No. 03-1114

In the Supreme Court of the United States

A-ONE MEDICAL SERVICES, INC., ET AL.,
PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners acted in reckless disregard of their obligations under the Fair Labor Standards Act of 1938 (FLSA) and thus willfully violated the FLSA when, for purposes of paying overtime, they failed to aggregate the hours worked by employees for their two integrated corporations.

2. Whether petitioners' corporations were "joint employers" for purposes of paying overtime under the FLSA when they had common management and shared office space, clients, and employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 346 F.3d 908. The decision and order of the district court (Pet. App. 27a-41a, 42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2003. On December 30, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 3, 2004. The petition for a writ of certiorari was filed on January 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners A-One Medical Services, Inc. (A-One), and Alternative Rehabilitation Home Healthcare, Inc. (Alternative), are separately owned corporations that provide health services to patients in their homes. Pet. App. 2a. In 1996, A-One's sole shareholder and president, petitioner Lorraine Black, entered into negotiations with Alternative's sole shareholder and president, petitioner Hanahn Korman, to purchase Alternative. *Id.* at 28a-29a. Black sought to acquire Alternative because it possessed Medicare Certificates of Need that would permit A-One to expand its business into other counties. *Id.* at 3a. Black and Korman reached an agreement for sale. *Ibid.* The agreement, however, has not been consummated. *Id.* at 29a.

After Black and Korman reached the agreement for sale, the two companies' operations became "very closely coordinated." Pet. App. 4a. Black transferred patients from A-One to Alternative, along with A-One's nurse employees who had cared for the patients. *Id.* at 3a. In addition, Alternative transferred patients to A-One. *Id.* at 5a.

Black eventually became responsible for the management of all services rendered by A-One and Alternative. Pet. App. 5a. Alternative initially paid Black a fee for this role, but the parties later agreed that no fee would be paid. *Ibid.* A-One, through Black or A-One's employees, oversaw Alternative's patient care, supervised its employees, and contracted for its vendors, including its accounting services. *Id.* at 4a. A-One also shared office space with Alternative, and an A-One receptionist answered the telephone calls for both companies. *Id.* at 4a, 34a.

The companies maintained some degree of separation. For example, employees were required to sign separate employment agreements with each corporation. Pet. App. 5a-6a. Employees received separate paychecks from each company (although checks from both companies arrived in the same envelope and were all signed by Black), and, in many instances, employees were paid at different rates by the two companies. *Id.* at 6a, 33a. Employees were also permitted to decline an assignment from either company. *Id.* at 6a. The same supervisors, however, oversaw nurses from both companies, and the same scheduler scheduled their duties. *Id.* at 4a.

A-One and Alternative paid overtime on a company-segregated basis, *i.e.*, only when an employee's hours with a particular company exceeded 40 per week. During some workweeks between July 1998 and January 2000, eight employees worked more than 40 combined hours for the companies but were not paid an overtime premium for the excess hours. Pet. App. 6a; C.A. E.R. 77.

During that time period, employees complained to Black about the companies' failure to make overtime payments. See Pet. App. 15a-16a, 37a. One of the employees who complained was a nurse who had been paid overtime by A-One before she and her patient were transferred to Alternative, but who did not receive overtime for the same number of hours after the transfer because her hours with that patient were treated as separate Alternative hours. C.A. Supp. E.R. 23. Black responded to the complaints by telling employees that they were "technically working for two companies" and that she would "go broke if she had to pay the nurses who worked on the state-pay cases for their overtime." Pet. App. 15a-16a.

Before the events in this case, the Department of Labor's Wage and Hour Division had twice conducted investigations of A-One's compliance with the Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. 201 *et seq.* In 1991, the Division had found that A-One owed back wages to 46 employees for overtime violations, and in 1994 the Division had found that A-One owed back wages to 45 employees for overtime violations. Pet. App. 6a. In 1994, the Division assessed civil money penalties against A-One for repeated and willful violations, and Black signed a settlement document in which she agreed individually and on behalf of A-One to comply with the FLSA. *Ibid.*; C.A. Supp. E.R. 11-12.

2. Respondent Secretary of Labor filed suit alleging that petitioners violated the FLSA because A-One and Alternative were joint employers and failed to pay overtime to employees when their combined hours with A-One and Alternative exceeded 40 per week. See 29 U.S.C. 207(a)(1).

