No. 12-726

In the Supreme Court of the United States

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, CHILD PROTECTIVE SERVICES DIVISION, PETITIONER

v.

SETH D. HARRIS, ACTING SECRETARY OF LABOR

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a State has sovereign immunity from a suit brought by the Secretary of Labor seeking back wages and injunctive relief under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is reprinted in 488 Fed. Appx. 837. The opinion of the district court (Pet. App. 8a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2012. The petition for writ of certiorari was filed on December 11, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA or Act) requires employers to, *inter alia*, pay their employees at least the federal minimum wage and pay

overtime compensation for any hours the employees work over 40 in a workweek. See 29 U.S.C. 206(a), 207(a)(1). The Act defines "employer" to "include[] a public agency," 29 U.S.C. 203(d), and "employee" to include (with exceptions not relevant here) "any individual employed by a State," 29 U.S.C. 203(e)(2)(C). The Act authorizes the Secretary of Labor (Secretary) to sue to recover unpaid minimum wages and overtime compensation owed to employees and an equal amount as liquidated damages, 29 U.S.C. 216(c), and it gives the district courts jurisdiction to enjoin violations of the Act, 29 U.S.C. 217.

2. The Secretary, respondent in this Court, filed a complaint under the Act against petitioner, alleging that it violated the Act by failing to pay its employees appropriate overtime compensation and by failing to keep adequate records of hours worked on a daily and weekly basis. Compl. 2-3. The Secretary seeks back wages, liquidated damages, pre-judgment interest, and an order enjoining petitioner from violating the Act's overtime and recordkeeping requirements and from withholding payment of overtime compensation found to be due employees. Compl. 3-4.

3. The district court denied petitioner's motion to dismiss the complaint as barred by sovereign immunity. Pet. App. 8a-18a. The court explained that "it is well-established that the State's sovereign immunity does not extend to suits brought by the federal government, to enforce federal law." *Id.* at 13a (citing *Idaho* v. *United States*, 533 U.S. 262, 271 n.4 (2001)). The district court noted in particular that this Court has confirmed that the Secretary "can sue on behalf of state employees to enforce the FLSA." *Id.* at 15a (citing *Alden* v. *Maine*, 527 U.S. 706, 755 (1999)).

The district court further recognized that it was bound by Fifth Circuit precedent squarely rejecting petitioner's argument that the Secretary should be disregarded as a mere nominal party in suits brought by the Secretary against a State to enforce federal law. Pet. App. 14a-15a (citing *EEOC* v. *Board of Supervisors*, 559 F.3d 270, 272-274 (5th Cir. 2009); *United States* v. *Mississippi Dep't of Pub. Safety*, 321 F.3d 495, 498-499 (5th Cir. 2003)). The district court concluded that "the Secretary is not merely a nominal party to this suit, and therefore, the State of Texas's sovereign immunity is not present, even if [petitioner] is correct that the nominal-party doctrine has any application as to the federal government (which is doubtful)." *Id.* at 15a. The court elaborated that because the Secretary is authorized to protect employees from FLSA violations, the Secretary has a "real and direct interest" in bringing this case. *Ibid.* The court further observed that under petitioner's approach, "States could flout the FLSA (and no doubt many other federal laws) with impunity"; the inescapable conclusion, the court explained, is that "the State of Texas is presumed by our Constitutional system to have consented to this type of suit, and therefore its sovereign immunity is waived." *Id.* at 17a.

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-5a. The court relied on circuit precedent holding "that sovereign immunity does not bar a suit by the United States on behalf of [state employees] under the FLSA," *id.* at 4a (citing *Marshall* v. *A&M Consol. Indep. Sch. Dist.*, 605 F.2d 186, 188-189 (5th Cir. 1979)), that "the Secretary of Labor [has] authority to bring suit for unpaid minimum wages or unpaid overtime compensation under the FLSA," and that "suits by the United States against a State are not

barred by the Constitution," *ibid.* (quoting *Employees of Dep't of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 285-286) (1973) (brackets in original). Finally, the court of appeals rejected respondent's nominal-party argument in explaining that "[a] suit by the Secretary of Labor under the FLSA is in the public interest, notwithstanding the fact that the money obtained passes to private individuals." *Ibid.* (citing *A&M*, 605 F.2d at 188-189; *Dunlop* v. *New Jersey*, 522 F.2d 504, 517 (3d Cir. 1975)).

