No. 04-1602

In the Supreme Court of the United States

HAROLD LEVINSON ASSOCIATES, 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 SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners' liability for unpaid overtime compensation may not be offset by a credit under Section 207(h)(2) of the Fair Labor Standards Act of 1938, 29 U.S.C. 207(h)(2), which authorizes such credit for "extra compensation" paid to employees that meet the qualifications set forth in 29 U.S.C. 207(e)(5)-(7), because petitioners failed to establish that they paid the qualifying extra compensation.

2. Whether the court of appeals was correct to uphold the district court's finding that the Secretary correctly calculated, as a matter of just and reasonable inference, the amount and extent of work that employees performed without being properly compensated.

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is *reprinted in* 121 Fed. Appx. 918. The remand decision of the district court (Pet. App. 6a-14a) is unreported. The initial summary order of the court of appeals (Pet. App. 15a-22a) is not published in the *Federal Reporter* but is *reprinted in* 37 Fed. Appx. 19. The initial decision of the district court (Pet. App. 23a-39a) is not reported in the *Federal Supplement* but is *available at* 2001 WL 34088698.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2005. The petition for a writ of certiorari was filed on May 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, requires employers to pay overtime pay to covered employees at a rate not less than one and one-half times the employee's regular rate for any hours worked over 40 in a workweek. 29 U.S.C. 207(a)(1), 215(a)(2). For purposes of the FLSA, an employee's "regular rate" of pay is defined to include "all remuneration of employment paid to, or on behalf of, the employee," with certain enumerated exceptions. 29 U.S.C. 207(e). Those exceptions include, among others, certain extra compensation provided at a premium rate for hours worked over eight in a day; for work performed other than on regular workdays; or for work performed outside a workday or workweek established pursuant to an employment contract or collective bargaining agreement. 29 U.S.C. 207(e)(5), (6) and (7). An employer may credit extra compensation paid that falls under any of the exceptions listed in Section 207(e)(5)-(7) against overtime compensation payable to the employee under Section 207. 29 U.S.C. 207(h)(2).

The FLSA also requires covered employers to keep records of their employees' wages and hours. 29 C.F.R. 211(c); see 29 C.F.R. Pt. 516. The Secretary of Labor may sue to redress violations of the FLSA's minimum wage, overtime, and record-keeping provisions. See 29 U.S.C. 216(c), 217. In addition to recovering back pay for affected employees, the Secretary may recover an

equal amount in liquidated damages, unless the employer shows that he acted in good faith and had reasonable grounds for believing his actions did not violate the FLSA. 29 U.S.C. 216(c), 260.

2. Petitioners are a corporation and its president who are engaged in the wholesale distribution of cigarettes, tobacco, and candy and related activities. Pet. App. 24a. In 1990, a Labor Department investigator determined that petitioners had been violating the FLSA's record-keeping and overtime requirements. *Id.* at 28a. Petitioners agreed to make full restitution and provided the investigator with signed statements showing that employees had been paid, but later forced employees to return the money. *Ibid.* Between May 1992 and December 1994, the time period at issue in this case, petitioners made no genuine effort to maintain records that accurately reflected the lengthy hours that employees worked. *Ibid.* Between May 1992 and October 1993, when petitioners used Paychex, a payroll services company, to prepare its payment records, the payrolls were based on general schedules of hours that did not accurately reflect employees' working time. *Id.* at 27a, 29a. From October 1993 to December 1994, when petitioners used ADP, another payroll services company, to prepare their payment records, they created payroll hours for ADP that did not reflect time actually worked. *Id.* at 29a.

The Secretary of Labor brought an enforcement action against petitioners, alleging violations of the overtime and record-keeping provisions of the FLSA. Pet. App. 15a, 33a. After a bench trial, the district court found, *inter alia*, that petitioners had "continually, willfully evaded and violated known requirements of the FLSA." *Id.* at 28a. The court also found that petition-

ers had no lawful prepayment (or pay stabilization) agreement with its employees and that petitioners had ignored provisions in the collective bargaining agreement calling for an overtime rate of one and one-half times the regular rate for hours in excess of 40 hours in a workweek. *Id.* at 30a, 32a (factual findings), 37a-38a (legal conclusions).