The district court granted summary judgment to the Secretary. The court first concluded that A-One and Alternative engaged in related activities under common control for a common business purpose and therefore were a single "enterprise" for FLSA coverage purposes. Pet. App. 32a-35a; see 29 U.S.C. 203(r)(1). The court held that A-One and Alternative were engaged in related activities because they both provided home health services. Pet. App. 32a. The court concluded that the two companies were under common control because Black managed Alternative and acted on its behalf with respect to clients, patients, and state government agencies. *Id.* at 32a-34a. It further held that A-One and Alternative had a common business purpose "to service home health patients, who were clients of either company, utilizing the same pool of nurses, the same scheduler, and the same phone service." *Id.* at 34a. That common business purpose was also evidenced, the court reasoned, by Black's testimony that she managed Alternative so as to strengthen the company for its ultimate merger with A-One. *Ibid.*[1]

The district court concluded that the same facts showed that A-One and Alternative were joint employers under the Secretary's regulation governing joint employment, 29 C.F.R. 791.2(a). Thus, petitioners violated the FLSA to the extent that they failed to pay overtime compensation when an employee's combined hours with the companies in a workweek exceeded the FLSA threshold. See Pet. App. 35a-36a.

The district court also concluded (Pet. App. 37a) that the petitioners "at least, show[ed] reckless disregard" for the FLSA's requirements and thus their violations were "willful" under *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988), so that they are subject to the Act's three-year, rather than two-year, statute of limitations. 29 U.S.C. 255(a). The court cited the unrebutted testimony of former employees showing "that Black, as manager for both A-One and Alternative Rehabilitation, meticulously attempted to maintain the separate-

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[1] Although A-One independently meets the $500,000 gross business volume threshold for an "enterprise" under 29 U.S.C. 203(s)(1)(A)(ii), Alternative does not. Thus, Alternative is covered by the FLSA only if, as the district court held, it is a single "enterprise" with A-One. Petitioners have not sought this Court's review of that ruling, but the district court's analysis of that issue is intertwined with the "joint employer" ruling, which petitioners do challenge in this Court.

ness of the two companies, in part, to avoid paying the employees overtime." Pet. App. 37a.[2]

The district court therefore concluded that petitioners violated the FLSA over a three year period and awarded $7294.85 in back wages and an equal amount in liquidated damages. Pet. App. 42a.

3. The court of appeals affirmed in relevant part. Pet. App. 1a-26a. On the joint employer issue, the court agreed with petitioners that an "eight factor 'economic reality' test for determining joint employment" applies only to "vertical" joint employment contexts, *i.e.*, where a company has contracted for workers who are directly employed by an intermediary company. *Id.* at 13a. The court concluded that, in cases of "horizontal joint employment, of the type in question here," the Secretary's interpretive regulations at 29 C.F.R. 791.2 "primarily guide [the] determination of joint employment status." Pet. App. 13a. The court observed that, under those regulations, joint employment generally exists where the employers are not completely disassociated with respect to the employment of the individuals at issue and one employer is controlled by the other or the employers are under common control. See *id.* at 14a (citing 29 C.F.R. 791.2(b)(3)).

Applying those criteria, the court concluded that the companies were not completely disassociated with respect to the employees' employment because Black oversaw the work done by Alternative's employees, and the same nursing supervisors and scheduler were

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[2] The district court concluded that evidence that A-One had committed prior overtime violations of a different kind was not probative of the willfulness of petitioners' current violations, and thus rested its ruling exclusively on the employee affidavits and complaints. Pet. App. 36a.

in charge of employees working for both companies. Pet. App. 15a. The court concluded as well that the undisputed facts showed that both companies were under the common control of Black. *Ibid.* Accordingly, A-One and Alternative were joint employers that must aggregate the work performed by employees for both companies. *Ibid.*

The court of appeals also affirmed the district court's ruling that petitioners' violations reflected a reckless disregard of the Act and thus were willful under the *Richland Shoe* standard. Pet. App. 15a-18a. The court of appeals stated that, although it was "wary of giving full credence" to statements of employees whose interests were at stake, petitioners did not sufficiently controvert the employees' affidavits describing their complaints about the lack of overtime pay and Black's responses. *Id.* at 16a-17a. The court concluded that this uncontroverted evidence, even when viewed in the light most favorable to petitioners, supported the finding of willfulness. *Id.* at 17a.