ARGUMENT

Petitioner renews its argument that sovereign immunity bars this suit by the Secretary, whom petitioner characterizes as a mere "nominal party" (Pet. i). In particular, petitioner contends that the uniform understanding of this Court and the courts of appeals that the Secretary may bring suit against a State to enforce the FLSA is erroneous because it "is based on an incomplete understanding of the [States'] consent to suit that is inherent in the constitutional plan" (Pet. 10). The decision of the court of appeals is correct and, as petitioner concedes (Pet. 15, 17), does not conflict with the decision of any other court of appeals. Further review is not warranted.

1. a. A settled feature of the constitutional plan is that, under our federal system, the "States retain no sovereign immunity as against the Federal Government." *West Virginia* v. *United States*, 479 U.S. 305, 312 n.4 (1987); accord *Alden* v. *Maine*, 527 U.S. 706, 755 (1999) ("In ratifying the Constitution, the States consented to suits brought * * * by the Federal Government."); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 71 n.14 (1996) ("The Federal Government can bring suit in federal court against a State."); *United States* v. *Mississip-*

pi, 380 U.S. 128, 140 (1965) ("[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States."); *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 329 (1934) (contrasting States' retention of sovereign immunity against suits brought by foreign states with States' surrender of immunity from suit by the United States); *United States* v. *Texas*, 143 U.S. 621, 644-645 (1892) (holding that this Court has original jurisdiction over a suit brought by the United States against Texas to determine questions of boundaries). As this Court has recognized, absent such an understanding, disputes between a State and the United States would require extralegal resolution and "the permanence of the Union might be endangered." *Principality of Monaco*, 292 U.S. at 329 (quoting *Texas*, 143 U.S. at 645).

b. With respect to the FLSA in particular, this Court has repeatedly recognized that sovereign immunity is no impediment to a suit against a State by the United States through the Secretary seeking injunctive relief and back wages for state employees to remedy violations of the Act. In *Employees of Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), the Court held that Congress did not intend the Act to abrogate States' sovereign immunity against claims brought by state employees. The Court explained that its holding did not render state employees' FLSA rights meaningless because the Secretary retained authority under 29 U.S.C. 216 and 217 to bring FLSA claims against States:

> [R]emitting [state employees] to relief through the Secretary of Labor may explain why Congress was silent as to waiver of sovereign immunity of the

> States. For suits by the United States against a State are not barred by the Constitution. * * * The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor.

411 U.S. at 285-286 (emphasis added).

Likewise in *Alden*, this Court held that sovereign immunity could be asserted against an FLSA claim brought by state employees in state court, 527 U.S. at 712, but, as in *Employees of Department of Public Health & Welfare*, the Court recognized that sovereign immunity would not bar a suit brought against a State by the United States through the Secretary:

> The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second.

Id. at 759-760. Such "[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." *Id.* at 756.

Petitioner dismisses the foregoing discussions in *Employees of Department of Public Health & Welfare* and *Alden* as "dicta." Pet. 18. That mischaracterizes this Court's analysis. In both cases, the Court's observations about the status of suits by the Secretary under

29 U.S.C. 216 and 217 were important to its reasoning. In *Employees of Department of Public Health & Welfare*, the Court's approval of suits by the Secretary answered any objection that the unavailability of a private suit against a State left the FLSA's substantive "extension of coverage to state employees meaningless." 411 U.S. at 285 (citing *Parden* v. *Terminal Ry.*, 377 U.S. 184, 190 (1964)); cf. *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001) (recognizing that unavailability of private suits against States to enforce Title I of the Americans with Disabilities Act "does not mean that persons with disabilities have no federal recourse against discrimination," partly in light of "enforce[ment] by United States in actions for money damages"). And in *Alden*, the Court's discussion of the lack of sovereign immunity of the States as against suits by the United States in general (527 U.S. at 755) or the Secretary under the FLSA in particular (*id.* at 759-760) was integral to its description of the bounds of state sovereign immunity: Just as "the States' immunity from suit is a fundamental aspect of the sovereignty which the States * * * retain," *id.* at 738, certain "limits are implicit in the constitutional principle of state sovereign immunity," *id.* at 755.

2. Petitioner nonetheless contends that this Court's conclusion that sovereign immunity does not bar a suit against a State by the United States through the Secretary to enforce the FLSA reflects an "incomplete understanding" by this Court of the States' consent to suit under the constitutional plan. Pet. 10, 18-19. In particular, petitioner argues that in such suits the United States is acting as a nominal party—a "mere collecting agent"—for individuals who cannot themselves sue their state employer under the Act. Pet. 12.

a. In making that argument, petitioner relies on the nominal-party holding of *New Hampshire* v. *Louisiana*, 108 U.S. 76, 88-89 (1883). In that case, certain New Hampshire and New York citizens owned Louisiana bonds on which Louisiana had defaulted. *Id.* at 79-80. Because the Eleventh Amendment would have barred the exercise of federal jurisdiction in a suit by the private parties against Louisiana, *id.* at 88, New York and New Hampshire enacted statutes permitting an assignment to the State for prosecution of a private party's claim against Louisiana, provided that the private party paid all expenses of the litigation, with proceeds of the suit to be paid to the private party, see *id.* at 77, 79 (reprinting statutes). Upon assignments from private parties under the statutes, New York and New Hampshire brought suits in this Court against Louisiana on behalf of the private parties. *Id.* at 86.