Accepting the Secretary's calculations of actual time worked, actual pay received, and overtime pay due petitioners' employees, the court awarded $487,584.58 in back wages to 105 employees and an equal amount in liquidated damages (plus an additional $16,500 in back wages to one of the three employees for whom an exemption from overtime defense was claimed but not proved). Pet. App. 37a-39a.

3. On May 22, 2002, the court of appeals affirmed the majority of the district court's findings, but vacated and remanded the case solely for a "partial recalculation of damages." Pet. App. 17a. Finding that the damages award "unfairly penalizes the [petitioners]" by assuming that "in each week of the PCX [*i.e.*, Paychex] period each employee worked precisely the *average* number of hours worked [during the ADP period]," the court instructed recalculation to be "based on comparison of the total hours worked by each employee for the entire PCX period (computed by multiplying the imported ADP weekly average by total PCX-period weeks worked) against total hours compensated for the PCX period." *Id.* at 20a. In so doing, however, the court also rejected petitioners' argument that they were entitled to an offset for "overpayments" to their employees, recognizing that "this case does not involve payments that satisfy the requirements" of Section 207(h). *Id.* at 21a. It explained that its "decision to remand effectively gives the

[petitioners] the benefit of a credit for the PCX period, but does so not because as a matter of law [they] are entitled to credit one week's overpayment against another week's liability, but because of the lack of foundation for the [Secretary's] actual computations of weekly hours for the PCX period." *Id.* at 21a n.3.[1]

4. Following the remand order, the Secretary performed the directed recalculations, and a bench trial was held on August 4, 2003. Pet. App. 6a. The district court issued a decision on December 30, 2003, which upheld the Secretary's calculations and awarded $831,147.18 in actual and liquidated damages. *Id.* at 6a, 13a.[2] Based on the "plenary trial record" (including new evidence) developed in the event that the court of appeals might be persuaded to "reopen all issues," *id.* at 11a, the court reached the same findings of fact and conclusions of law it had adopted in its first decision "except for the method of calculating PCX damages for all but three employees." *Id.* at 13a.

5. The court of appeals affirmed. Pet. App. 1a-5a. The court initially noted that its earlier decision had rejected petitioners' arguments that (1) they were entitled, under Section 207(h), to a credit of $529,000

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[1] In effect, the court suggested that the use of the ADP departmental averages in the original calculations resulted in overstating the amount of owed overtime payments in weeks in which the recorded hours worked by an employee (who worked only during the Paychex period) were less than the departmental average. See Pet. App. 20a.

[2] The district court determined: "[The Secretary's] exhibits * * * accurately set forth the mathematical calculations called for by * * * the court of appeals decision. [The petitioners] have not presented any credible challenge to those calculations." Pet. App. 9a.

against their liability,[3] and (2) that the district court's formula for damages did "not yield a just and reasonable approximation of overtime hours worked." *Id.* at 3a. Nonetheless, the court considered the new evidence brought before the district court and concluded that petitioners' arguments were "wholly without merit." *Ibid.* Specifically, the court held that petitioners had failed to show that any alleged "overpayment" was made "for any of the purposes specified at 29 U.S.C. § 207(h)(2)." *Ibid.* Moreover, the court held that the district court acted reasonably in adopting the Secretary's recalculation of damages and in rejecting petitioners' "unreasonable and belatedly proferred alternative." *Id.* at 4a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this fact-bound case is unwarranted.

1. Petitioners' principal contention (Pet. 17-26) is that the circuits are divided over the question whether an employer's payment of extra compensation to its employees may "be credited across work weeks or work periods to offset liability for overtime wages" under 29 U.S.C. 207(h)(2). Pet. 16. No such question is presented in this case, however, because petitioners failed to establish that any alleged overpayment to their employees "was paid for any of the purposes specified at 29 U.S.C. § 207(h)(2)." Pet. App. 3a.[4]

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[3] According to petitioners, this sum is derived from their expert's calculation that petitioners had overpaid their employees $540,000, and underpaid them $11,000, for a net overpayment of $529,000. Pet. 13.

