No. _____

In The
Supreme Court of the United States

COUNTY OF LOS ANGELES,

Petitioner,

v.

TRINA RAY AND SASHA WALKER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents, on behalf of themselves and other similarly situated home care workers in the State of California's In-Home Supportive Services ("IHSS") program, sued Petitioner the County of Los Angeles ("County") under the Fair Labor Standards Act ("FLSA") for payment of overtime wages. The State of California is responsible for paying overtime wages to eligible home care workers in the IHSS program. The Ninth Circuit recognized that the County had no control over the action which led to potential liability here: the State of California's delayed implementation of a new Department of Labor ("DOL") rule. Nonetheless, the Ninth Circuit held that the County was not entitled to claim state sovereign immunity. The Ninth Circuit also held that the County could be liable for the non-payment of overtime wages during a mandatory, non-enforcement period adopted by the DOL.

The questions presented are:

(1) Whether a county, which acts as an agent of the state in administering a state social welfare program, is an arm of the state entitled to sovereign immunity from a lawsuit challenging a state policy over which the county had no control; and

(2) Whether the DOL's non-enforcement policy bars private rights of action for alleged violations during the agency's non-enforcement period.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceedings below.

Petitioner the County of Los Angeles is a legal subdivision of the State of California with no parent corporation or shares held by a publicly traded company.

STATEMENT OF RELATED CASES

- *Ray, et al. v. The County of Los Angeles*, No. 2:17-cv-04239-PA-SK, U.S. District Court for the Central District of California. Order denying motions to dismiss entered on September 28, 2017.
- *Ray v. The County of Los Angeles*, No. 17-56581, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on August 22, 2019.
- *Ray, et al. v. The Los Angeles County Department of Public Services*, No. 18-55276, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on August 22, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

Pursuant to state law, the County of Los Angeles ("County") administers the state In-Home Supportive Services ("IHSS") program under the supervision of a state agency, the California Department of Social Services ("CDSS"). The County assists the state at a local level, such as by interviewing recipients to determine if they meet state eligibility standards and assessing IHSS providers to determine if they meet state qualifications. The County does not pay providers directly; the state does. IHSS providers submit payment requests to the state, and the state processes the requests and issues payment. The state is responsible for providing the majority of the funds to pay IHSS providers, either through federal reimbursements or the state treasury. The County is required by state law to contribute a minority share of the funds. Not surprisingly in light of its role assisting the state in its IHSS program, California law treats the County as an agent of the state in administering the IHSS program at a local level.

It is uncontested between the parties in this case that the County had "no discretion over the action (or inaction) that subjected it to potential liability here: payment of overtime wages under the FLSA." App. 16a. The Ninth Circuit held that the County had "neither 'discretionary powers' nor 'substantial autonomy'" in carrying out its duties, which weighed in favor of granting the County sovereign immunity. *Id.*

Nevertheless, the Ninth Circuit held that the County was not entitled to sovereign immunity under the circuit's five-factor arm-of-the-state test. Under that test, the Ninth Circuit treats the first factor—whether the state would be responsible for satisfying a money judgment—as the "most important" factor. The Ninth Circuit weighs this factor more than the others, even though this Court has held that the "primary function of sovereign immunity" is "not to protect state treasuries . . . but to afford the States the dignity and respect due sovereign entities." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002). The Ninth Circuit further overemphasizes protection of state treasuries because the third, fourth and fifth factors overlap with the first. The third factor is whether the defendant can sue or be sued, which obviously will weigh against sovereign immunity if the defendant, and not the state, will be required to satisfy the judgment. Similarly, the fourth factor is whether the defendant can take property in its own name, and the fifth factor is whether the defendant is a separate corporate entity, both of which will weigh against sovereign immunity if the first factor does as well.

