming took place between October 6, 2007 and December 22, 2007 in and around Hammond, Louisiana. Throughout this filming period, the Grips were members of the International Alliance of Theatrical Stage Employees, Local 478 (the "Union" or "IATSE").

The Grips worked pursuant to a Collective Bargaining Agreement ("CBA") which provided for the methods and rates of payment for wages as well has provided for a mandatory grievance procedure for all claims arising under the CBA. (USCA5 695-711).

Toward the end of production of the movie, a number of employees, including the Grips, filed a grievance against Spring Break Louisiana alleging that they had not been paid wages for work they performed under the CBA. The Union sent a representative to investigate the merits of the claims. After his investigation, the representative concluded that it would be impossible to determine whether or not Appellants worked on the days they alleged they had worked.

The Grips then filed this action in the Superior Court of the State of California on June 16, 2009 alleging, that Spring Break Louisiana failed to pay the Grips proper overtime and minimum wage under the Fair Labor Standards Act. The case was removed to federal

court based on federal subject matter jurisdiction and transferred to Louisiana.

While the litigation was pending, the Union and Spring Break Louisiana entered into a Settlement Agreement which reads in the relevant part that:

> The Union on its own behalf and on behalf of the IATSE Employees agrees and acknowledges that the Union has not and will not file any complaints, charges or other proceedings against Producer, its successors, licenses and/or assignees, with any agency, court, administrative body, or in any forum, on condition that payment in full is made pursuant to the terms of this Settlement Agreement. (USCA5 680-88).

Full payment was made pursuant to the settlement agreement.

Facts relating to whether corporate officers are liable as employers under the FLSA.

In addition to the production company, Petitioners named several officers and managers of the production company seeking liability in their individual capacity. These "Individual Defendants" are Mars Callahan, John Heremansen, George Bours, and Randy Chortkoff.

The film *Spring Break '83* was written, directed, and produced by Mars Callahan. Mr. Callahan was intimately involved with every aspect of the film, and would issue instructions to employees working on the production. He could hire and fire employees, and Mr. Martin personally

witnessed him fire employees from the set. Mr. Callahan was also directly involved with paying the employees, he paid the employees in cash for certain expenses, and told employees he was addressing issues with the payment of their wages. Mr. Callahan was considered to be the "boss" on the set by the employees. Mr. Callahan hired the key employees for the production, and those employees, in turn, hired the lower level employees that made up the majority of the crew. (USCA5 779-8).

George Bours and John Hermansen were directly in charge of handling employee complaints relating to payment of wages during the "wrap" of the show. They were tasked to investigate the claims and had complete authority to resolve them. (USCA5 780-1) Hermansen maintained the employment records for the show. (USCA5 606).

Randy Chortkoff was an Executive Producer on Spring Break '83 and was in charge of all financial matters, including the payment of wages to employees. Mr. Chortkoff was a partner with Mr. Callahan in running the production. (USCA5 781).

Relevant Motions and Orders

In the District Court for Eastern District of Louisiana, the Defendants moved for summary judgment arguing that the settlement agreement signed by the union extinguished all claims under the FLSA and that the Individual Defendants were not liable because there were not "employers" as defined within the FLSA. This District Court granted this motion and the Fifth Circuit affirmed the judgment.

REASON FOR GRANTING THE PETITION

This case covers two important issues regarding interpretation of various statues within the Fair Labor Standards Act. 29 U.S.C. § 201, *et seq.* Namely, it addresses the circumstances in which individual corporate officers or managers can be liable for violations of the Fair Labor Standards Act and it addresses whether a private settlement agreement executed by a union can waive employees' individual rights under the Fair Labor Standards Act.