[4] Petitioners assert (Pet. 5 & n.1) that they paid $529,000 in extra compensation during the ADP period as part of an agreement to make

Section 207(h)(2) allows a credit only for compensation paid pursuant to 29 U.S.C. 207(e)(5), (6) and (7), *i.e.*, compensation paid at a premium rate for hours that exceed an eight-hour workday, for Saturday, Sunday, or holiday work, or for work outside a workday or workweek established by an employment contract or collective bargaining agreement. See 29 C.F.R. 778.201(c) ("No other types of remuneration for employment may be credited."). As the court of appeals explained, petitioners "fail[ed] to point to any evidence suggesting that § 207(e)(5), (6) or (7), as incorporated in § 207(h)(2), are applicable." Pet. App. 3a n.1. The court of appeals accordingly did not consider whether premium pay creditable pursuant to 29 U.S.C. 207(h)(2) may be credited

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up the difference between what the employees would have earned in overtime compensation before the period at issue in this case and what they would earn under the collective bargaining agreement governing that period. Even if true, there would be no claim that any extra compensation relating to either the Paychex or ADP periods was paid for the purposes specified in Section 207(e)(5)-(7). Instead, petitioners defended on the basis of 29 U.S.C. 207(f), which addresses prepayment plans for employees with unpredictable and irregular hours of work. Under Section 207(f), an employer may, under certain conditions and pursuant to a bona fide individual contract or a collective bargaining agreement, pay the employee a set amount each week despite varying hours worked by the employee, without incurring overtime-pay liabilities in the weeks in which the actual hours worked would normally entitle the employee to overtime pay. Those plans are known as "Belo" plans, following the decision that approved their use. See *Walling* v. *A.H. Belo Corp.*, 316 U.S. 624 (1942). The district court found that petitioners did not have a "Belo" prepayment plan, Pet. App. 37a-38a, a finding that the court of appeals affirmed, *id.* at 20a, and that petitioners no longer contest.

across pay periods. Pet. App. 20a-21a. There is, therefore, no need for this Court to consider that question.

2. Petitioners' remaining arguments are equally without merit and do not warrant further review.

a. Petitioners suggest (Pet. 22-23) that failing to credit extra compensation against overtime liability is an enhanced penalty designed to punish the employer, rather than compensate the employee. The FLSA, however, specifies with careful precision the circumstances in which an employer is entitled to a credit; here, petitioners simply did not establish that they were entitled to one. Instead, the district court found (Pet. App. 28a-29a), and the court of appeals affirmed, that petitioners "had failed properly to record overtime hours and pay proper compensation for such hours," *id.* 17a; that petitioners' "violations were 'willful' within the meaning of 29 U.S.C. § 255(a)," *id.* at 21a; and that they "do not satisfy the good faith reasonable belief exception to liquidated damages provided by 29 U.S.C. § 260," *ibid.* See *id.* at 33a-35a, 38a.[5] The resulting award was no less, but also no more, than the statute requires, and clearly

[5] Liquidated damages are not a penalty, but compensation to the employees for the delay in receiving the wages due as a result of the employer's FLSA violation. See *Herman* v. *RSR Sec. Servs, Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999) (citing *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 583-84 (1942)). Courts have discretion to deny the award of liquidated damages *only* if the employer shows that it acted in subjective "good faith" and had objectively "reasonable grounds" for believing that its conduct did not violate the FLSA. 29 U.S.C. 260; see also *RSR Sec. Servs*, 172 F.3d at 142. The employer bears the burden of proving both good faith and reasonable grounds, and the burden is a heavy one; double damages are the norm. 172 F.3d at 142; *Reich* v. *Southern New England Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997); *Brock* v. *Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987).

does not exact an extra-statutory penalty from petitioners.