The second factor—whether the defendant exercises central government functions—is the only factor that is not squarely focused on protecting state treasuries. And for the limited purposes of implementing state laws regarding payment of overtime wages to IHSS providers, the Ninth Circuit recognized that this second factor favored granting sovereign immunity to the County. In *Hess v. Port Authority Trans-Hudson*

Corp., 513 U.S. 30, 30-31 (1994), the Court held that, when the "indicators of immunity" point in different directions, as they do here, courts must evaluate the different factors in light of the purposes of the Eleventh Amendment. But the Ninth Circuit test does not include this important step. Instead, the Ninth Circuit just tallies up the results. Here, the County lost 4 to 1.

The Ninth Circuit test is deeply flawed, conflicts with this Court's precedents and does not afford the states the dignity and respect due sovereign entities. A state's dignity is implicated when a private plaintiff sues a state's agent in federal court solely to challenge the legality of a state policy over which the agent had no control. It is practically the same thing as haling a state into federal court without its consent. Indeed, federal judges have already sat in judgment of the state in this case. The Ninth Circuit stated: "Los Angeles makes a legitimate point about the unfairness of the result here. But that unfairness *springs from the State* and its implementing legislation, not the Eleventh Amendment. Los Angeles must air its grievance, if at all, in Sacramento." App. 20a n.9 (emphasis added). The Ninth Circuit further found that the state "*gambled*" in not implementing the new overtime rules by January 1, 2015. App. 27a (emphasis added). These are serious moral and ethical judgments about state conduct—issued in a published federal appellate court decision—that puts the state in an untenable position. The state can either remain a non-party and allow federal courts to make findings about the state's conduct,

or the state must waive sovereign immunity and intervene to defend itself.

Certiorari is necessary here to correct the wrong result below and also to clarify the arm-of-the-state doctrine. This Court has not substantially confronted the arm-of-the-state doctrine since 1994. Since then, a conflict among the circuits has emerged, where their tests include two, three, four, five and six factors, which differ dramatically from circuit to circuit. These differences are material, in that the County would be an arm of the state under some tests but not the Ninth Circuit's test. Some circuits, like the First Circuit, give particular weight to whether the state intended to extend its sovereign immunity to the defendant. Other circuits look to how the defendant is treated as a matter of state law, such as whether the state deems the defendant its agent. Under these tests, the County would be entitled to sovereign immunity. But the Ninth Circuit does not even consider these factors.

The Ninth Circuit decision also raises an open question in this Court of considerable importance. This Court has not squarely addressed the question of what effect, if any, an agency's mandatory, non-enforcement period has on private rights of action for violations during that period. The Court confronted a related question in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), an FLSA case, where the Court held that courts should defer to an agency's interpretation of the statute it enforces to determine the scope of private rights of action. But *Skidmore* did not deal with a time-limited non-enforcement policy like that imposed here by the Department of Labor ("DOL").

This Court should grant certiorari and hold that when a federal agency adopts a mandatory, non-enforcement period—especially when that agency adopts such a policy to allow for the orderly implementation of a burdensome new rule—private parties cannot sue for violations during that non-enforcement period. Here, when the DOL initially changed its exemption for home care workers, the State of California estimated that this rule change would result in over $400 million in personnel and administrative costs in 2014-15 and over $700 million each year thereafter. The DOL recognized that its rule change imposed considerable burdens on state social welfare programs, and thus it adopted a non-enforcement policy to allow states to bring themselves into compliance in an orderly fashion. Allowing private plaintiffs to sue for violations during this non-enforcement period undermines this policy of the DOL and unfairly subjects agents of the state to potential liability despite reasonable reliance on the DOL's mandatory, non-enforcement policy.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 935 F.3d 703 (9th Cir. 2019), and is reproduced in the Appendix starting at App. 1a. The Ninth Circuit amended its opinion on October 8, 2019, and this amendment is reported at 939 F.3d 1062 (9th Cir. 2019), and is reproduced in the Appendix starting at App. 56a. The opinion and order of the district court is not published in the Federal Supplement but is

available at 2017 WL 10436061 and is reproduced in the Appendix starting at App. 30a.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2019. App. 1a. The court of appeals denied petitions for panel rehearing and rehearing en banc on October 8, 2019. App. 56a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT

I. Factual Background

A. The State Of California's IHSS Program

The California IHSS program provides home-based supportive services to enable the aged, blind or disabled to avoid institutionalization. *Basden v. Wagner*, 181 Cal. App. 4th 929, 939 (Cal. Ct. App. 2010). "Supportive services" under the program include "domestic

services and services related to domestic services." Cal. Welf. & Inst. Code § 12300(b).

CDSS is the state agency responsible for administering the IHSS program. *Guerrero v. Superior Court*, 213 Cal. App. 4th 912, 921 (Cal. Ct. App. 2013). CDSS "promulgates regulations that implement the program, and county welfare departments administer the program under the Department's supervision." *Id.* Counties assist the state and CDSS by providing local administrative support in accordance with state law. County social workers interview recipients, collect background information and calculate the number of service hours they are authorized to receive under state law, among other tasks. Cal. Welf. & Inst. Code §§ 12301.1(b), 12301.15-12301.17, 12301.2(b), 12301.21(b).

In providing local administrative support for the IHSS program, "counties act as agents of the state." *Guerrero*, 213 Cal. App. 4th at 933-34; *In-Home Supportive Servs. v. Workers' Comp. Appeals Bd.*, 152 Cal. App. 3d 720, 729 (Cal. Ct. App. 1984) (the state has "ultimate direction and control of the IHSS program by virtue of its authority to supervise the program and through the supervision and control of the counties acting as its agent").

While the County, as an agent of the state, plays some role in administering the IHSS program at a local level, the County does not receive or process payroll timesheets from providers of in-home supportive services, and the County does not pay providers of such services under the program. Providers submit timecards to the state, and the state is solely responsible for issuing payment both of regular and overtime

wages. Cal. Welf. & Inst. Code §§ 12300.4(g), 12301.17; *see also* App. 16a.

B. The DOL Adopts A New Rule Granting IHSS Providers The Right To Receive Overtime Under The FLSA

Unless exempt, employees covered by the FLSA must receive overtime pay for hours worked over 40 in a workweek at a rate not less than time and one-half their regular rates of pay. 29 U.S.C. § 207(a)(1). In 1974, Congress created a "companionship exemption" to the FLSA for employees "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." 29 U.S.C. § 213(a)(15). For nearly four decades, DOL regulations had consistently defined "companionship services" to include domestic services. *See* 78 Fed. Reg. 60,454-55 (Oct. 1, 2013) (codified at 29 C.F.R. pt. 552) (noting that the prior DOL regulations "defined companionship services as 'fellowship, care, and protection,' which included 'household work . . . such as meal preparation, bed making, washing of clothes, and other similar services' and could include general household work not exceeding '20 percent of the total weekly hours worked'"); *see also* App. 4a (explaining that, under prior DOL regulations, the companionship exemption "applied to homecare providers" like respondents).

In 2013, the DOL promulgated new regulations (the "Final Rule") which narrowed the definition of

"companionship services" and also prohibited third-party employers of home healthcare workers from claiming the exemption for its employees. 78 Fed. Reg. at 60,454-56. This rule change, in effect, required that home healthcare workers, such as IHSS providers, be paid overtime.