This Court held that the Eleventh Amendment barred federal jurisdiction over the suits because "they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds," *New Hampshire* v. *Louisiana*, 108 U.S. at 89, and thus fell within the Eleventh Amendment's prohibition of the exercise of federal jurisdiction in "any suit commenced or prosecuted *by* citizens of one State against another State," *id.* at 88-89 (paraphrasing U.S. Const. Amend. XI). The Court elaborated:

> [New York] as well as New Hampshire is nothing more nor less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the states, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them.

Id. at 89. The Court further emphasized that under the States' schemes, the bond owners paid all expenses and the States incurred no expenses. *Ibid.*

New York and New Hampshire argued that "notwithstanding the prohibition of the amendment," they could nonetheless "prosecute the suits, because, as the sovereign and trustee of its citizens, a State is clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former." *New Hampshire* v. *Louisiana*, 108 U.S. at 89-90 (internal quotation marks omitted). This Court rejected that argument, explaining that although the power of "one nation [to] * * * demand of another nation the payment of a debt owing by the latter to a citizen of the former * * * is well recognized as an incident of national sovereignty," that power "w[as] surrendered to the United States" on formation of the Union. *Id.* at 90.

Moreover, as part of that surrender the States did not receive "in lieu the constitutional right of suit in the national courts" on claims for which "the[ir] citizens c[ould] themselves employ the identical * * * remedy" by suit. *New Hampshire* v. *Louisiana*, 108 U.S. at 90-91. Because, prior to adoption of the Eleventh Amendment, "a citizen of one State could sue another State in the courts of the United States for himself, * * * there [wa]s no necessity for power in his State to sue in his behalf." *Id.* at 91. Although the Eleventh Amendment "took away the [citizens'] special remedy" by suit against another State, this Court did not interpret the Eleventh Amendment to have also "restored" any power in the States to sue other States on behalf of their citizens. *Ibid.* Accordingly, the Court concluded, "one State cannot create a controversy with another State,

within the meaning of [Article III], by assuming the prosecution of debts owing by the other State to its citizens." *Ibid.*

b. Petitioner asserts that "there is no reason to believe that [suits against a State by the United States instead of a sister State] warrant different treatment." Pet. 11. But the logic of the nominal-party doctrine of *New Hampshire* v. *Louisiana*, a case in which a State was the plaintiff, does not readily translate to this case, in which the United States is the plaintiff.

As this Court explained in *New Hampshire* v. *Louisiana*, the power of "one nation [to] * * * demand of another nation the payment of a debt owing by the latter to a citizen of the former" is an incident of sovereignty. 108 U.S. at 90. In contrast to the States, which surrendered that power at the Framing, see *ibid.*, the United States was endowed at the Framing with that power as an ordinary incident of sovereignty. Of course, by virtue of Article III's creation of a federal judicial power to hear suits by the United States, see U.S. Const. Art. III, § 2, Cl. 1, the United States would make any such demand against the States not through "the national powers of levying war and making treaties," but instead through "suit in the national courts." *New Hampshire* v. *Louisiana*, 108 U.S. at 90.

Moreover, this Court's explanation of why the States surrendered their power to bring suits on behalf of their citizens against sister States—*viz.*, under the Constitution prior to amendment, a citizen of one State was able to bring such a suit—does not apply when the putative real private parties in interest on whose behalf the United States brings suit are citizens of the defendant State (as is the case of most, if not all, of petitioners' employees at issue here). As *Alden* itself explained,

"the States' immunity from suit [by private parties] is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." 527 U.S. at 713. Although that immunity did not exist as against citizens of another State in the brief period between the Framing and adoption of the Eleventh Amendment, see *New Hampshire* v. *Louisiana*, 108 U.S. at 91, the immunity has existed uninterrupted as against a State's own citizens. Thus, this further rationale of *New Hampshire* v. *Louisiana*—that "when [a citizen] can sue for himself, there is no necessity for power in his State to sue in his behalf," *ibid.*—does not apply in a suit such as this, and here the Secretary sues to enforce federal law obligations under the FLSA.