In terms of individual liability under the FLSA, the Fifth Circuit's decision is in conflict with several other circuit's opinions on the same matter. Indeed, many circuits have developed their own nuances in applying individual liability to corporate managers, but the Fifth Circuit's opinion in this case departs from all of them significantly in that it applies a mechanical analysis of four factors. The end result of the Fifth Circuit's analysis is that as long as a corporation splits up the supervision of employees among several corporate managers, none of them can be found to be individually liable, because the Fifth Circuit requires each individual to be analyzed separately to determine whether or not he or she is an employer. In contrast, the majority of other circuits undertake a more holistic analysis to determine if a person has "significant" control over the employment relationship and allows this control to be shared among several managers.

In terms of the validity of the settlement agreement, review is appropriate for the following reasons: (1) the Fifth Circuits' decision in this case creates a split of authority regarding whether a private settlement

agreement not approved by a court or the Department of Labor can release claims under the FLSA; and (2) the Fifth Circuit's decision that a union can collectively waive members individual claims under the FLSA conflicts with the relevant decision of this Court.

Review should be granted because this Court has never addressed the issue of individual liability under the FLSA and various circuits have taken up nuanced interpretations of the same statute, all of which are at variance to the Fifth Circuit's decision in this case.

The FLSA defines the term "employer" to be "any person acting directly or indirectly in the interest of an employer in relation to an employee...." 29 U.S.C. § 203(d). In addition, the FLSA defines "employee" to "mean any individual employed by an employer." 29 U.S.C. § 203(e)(1). It is not surprising that these circular definitions have given rise to conflicting interpretations.

This Court first addressed the meaning of these definitions in the context of employment by an incorporated cooperative. In *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961), this Court held that an incorporated cooperative was an "employer" under the FLSA using an "economic reality" test. However, this Court failed to define exactly that the "economic reality" test was beyond the common sense meaning of the phrase. Later, this Court briefly defined "employer" to include an entity with "substantial control of the terms and conditions of the work" in the context of a whether a corporate entity that was managing independent apartment complexes was the employer of the individuals actually managing the apartments. *Falk v. Brennan*, 414 U.S. 190, 195 (1973).

However, this Court has never taken up the definition of the term "employer" as it relates to individuals who act "directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

From this statute and the terse opinions of this Court, the various circuits have crafted their own "economic reality" tests for employment. In addition, there has grown two different analysis of the term "employer." The first type of analysis is whether two or more corporate entities are joint employers under the FLSA. The second is whether an individual officer or manager of a corporation can be held individually liable for violations of the FLSA. It is only this second type of liability that is at issue in this case.

In terms of individual liability for corporate managers, there are nearly as many rules as there are circuits. For instance, the First Circuit looks at whether an officer had "significant ownership interest" or had "operational control of significant aspects of the corporation's day to day function." *Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir. Mass. 1983). The Second Circuit uses a broad test of "whether the alleged employer possessed the power to control the workers in question." *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 139 (2d Cir. N.Y. 1999). The Sixth Circuit found individuals who made "major corporate decisions" but did not have "day-to-day control of specific operations" to be employers. *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 966 (6th Cir. Mich. 1991). The Seventh Circuit seems to have never directly addressed the issue. *Arteaga v. Lynch*, 2012 U.S. Dist. LEXIS 126784 (N.D. Ill. Sept. 6, 2012). The Ninth Circuit also has a broad definition of "employer" which includes individuals

who exercise "control over the nature and structure of the employment relationship, or 'economic control' over the relationship." *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. Nev. 2009).

The Fifth Circuit rule applied in this case is in conflict with nearly every circuit to rule on the issue of individual liability.

In this case, the Fifth Circuit performed an "economic reality" test which consisted exclusively of the following factors: whether the individual "(1) possessed the power to hire and fire employees; (2) supervised or controlled employee work schedules or conditions of employment; (3) determined the rate or method of payment; and (4) maintained employee records." *Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247, 251 (5th Cir. La. 2012). The Fifth Circuit then mechanically applied these factors to four different individuals and noted that while each individual may have exercises one or more of the factors, because no one individual exercised a significant portion of them, that none of them were employers.