"Typically, employers subject to FLSA regulatory changes have 30 or 60 days to adjust before a rulemaking becomes effective," and before the Final Rule, "the longest effective date delay for a Wage and Hour Division rule was 120 days." 79 Fed. Reg. 60,974 n.1 (Oct. 9, 2014). But the DOL recognized that the Final Rule imposed significant burdens on both government and private employers and took the "unprecedented" step of delaying the effective date of the Final Rule until January 1, 2015—15 months after publication of the Final Rule. *Id.* at 60,974. The DOL explained that "complex Federal and State systems fund a significant portion of the home care services provided across the country, and making adjustments to operations, programs, and budgets in order to comply with the FLSA could take time." *Id.*

Over a year after promulgating the Final Rule, but before the effective date, the DOL issued a policy statement setting forth the department's non-enforcement policy (the "Non-Enforcement Policy"). *Id.* The DOL announced that it would not bring any enforcement actions against any employer for violations of the FLSA resulting from the Final Rule between January 1, 2015 and June 30, 2015. *Id.* at 60,975. The DOL also announced that after July 1, 2015, it would commence

enforcement actions but will exercise prosecutorial discretion on a case-by-case basis, giving "strong consideration to an employer's efforts to make any adjustments necessary to implement the Final Rule, and in particular a State's efforts to bring its publicly funded home care programs into FLSA compliance." *Id.*

C. The State's Efforts To Implement The New DOL Rule

Before the Final Rule was adopted, there was no need to calculate how many hours *per week* an IHSS provider worked. But the Final Rule required IHSS providers to receive overtime if they worked more than 40 hours per week, which required the state to update its policies and procedures for the state's payment processing system. This required new legislation. The California Legislature enacted Senate Bill No. 855 ("SB 855") on June 20, 2014, which, in part, implemented the new overtime pay requirements for home healthcare workers in the state's IHSS program. Cal. Welf. & Inst. Code § 12300.4.

SB 855 defined a "workweek" for purposes of calculating overtime, and required IHSS providers to submit signed payroll timesheets twice a month to the state for processing. *Id.* § 12300.4(b)(1), (g). The law also set important restrictions to prevent fraud and abuse of the new overtime benefit. For example, SB 855 provided that IHSS providers could only work up to 66 hours per week, and that additional providers must be

employed for those recipients who need more than 66 hours of services per week. *Id.* § 12300.4(b)(2)-(3).

The California Legislature set additional limits on the overtime benefit. SB 855 confirmed that IHSS providers are not entitled to any overtime pay under state law. *Id.* § 12300.4(c) ("Notwithstanding any other law, only federal law and regulations regarding overtime compensation apply to providers of services. . . ."). SB 855 also provided that the "state *and counties* are immune from any liability resulting from implementation of this section." *Id.* § 12300.4(i) (emphasis added).

SB 855 further provided that CDSS and the California Department of Health Care Services may implement section 12300.4 by way of all-county letters ("ACL"). *Id.* § 12300.4(k). To that end, CDSS issued a series of ACLs, outlining the steps necessary for implementation of the Final Rule, including that CDSS would modify its payment processing system to calculate overtime compensation and would update IHSS timesheets, notices, forms and agreements.[1]

D. The State Freezes Implementation When The D.C. District Court Vacates The DOL Rule

While the state and counties were taking steps to implement the Final Rule, but before the Final Rule

[1] The state estimated the personnel and administrative costs for complying with the new overtime wage requirements for IHSS providers to be $403.5 million in 2014-15 and $707.6 million annually thereafter.

and SB 855 became effective, the United States District Court for the District of Columbia vacated the Final Rule as contrary to the text of the FLSA. *Home Care Ass'n of Am. v. Weil*, 76 F. Supp. 3d 138, 148 (D.D.C. 2014) (*Weil I*). As a result, the Final Rule did not take effect on January 1, 2015, as originally scheduled, and the longstanding exemption for home healthcare workers, including IHSS providers, remained in place.