In addition, the court of appeals, unlike the district court (see note 2, *supra*), found it "probative" that A-One had previously committed FLSA overtime violations. Pet. App. 17a. The court concluded that, even though the prior overtime violations were different in kind from the present violations, A-One's "run-ins with the Labor Department certainly put A-One and Black on notice of other potential FLSA requirements." *Ibid.* The court recognized that mere knowledge that the FLSA is "in the picture" does not establish willfulness, but concluded that A-One's overtime violations, "especially when combined with the undisputed testimony of the former employees" about Black's response to their complaints, show, "at the very least, reckless disregard * * * for the illegality of treating A-One and

Alternative separately for the purpose of determining overtime pay." *Ibid.*

The court also rejected petitioners' argument that Black's "efforts at maintaining separation between the two companies * * * tend to prove that her FLSA violations were not willful." Pet. App. 18a n.7. The court concluded that the argument might be worthy of credence if "the crucial question of joint employment [were] a closer one," but, in the circumstances of this case, Black's "efforts at keeping A-One and Alternative separate, even viewed in the light most favorable to her, appear to have been steps made to evade the FLSA, not to comply with it." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and neither its holding on willfulness nor its holding on joint employment conflicts with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Petitioners contend (Pet. 6-11) that the court of appeals' willfulness determination conflicts with this Court's decision in *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988), and with decisions of other courts of appeals applying the *Richland Shoe* standard. That contention lacks merit.

Richland Shoe held that an employer commits a "willful" violation of the FLSA if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the" Act. 486 U.S. at 133. Contrary to petitioner's claim (Pet. 6-9) that the court of appeals applied a negligence standard rather than the *Richland Shoe* standard, the court of appeals expressly quoted *Richland Shoe*'s "knew or showed reckless disregard" standard. See Pet. App. 15a. The court of appeals then proceeded to apply that standard and concluded that petitioners' conduct manifested a reckless disregard for the Act. See *id.* at 17a ("A-One's prior FLSA violations, especially when combined with the undisputed testimony of the former employees, prove, at the very least, *reckless disregard* * * * for the illegality" of petitioners' conduct) (emphasis added); *id.* at 17a-18a ("[n]either Black's efforts at maintaining a superficial separation between the two companies nor the formally separate legal existence of the two entities creates any material doubt as to Black's *reckless disregard*") (emphasis added).

Petitioners ignore the court of appeals' express quotation and application of the *Richland Shoe* standard. Instead they focus (Pet. 7) on the court's quotation (in a parenthetical to a citation) of a statement in a prior Ninth Circuit opinion that "willfulness exists 'where an employer disregarded the very possibility that it was violating the FLSA.'" Pet. App. 17a (quoting *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 908-909 (9th Cir. 2003), petition for cert. pending, No. 03-1238). The court of appeals did not rely on that statement as establishing the standard for when a violation is willful, but merely quoted the statement in explaining that A-One had previously violated the FLSA and demonstrated a cavalier attitude when employees complained about the violations in this case. In any event, the quoted language is consistent with a "reckless disregard" standard because "disregard[ing] the very possibility" of a violation may well be reckless. *Ibid.* In fact, the *Alvarez* decision, from which the language is quoted, itself applied the "reckless disregard" standard. See 339 F.3d at 909 ("We agree with the district court and conclude that 'the proof demonstrate[s] [that the employer] *recklessly disregarded* the possibility that

[it] was violating the FLSA.'") (emphases changed). Thus, the Ninth Circuit, like the courts of appeals identified by petitioner (Pet. 8), applies the "reckless disregard" standard of *Richland Shoe*. The court of appeals did not deviate from that standard in this case, and there is thus no conflict between the decision below and decisions of the courts of appeals identified by petitioners (Pet. 7-8) as rejecting a negligence standard.

Petitioners incorrectly assert that the court of appeals imposed an "*absolute* affirmative duty on employers to 'inquire further' into the legality of their conduct." Pet. 8 (emphasis added). The court's conclusion that petitioners acted in reckless disregard of their FLSA responsibilities was premised on a variety of factors, including petitioners' previous violations, their response to complaints by employees, and the weakness of petitioners' argument that they lacked joint employer status. See Pet. App. 16a-18a & n.7. The court nowhere endorsed a general rule that employers commit a willful violation of the FLSA whenever they fail to seek advice about the legality of their actions. Thus, petitioners are off the mark in asserting that the decision below conflicts with court of appeals decisions holding, on the particular record before them, that a willfulness finding was not required by an employer's failure to obtain advice or take further action. See Pet. 8 (citing, *e.g.*, *Reich* v. *Department of Conservation & Natural Res.*, 28 F.3d 1076, 1084 (11th Cir. 1994) (finding employer's failure to do "more to ameliorate the problem" was result of negligence but not reckless disregard)).