Petitioner relies (Pet. 11) on *United States* v. *Minnesota*, 270 U.S. 181 (1926). In that case, the United States brought suit on behalf of Chippewa Indians against Minnesota for cancellation of land patents and to recover the value of the lands sold. Although *United States* v. *Minnesota* stated (with a passing citation to *New Hampshire* v. *Louisiana*, *supra*) that if the United States had been a mere nominal party to the suit, then the suit would not have been within this Court's original jurisdiction, 270 U.S. at 193, that observation was not part of the Court's holding, which was that the United States' guardianship and protection obligations over the Indians gave it a "real and direct interest" in the case, *id.* at 194. As the district court noted here, "[s]ubsequent cases have failed to expand upon the dictum in *United States* v. *Minnesota*." Pet. App. 14a.

c. In any event, even if the nominal-party principle ought to apply in some circumstances to a suit by the United States, it would not bar this action by the Secre-

tary under the FLSA. Petitioner's argument misconceives both the purposes of the FLSA and the role of the Secretary in bringing FLSA actions.

To begin with, the public purposes of the FLSA in general, and enforcement actions by the Secretary in particular, distinguish the objects of the Secretary's suit here from the private pecuniary concerns of, for example, the bondholders in *New Hampshire* v. *Louisiana*, *supra*, or the farm owners in *North Dakota* v. *Minnesota*, 263 U.S. 365, 375-376 (1923). The FLSA was designed to serve the public remedial purpose of eliminating substandard wages, oppressive working hours, and detrimental working conditions for employees in covered industries. See *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 727 (1947); see also 29 U.S.C. 202(a) (congressional finding and declaration of policy). Congress extended the FLSA's obligations to reach petitioner, see 29 U.S.C. 203(d) and (e)(2)(C), and in this case, the Secretary seeks to enforce compliance with those obligations, a matter of direct interest to the United States. See, *e.g.*, *Wirtz* v. *Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968) ("[R]estraining appellees from withholding the minimum wages and overtime compensation is meant to vindicate a public, rather than a private, right, and * * * the withholding of the money due is considered a continuing public offense.") (internal quotation marks and citation omitted).

The monetary and injunctive relief the Secretary seeks thus would serve the public purposes of (1) correcting a continuing offense against the public interest both prospectively and by depriving petitioner of the gains resulting from its violations, and (2) placing petitioner on a level playing field with other employers who

have complied with the FLSA. See, *e.g.*, *Donovan* v. *Brown Equip. & Serv. Tools, Inc.*, 666 F.2d 148, 156-157 (5th Cir. 1982). Moreover, the enforcement of monetary remedies for violations of the FLSA is integral to the Act's plan to encourage compliance in the first instance. As this Court explained in the analogous context of Title VII:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that provide[s] the spur or catalyst which causes employers * * * to self-examine and to self-evaluate their employment practices.

Albemarle Paper Co. v. *Moody*, 422 U.S. 405, 417-418 (1975) (internal quotation marks and citation omitted).

To be sure, enforcing petitioner's compliance with the FLSA will not only serve those public purposes of the United States, but also benefit petitioner's employees by making them whole. See, *e.g.*, *Donovan*, 666 F.2d at 156-157. But it will often be the case that enforcement of a sovereign's public interest will redound to the benefit of private parties. For example, in *North Dakota* v. *Minnesota*, North Dakota was permitted to seek an injunction against Minnesota's use of drainage ditches alleged to cause flooding in North Dakota, 263 U.S. at 376, even though the injunction would also have benefitted private farmers, *id.* at 371-372—the same farmers whose claims for money damages this Court held could not be presented by North Dakota, *id.* at 375-376. The nominal-party exception to the general rule that States lack sovereign immunity as against sister States thus serves only to ensure that the sovereign plaintiff *does* have an interest in the relief sought, not that private

parties *do not* have such an interest. See also *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination."); *Kansas* v. *Colorado*, 533 U.S. 1, 8-9 (2001). That standard is amply met here.

Moreover, here the United States has the political control found lacking in *New Hampshire* v. *Louisiana*, *supra*. This case was brought by the Secretary and is conducted by federal government attorneys acting on behalf of the United States. Petitioner's employees do not control litigation brought by the Secretary under 29 U.S.C. 216(c) and 217, do not pay any costs of that litigation, and have no ability to opt out of that litigation. Compare 29 U.S.C. 216(b) ("No employee shall be a party plaintiff to [a private] action unless he gives his consent.") with 29 U.S.C. 216(c) ("The [private] right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover [unpaid minimum wages and overtime payment] shall terminate upon the filing of a complaint by the Secretary."). The Secretary is thus not a mere "nominal party" to the case, but the party with direct control over, and responsibility and accountability for, the suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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