CDSS, in response, issued a new ACL informing the counties that implementation would "be delayed until further court clarification." App. 130a. CDSS also prepared an "information notice" about its decision not to implement the Final Rule on the original timetable, which was sent to all IHSS providers and recipients. *Id.*

The DOL appealed the *Weil I* decision, and the court of appeals reversed. *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084, 1097 (D.C. Cir. 2015) (*Weil II*). The DOL announced that it would not bring enforcement actions against any employer for violations of the Final Rule for 30 days after the court of appeals issued its mandate. 80 Fed. Reg. 55,029 (Sept. 14, 2015). The court of appeals issued its mandate on October 13, 2015, and the DOL announced that it would not enforce the Final Rule until November 12, 2015. 80 Fed. Reg. 65,646 (Oct. 27, 2015). The DOL explained that it was extending the mandatory, non-enforcement period in part because it was a party to a federal lawsuit in which the Final Rule was vacated in *Weil I*. *Id.*

E. The State Renews Its Implementation Efforts

Within weeks of the court of appeals' mandate in *Weil II*, and while a petition for a writ of certiorari was still pending in this Court, CDSS issued a revised ACL setting forth its renewed efforts to implement the Final Rule. State officials consulted with consumer advocates and unions representing IHSS providers, and announced that it would begin paying overtime wages on February 1, 2016. The state explained that it needed time to update timesheets used in the IHSS program, train the state's nearly 400,000 service providers and 500,000 home care services recipients in how to fill out and approve the new timesheets, and finalize changes to the state's automated case management and payroll system to enable overtime payments, among others. App. 126a.

The state and the counties worked together to ensure that eligible IHSS providers received overtime wages under the FLSA beginning February 1, 2016.

II. Proceedings Below

In June 2017, respondent Trina Ray ("Ray") filed a putative collective action against both CDSS and the County for alleged failure to pay overtime before February 1, 2016. App. 111a. Ray alleged that she was a state employee and that CDSS—the state agency responsible for administering the IHSS program—"exercises significant control" over the program in that CDSS "issues payment" to IHSS providers and "played

a role in deciding whether to pay overtime to IHSS" providers. App. 115a. Ray subsequently moved for conditional certification of her putative collective action, stating that her "lawsuit challenges a single policy" of delaying implementation of the Final Rule. App. 91a. Ray argued that the delayed implementation was a state policy effected by CDSS. App. 83a.

Ray then filed a First Amended Complaint, which is the operative complaint. App. 58a. The First Amended Complaint dropped CDSS as a defendant and added respondent Sasha Walker ("Walker") as a plaintiff. *Id*.

The County filed a motion to dismiss under Rules 12 and 19 of the Federal Rules of Civil Procedure on the grounds that the County was entitled to sovereign immunity and that the State of California was an indispensable party. The County also moved to strike respondents' putative collective period of January 1, 2015 to February 1, 2016 as overbroad.

A. The District Court Ruling

The district court issued a combined ruling on the parties' motions. On the sovereign immunity issue, the court held that counties are political subdivisions of states that are not entitled to sovereign immunity. App. 40a-41a (citing *Moor v. Alameda County*, 411 U.S. 693, 719 (1973)). The court further held that, even if the County could be entitled to sovereign immunity, the

County was not an arm of the state under the Ninth Circuit's five-factor test announced in *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). App. 43a. The court explained that the first *Mitchell* factor—whether a money judgment would be satisfied out of state funds—is the "predominant factor" and that the County did not show that state funds would be required to satisfy a judgment in this case.[2] App. 44a.

The court noted the second *Mitchell* factor—whether the defendant performs central government functions—weighs in favor of sovereign immunity, but nevertheless found that sovereign immunity does not apply. The court lamented the "apparent inequity of making the County liable for overtime payments that the State directed that the counties not provide until February 1, 2016, through a payroll system controlled and administered by the State," but found that this "inequity does not overcome the four other *Mitchell* factors." App. 45a.

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[2] The County conceded that the third, fourth and fifth *Mitchell* factors weigh against sovereign immunity because the County can sue and be sued, take property in its own name and has a separate corporate status from the state. App. 44a. As explained *infra*, however, it is difficult to envision a scenario where a defendant can be required to pay a money judgment but, nevertheless, does not have the capacity to be sued, or the ability to take property in its own name, or a separate corporate status. The third, fourth and fifth *Mitchell* factors are, in effect, just a way for courts in the Ninth Circuit to quadruple count the first *Mitchell* factor.