The Fifth Circuit is the only circuit to require all individuals to possess all the characteristics of being an employer. This rule came from *Gray v. Powers*, 673 F.3d 352, 355 (5th Cir. Tex. 2012) noting that "[i]n cases where there may be more than one employer, this court "must apply the economic realities test **to each individual** or entity alleged to be an employer and each must satisfy the four part test." (emphasis added). This inflexible rule allows corporate managers, such as in this case, to escape liability by simply splitting up the management duties. For instance, the Fifth Circuit noted that "Appellants

presented no evidence that Callahan maintained any employment records." *Martin* at 252. While true, this is because it was undisputed that Mr. Hermansen stated in his declaration that "I was responsible for maintaining all the records for Spring Break '83 Louisiana, L.L.C." The Court then found Mr. Hermansen not to be an employer because he was not change of the payment of wages – a task found by the Court to be controlled by yet a different employee -- Mr. Chortkoff.

It should also be noted that the mechanical approach adopted by the Fifth Circuit does not work in union environment where the "rate or method of payment" was controlled by a collective bargaining agreement, as it was here. Curiously, the Fifth Circuit incorrectly notes that the "payroll company" was responsible for setting the rates and methods of payment without any citation to the record. *Martin* at 252. Nothing in the record to support this and is clear that payroll companies are not employers. *Futrell v. Payday California, Inc.*, 190 Cal. App. 4th 1419, 1424 (2010).

In addition, the notion that a payroll processing company controlled the "rate or method of payment" is directly contradicted by the Court's own discussion of the collective bargaining agreement and the discussion regarding the settlement of disputed wages under the collective bargaining agreement. *Martin* at 249. Indeed, the declaration of Mr. Hermansen clearly states that "The terms and conditions of Plaintiff's [the Grips] employment with Spring Break '83 Louisiana L.L.C. were governed by a Collective Bargaining Agreement..." This Agreement clearly controls the rate or method of payment of wages as well as a variety of other working conditions.

No other circuit follows the Fifth Circuit's mechanical application that requires that each individual meet all of the four factors in order to be considered an "employer." For instance, the First Circuit held the president of a company with "ultimate control over the business' day-to-day operations" to be liable without even any discussion of the maintenance of employee records. *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 34 (1st Cir. P.R. 2007). Similarly, the Second Circuit uses a holistic approach "based upon all the circumstances." *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 139 (2d Cir. N.Y. 1999). In particular, the *RSR Sec. Servs.* Court noted that a high level manager that employees testified they "viewed him as the 'boss'" was an employer. *RSR Sec. Servs.* at 137. Here, an almost identical fact was presented by the employees in that the declaration of Mr. Martin stated that "Mr. Callahan was in charge of the production and it was clear that he was the 'boss' on the set." (USCA 5 780 ¶6). The Fifth Circuit rejected this because Callahan didn't maintain the payroll records and because the CBA controlled the conditions and rates of employment.

The Ninth Circuit tests simply whether the employer exercises "'control over the nature and structure of the employment relationship,'" *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. Wash. 1999) quoting *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). In addition, in applying this general rule to a specific case, the Ninth Circuit used similar tests as the Fifth Circuit but dealt with the duties rather than the actual performance of the task. For instance, the Ninth Circuit analyzes, when appropriate, whether the individual had a "responsibility to" maintain employment records. *Lambert* at 1012. This is in stark contrast to the

Fifth Circuit's analysis of who actually maintained the employment records.

Ultimately, the Fifth Circuit's analysis allows companies to play the shell game with corporate responsibilities, as was done here. Mr. Callahan is not the employer because he doesn't maintain the payroll records, as task performed by Mr. Hermansen. Mr. Hermansen is not the employer because he didn't have ultimate financial control of the wages, as task held by Mr. Chortkoff, and so on.

This case also presents an excellent opportunity to review a general rule on individual employment because there are four different individuals, each of whom performed slightly different managerial tasks. As such, a resolution of which of these individuals were employers under the FLSA would provide a great deal of guidance almost all the realistic working environments that arise in litigation.