Petitioners also err in contending (Pet. 9-11) that the court of appeals adopted a "[r]epeat [o]ffender '[s]trict' [l]iability" rule under which FLSA violations are willful whenever the employer has previously violated the

Act. Pet. 9. Contrary to that contention, the court merely concluded that A-One's "previous run-ins with the Labor Department" gave it notice of other potential FLSA requirements and therefore was one factor weighing in favor of willfulness. Pet. App. 17a. The court relied on a variety of circumstances other than the prior violations in determining that petitioners acted willfully, including the undisputed testimony that former employees had complained to petitioners that they were violating the FLSA, and Black's efforts to maintain the appearance of separation between the two companies despite the fact that they were clearly joint employers. *Id.* at 15a-17a, 18a n.7. Indeed, notwithstanding the prior violations, the court of appeals noted that, "[w]ere the crucial question of joint employment a closer one," whether petitioners acted willfully might "at the very least" have presented a jury question. *Id.* at 18a n.7.[3]

Even petitioners themselves acknowledge (Pet. 10) that prior violations and a promise of future compliance may, in some circumstances, have weight in deter-

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[3] Because the court of appeals did not adopt a rule that an employer's history of prior FLSA violations necessarily establishes willfulness, its decision is in harmony with decisions concluding that the existence of prior violations does not *require* a finding of willfulness. See, *e.g.*, *Reich* v. *Newspapers of New England, Inc.*, 44 F.3d 1060, 1080 (1st Cir. 1995) (although the Secretary presented a "tenable argument[]" that Department's prior investigation, in which it explained overtime provisions of FLSA to employer, established willfulness, district court's contrary ruling was not clearly erroneous); *Reich* v. *Gateway Press, Inc.*, 13 F.3d 685, 702 n.20 (3d Cir. 1994) (district court was within its discretion in excluding consent judgment from consideration of willfulness question where that judgment involved different corporate defendants and did not shed light on coverage of the class of employees at issue).

mining whether a particular violation is willful. To the extent that petitioners contend that findings of previous FLSA violations weigh in favor of willfulness only if they involve precisely the same type of violation, that proposition is untenable. Even when prior violations involve different provisions, they serve "to acquaint [the employer] with the general requirements and policy of the" Act, and they are thus a factor in the totality of the circumstances bearing on whether the employer acted with reckless disregard. *Reich* v. *Waldbaum, Inc.*, 52 F.3d 35, 41 (2d Cir. 1995).

The court of appeals' determination, based on the totality of the circumstances, that petitioners willfully violated the FLSA is correct. The testimony of petitioner Black, the nurse employees, and the nurse scheduler showed substantial merging of A-One and Alternative's operations. Nonetheless, Black continued to maintain separate employment records depending on whether patients were nominally being served by A-One or Alternative. In the face of employee complaints that overtime should be paid when their combined service for patients exceeded 40 hours per week, Black gave cavalier responses and failed to seek advice about the legality of her conduct. In addition, the Department of Labor had on two previous occasions determined that Black had committed violations of the FLSA (including overtime violations), resulting in her payment of thousands of dollars in back wages and civil money penalties. Those circumstances, as a whole, provide a sufficient basis for the court's determination that petitioners acted in reckless disregard of the FLSA's requirements. See Pet. App. 16a-18a & n.7. That fact-bound determination does not warrant review by this Court.

2. Petitioners do not argue that the court of appeals' holding that they were joint employers conflicts with any decision of this Court or of another court of appeals. See Pet. 12 ("legal application of the interpretive joint employment rule is an issue of first impression with this Court"). Rather, they contend that the ruling below "establishes an overbroad and ambiguous standard for businesses who cannot provide full-time work and therein allow employees to work elsewhere." Pet. 11. Contrary to that contention, the court of appeals properly applied the Secretary's interpretive regulations on joint employment and correctly concluded that petitioners' highly integrated operation met the standards for joint employment.

The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. 203(e)(3). An entity "[e]mploy[s]" an individual under the Act if it "suffer[s] or permit[s]" that individual to work, 29 U.S.C. 203(g), and the term " '[e]mployer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d). Those broad definitions look to whether as a matter of "economic reality" an entity functions as an individual's employer. *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 32-33 (1961). In accord with this Court's precedent, the Department of Labor's interpretive regulations recognize that a worker may be employed by more than one entity at the same time. *Falk* v. *Brennan*, 414 U.S. 190, 195 (1973); 29 C.F.R. 791.1-791.2. Where the facts establish that an employee is employed jointly by two or more employers, all of the employee's hours worked during the workweek are considered as one employment for purposes of the Act. 29 C.F.R. 791.2.