The court further held that the state was a permissive, but not indispensable, party because the state is jointly and severally liable for FLSA violations arising out of their alleged status as joint employers of IHSS providers. App. 49a.

On the issue of the collective period, the court held that respondents could not sue the County for violations before November 12, 2015, the date that the DOL began enforcement of the Final Rule. App. 53a. The court explained that when the Final Rule was vacated in *Weil I* but then reinstated in *Weil II*, both the court of appeals and the DOL "understood and intended" for the Final Rule "to become effective and enforceable no earlier than November 12, 2015, 30 days after the Circuit issued its mandate on October 13, 2015." App. 51a-52a. The court reasoned, in part, that its ruling was "consistent with the general rule that a private right of action should ordinarily not exist when the applicable rule could not be enforced by the relevant enforcement agency." App. 53a (citing *Skidmore*, 323 U.S. at 140).

The County filed an interlocutory appeal on the denial of sovereign immunity, and the court granted respondents' motion to certify for interlocutory appeal the holding that the putative collective period began on November 12, 2015. App. 9a. The Ninth Circuit granted respondents' application to pursue an interlocutory appeal under 28 U.S.C. § 1292(b). *Id.*

B. The Ninth Circuit Opinion

On the issue of sovereign immunity, the Ninth Circuit noted a county can be entitled to sovereign immunity under this Court's precedents. App. 11a (citing *N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 190 (2006) (holding that a county may be entitled to sovereign immunity if it were "acting as an arm of the State, as delineated by this Court's precedents")). But the court of appeals found that the County was not entitled to immunity under its five-factor *Mitchell* test. App. 22a-23a.

The Ninth Circuit stated that the first *Mitchell* factor is the "most important," which required the County to show that "a money judgment would be paid directly with State funds." App. 13a. The County conceded that a money judgment would not be paid *directly* with state funds, but continued to emphasize that it is likely that the state would ultimately be responsible for a majority of any money judgment. App. 13a-14a. The County also conceded that the third, fourth and fifth *Mitchell* factors weigh against sovereign immunity. App. 17a.

On the second *Mitchell* factor, the Ninth Circuit noted its own test was "unclear" on whether a court is to determine whether the county performs central government functions in general or with respect to the particular function which allegedly gives rise to liability. App. 14a. Concluding that the latter is the better interpretation of its own precedents, the Ninth Circuit held—like the district court below—that the second

Mitchell factor weighed in favor of sovereign immunity. Although the County can, in general, make some important choices on its own, the court of appeals reasoned:

> But the County contends—and Plaintiffs do not dispute—that it has no discretion over the action (or inaction) that subjected it to potential liability here: payment of overtime wages under the FLSA. In taking the actions that have subjected it to potential liability, the County had neither "discretionary powers" nor "substantial autonomy" in carrying out its duties.
>
> We think this clearly tips the scales in the County's favor as to this factor. The County had *no choice* in the matter of the overtime wages, as the State mandated the payment start date. We therefore hold that the second *Mitchell* factor favors Eleventh Amendment immunity.

App. 16a-17a (emphasis added).

After noting that the factors pointed in different directions, the Ninth Circuit held that the second factor was not enough to outweigh the four other factors which pointed against sovereign immunity. App. 17a-18a.

On the putative collective period, the Ninth Circuit reversed the district court and held that the County could be sued for non-payment of FLSA overtime from January 1, 2015 to November 11, 2015. In so holding, the Ninth Circuit determined that the issue

was one of retroactivity, namely whether the court of appeals' decision in *Weil II* could be applied retroactively. App. 23a-24a. The Ninth Circuit also held that the DOL Non-Enforcement Policy had no effect on respondents' ability to assert a private right of action. App. 27a (citing *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133, 145 (4th Cir. 2017) (stating, in dicta, that an "agency's informal assurance that it will not pursue enforcement cannot preclude a citizen's suit to do so")).