b. Petitioners contend (Pet. 23) that the "work period limitation" in this case is particularly inappropriate because the damages are averaged over work periods without accounting for any potential business changes over the time period in question. The district court, in its second decision, and the court of appeals, in its second summary order, considered that fact-bound argument and both courts soundly rejected it. Pet. App. 4a (characterizing petitioners' new evidence as "unreasonable"), 11a-12a (finding petitioners' expert witness testimony regarding the growth of Levinson's business "entirely unpersuasive"). Petitioners' attempt to relitigate that case-specific issue here is unpersuasive and unworthy of this Court's review. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

c. Petitioners suggest that the court below disregarded a stipulation between the parties regarding the amount that petitioners paid their employees. Pet. 24.[6] Petitioners interpret the stipulation to mean that the Secretary agreed that they had "paid $529,000.00 in excess premium overtime wages during the ADP period." Pet. 25. The stipulated facts, however, as reflected in the district court's first order (Pet. App. 26a-27a), contain no such agreement. Rather, the parties stipulated

[6] The stipulations entered into between the parties and listed in the pretrial order (see Pet. 25) are incorporated into the findings of fact by the district court in its April 20, 2001, judgment. Pet. App. 24a-27a.

that the Secretary's transcriptions of petitioners' payroll records were accurate, with some exceptions, as to the gross wages paid, the "punch detail report hours," and the hourly rates paid to employees. *Ibid.* Moreover, the court of appeals did not improperly disregard any stipulation, but rejected petitioners' reasoning, concluding, for the reasons previously discussed, that any "purported 'overpayments' * * * provide no basis for a credit." *Id.* at 21a.

3. Petitioners argue (Pet. 26-30) that the lower courts' damages calculations have not been demonstrated to be "a matter of just and reasonable inference," in accordance with this Court's instructions in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). By its terms, that argument is not worthy of further review because "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In any event, the courts below correctly concluded that the Secretary met her prima facie burden to establish as a matter of just and reasonable inference the amount and extent of work that employees had performed without being properly compensated in accordance with the FLSA. Pet. App. 4a, 18a-19a, 36a. Petitioners failed to rebut that inference. *Id.* at 4a, 18a, 37a.

As recognized by the court of appeals in this case, under the FLSA, "[t]he burden is on an employer properly to record hours, and an employee need only as a *prima facie* matter present an estimate of damages that is satisfactory as 'a matter of just and reasonable inference.'" Pet. App. 18a (quoting *Mt. Clemens*, 328 U.S. at 686-687). Employees who have not been properly compensated are not required to recreate with precision the record of hours worked which their employer—in viola-

tion of law—failed to keep. See *Mt. Clemens*, 328 U.S. at 687. Instead, the burden shifts to the employer to provide evidence of the precise number of hours worked, or alternatively, the employer may provide evidence demonstrating that the plaintiff's estimate was unreasonable. See Pet. App. 18a (quoting *Reich* v. *Southern New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997)). In this case, both the district court and the court of appeals accepted the Secretary's estimate of damages,[7] based on credible testimony from employees of Levinson and the time-clock records from the ADP period, Pet. App. 18a-19a, 28a-30a. The court of appeals, in its second summary order, noted that the district court, in considering the case on remand, allowed petitioners to present new evidence regarding the reasonableness of the number of overtime hours worked by Levinson's employees. *Id.* at 3a-4a. Despite the opportunity for a "second bite at the apple," petitioners failed to persuade either court below that the estimated damages in this case were unreasonable. *Id.* at 4a.

As this Court stated nearly 60 years ago in a dispute over unpaid overtime wages: "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the require-

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[7] In its first summary order, the court of appeals affirmed the district court's judgment regarding the Secretary's estimation of damages in the ADP period. Pet. App. 19a. It remanded the case for the district court to recalculate the damages, for all but three employees, in the Paychex period. *Id.* at 19a-20a, 22a. The Secretary recalculated the Paychex-period damages in accordance with the instructions given by the court of appeals; the district court accepted the Secretary's recalculations and entered judgment against Levinson for the revised damages total. *Id.* at 9a, 13a. The court of appeals affirmed. *Id.* at 5a.

ments * * * of the [FLSA]." *Mt. Clemens*, 328 U.S. at 688. In this case, the courts below, after fully considering and rejecting the same methodological arguments that petitioners are making here, properly concluded that the Secretary established as a matter of just and reasonable inference the amount and extent of work that employees had performed without being properly compensated for overtime in accordance with the FLSA. Further review of those arguments is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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