The court of appeals' holding that A-One and Alternative were joint employers rests on 29 C.F.R. 791.2(a)(3). That regulation provides that a joint-employer relationship exists where employers are not "completely disassociated *with respect to the employment of a particular employee*" and are "deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." 29 C.F.R. 791.2(a)(3) (emphasis added). The court of appeals concluded that the regulatory criteria were satisfied in this case because of "the substantial merging of A-One's and Alternative's operations," Pet. App. 3a, which was evidenced by Black's general control over Alternative's operations and by the substantial common control exercised by her and other managers over employees, whether those employees served A-One's patients, Alternative's patients, or both. *Id.* at 15a.

Petitioners are thus incorrect when they assert that the court's ruling imposes joint employer status on "[a]ll [e]mployers [w]ho [c]ommonly [e]mploy [a] [w]orker" (Pet. 11), applies "where there is only the barest association or a simple potential of a common business purpose" (Pet. 14), and covers "any two companies" that "are even remotely associated" (Pet. 17). To the contrary, as the plain language of the regulation makes clear, there must be an association between the businesses "with respect to the employment of a particular employee," and one business must control the other or the businesses must be under common control. 29 C.F.R. 791.2(b)(3). The court of appeals found those requirements met here because of the integrated operation of A-One and Alternative, including the common management of the relevant employees. See Pet. App. 15a. Petitioners' contention that the court's ruling is overbroad and ambiguous is thus based on a mischaracterization of the ruling and lacks merit.

Petitioners also err in asserting (Pet. 15-16) that the employees' ability to decline assignments is inconsistent with the conclusion that petitioners are joint employers. Although a compulsory transfer of employees between employers would support the conclusion that their operations are integrated, the absence of compulsory transfers does not preclude a joint employer finding. In fact, the absence of mandatory cross-employer assignments has virtually no significance here, because employees could decline *any* assignment, even an intra-company one, *i.e.*, employees assigned to an A-One patient could decline assignment to another A-One patient. Thus, the absence of a mandatory cross-assignment policy does not undermine the conclusion that there was substantial merging of A-One's and Alternative's operations, including management of the relevant employees.[4]

Petitioners acknowledge (Pet. 14) that the joint-employer concept applies to an "integrated 'unit of production,'" like the meat packing company in *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947), which contracted out a portion of its slaughterhouse operation

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[4] Petitioners appear to argue (Pet. 15-16) that employees' ability to decline work should be considered as part of a multi-factor test for assessing joint employment that would include factors other than those identified in 29 C.F.R. 791.2. In the court of appeals, however, petitioners argued that a multi-factor test was inapplicable. Pet. App. 13a. In any event, petitioners concede (Pet. 15, 16) that employees' ability to decline work is not an independent factor currently considered by the courts or the Department of Labor in assessing whether joint employment exists.

to "individual contractor" boners. Petitioners attempt to distinguish (Pet. 14-15) an integrated unit of production from the situation here because, in that context, "the producer or employer at the top of the chain" benefits from the fruits of the employees' labor and thus "suffer[s] or permit[s]" the employees to work within the meaning of 29 U.S.C. 203(g). That purported distinction does not withstand scrutiny. Like the integrated unit of production in *Rutherford*, the integration of A-One and Alternative's operations was designed to benefit those corporations and their owners (by facilitating the anticipated sale of Alternative to A-One), and the employees' labor clearly contributed to the owners' joint goals. See Pet. App. 34a (explaining that A-One and Alternative have a common business purpose); see also *id.* at 5a (noting that "Alternative's losses and profits were simply left in the corporation to be assumed by Black when the sale was finalized"). Moreover, because of the common management of the employees, both A-One and Alternative are properly deemed, as in the integrated production unit context, jointly to "suffer or permit" the employees to work.

Petitioners also incorrectly contend (Pet. 16) that the joint-employer principle should not apply to "highly paid professionals," as petitioners refer to the employees in this case. Petitioners do not argue that the employees fall within the Act's exemption for professional employees, 29 U.S.C. 213(a)(1), and the FLSA and its interpretive principles therefore fully apply to them. Petitioners' related assertion (Pet. 18-19) that the high cost of overtime discourages employers from employing highly paid workers and thereby impairs the ability of those employees to obtain additional work is, in essence, a quarrel with the policy underlying the

FLSA, and is properly addressed to Congress rather than this Court.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioners cite (Pet. 10, 13) Department of Labor press releases and a newspaper article as support for the proposition that the Department's regulations are outdated and unclear. The cited article and press releases do not address the Department's joint employer regulations, but instead concern the regulations implementing the FLSA exemption for executive, administrative, professional, outside sales, and computer employees. See 29 U.S.C. 213(a); 29 C.F.R. Pt. 541; 68 Fed. Reg. 15,560 (2003) (proposal to amend Part 541 regulations). The article and press releases are thus irrelevant to the questions presented here.