Review should be granted because this decision creates a split of authority on whether claims under the Fair Labor Standards Act can be compromised in a private settlement.

When Congress passed Fair Labor Standards Act, a method to settle outstanding disputes was inserted into 29 U.S.C. § 216(b). In particular, the Department of Labor is authorized to supervise settlements entered into between an employee and an employer regarding claims for minimum wage and overtime. The Eleventh Circuit has interpreted this provision to imply that other private settlements are not valid. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352 (11th Cir. Ga. 1982). The *Lynn's Food* Court noted that there are only two ways to compromise claims under the FLSA: (1) under a Department of Labor supervised settlement and (2) for an employee to bring a lawsuit and have the settlement reviewed by the court. See *Yue Zhou v. Wang's Rest.*, 2006 U.S. Dist. LEXIS 84397 (D. Cal. Nov. 9, 2006) for detailed discussion of the invalidity of private releases.

Here, the Fifth Circuit has rejected this line of reasoning and held that "a private compromise of claims under the FLSA is permissible where there exists a bona fide dispute as to liability." *Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247, 255 (5th Cir. La. 2012) quoting *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608 (W.D. Tex. 2005).

It should be noted that in *Brooklyn Sav. Bank v. O'Neil*, 65 S. Ct. 895, 905 (1945), this Court ruled on special releases of liquidated damages under the FLSA but specifically noted that it was not ruling on the issue of "what limitation, if any, § 16 (b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties." *Id.* This case presents this unresolved issue.

Review should be granted because this Court has already ruled that unions cannot collectively bargain away individuals' rights under the Fair Labor Standards Act.

This Court has long held that "FLSA rights ... are independent of the collective-bargaining process.

They devolve on petitioners as individual workers, not as members of a collective organization. They are not waivable." *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 745 (1981). The Ninth Circuit has taken this to mean that "employees cannot waive the protections of the FLSA,[], nor may labor organizations negotiate provisions that waive employees' statutory rights under the FLSA." *Gordon v. City of Oakland*, 627 F.3d 1092, 1095 (9th Cir. Cal. 2010), citations omitted. See also, "The minimum wage and overtime provisions of the Act are guarantees to individual workers that may not be waived through collective bargaining." *Local 246 Util. Workers Union v. Southern Cal. Edison Co.*, 83 F.3d 292, 296 (9th Cir. Cal. 1996).

The Fifth Circuit attempts to distinguish *Barrentine* by noting that "[i]n Barrentine, the plaintiffs' grievances based on rights under the FLSA were submitted by the union to a joint grievance committee that rejected them without explanation, a final and binding decision pursuant to the collective bargaining agreement.[citations omitted]. Here, Appellants accepted and cashed settlement payments—Appellants' FLSA rights were adhered to and addressed through the Settlement Agreement, not waived or bargained away." *Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247, 257 (5th Cir. La. 2012). The Court goes on to note that "FLSA substantive rights may not be waived in the collective bargaining process, however, here, FLSA rights were not waived, but instead, validated through a settlement of a bona fide dispute, which Appellants accepted and were compensated for." Curiously, the Settlement Agreement does not even mention the FLSA, minimum wage, or overtime. However, there is no meaningful distinction between "waving" a claim and "validating" a claim "though settlement."

This Court had previously focused on the fact that unions have very different agendas and goals than individuals under the FLSA. This Court noted that "a union's objective is to maximize overall compensation of its members, not to ensure that each employee receives the best compensation deal available." *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 742 (1981). This is particularly true in this case where a simple review of the settlement agreement shows that a significant amount of money was paid into the union's pension fund. (USCA5 682). While this may be a laudable goal for the union, it is also likely that the union might reduce the amounts demanded under the FLSA in exchange for an enhanced pension payment. It is for this very reason that this Court had previously ruled that FLSA claims could not be compromised by a union through the collective bargaining process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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