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari To Correct The Wrong Result Below And To Clarify The Eleventh Amendment Arm-Of-The-State Doctrine.

A. A County Can Act As An Arm Of The State.

As an initial matter, this case presents the question of whether the County could ever be entitled to sovereign immunity in any context. For over a century, this Court had held that counties are independent political subdivisions of a state that are not entitled to sovereign immunity. *See*, *e.g.*, *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) ("[T]he Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of

state power.'"); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (noting that the Court, in *Ex parte Ayers*, 123 U.S. 443 (1887), held sovereign immunity applied where the state is a real party defendant even if not so named, but that a county is a separate political entity not entitled to sovereign immunity); *cf. Moor*, 411 U.S. at 717 (holding that California counties are not "simply 'the arm or alter ego of the State'" and, as such, are citizens of California for purposes of diversity jurisdiction) (quoting *State Highway Comm'n of Wyo. v. Utah Constr. Co.*, 278 U.S. 194, 199 (1929)).

The Court recently recognized, however, that counties *can be* entitled to sovereign immunity in limited circumstances. In *Chatham County*, 547 U.S. at 194, the Court stated, in a unanimous opinion, that a county is subject to suit notwithstanding the Eleventh Amendment "unless it was acting as an arm of the State, as delineated by this Court's precedents. . . ." The county defendant in that case conceded it was not an arm of the state, and thus the Court did not analyze the question. *Id*.

The Ninth Circuit below found that this Court's opinion in *Chatham County* was ambiguous on whether a county could ever be an arm of the state entitled to sovereign immunity. App. 12a. But the Ninth Circuit ultimately recognized that the Court meant what it said in *Chatham County* and that counties can be entitled to sovereign immunity in limited circumstances if they act as arms of the state under this Court's precedents. App. 13a.

The Ninth Circuit holding was correct and consistent with other circuits that have addressed the question. *Fuesting v. Lafayette Par. Bayou Vermilion Dist.*, 470 F.3d 576, 579 (5th Cir. 2006) (citing *Chatham County* for the proposition that a municipality can be immune from suit if acting as an arm of the state); *see also Jones v. Hamilton Cty. Sheriff*, 838 F.3d 782, 783 (6th Cir. 2016) (holding that a county sheriff was entitled to sovereign immunity in connection with his implementation of state policy); *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (holding that a sheriff responsible for operating a county jail acted as an arm of the state for purposes of adopting and implementing the use-of-force policy at the jail and thus was entitled to sovereign immunity); *Scott v. O'Grady*, 975 F.2d 366, 369-71 (7th Cir. 1992) (holding that the county sheriff and his deputy "were effectively acting as state officers" in enforcing state court eviction orders and thus were entitled to sovereign immunity); *cf. Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) ("A county official pursues his duties as a state agent when he is enforcing state law or policy. . . . It may be possible for the officer to wear both state and county hats at the same time, but when a state statute directs the actions of an official, as here, the officer, be he state or local, is acting as a state official." (citation omitted)).

B. This Court's Precedents Have Left The Circuits Conflicted Over The Proper Test For Determining Whether An Entity Is An Arm Of The State.

While the Court was clear in *Chatham County* that a county can be entitled to sovereign immunity if it acted as an arm of the state under this Court's precedents, the "jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused." *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996); *accord* Erwin Chemerinsky, *Federal Jurisdiction* § 7.4, at 444 (6th ed. 2012) ("[T]he law concerning the immunity of state agencies, boards, and other entities from suit in federal courts is quite inconsistent."). Each circuit has adopted a different multi-factor test to determine whether an entity acts as an arm of the state. These tests—which include two, three, four, five or six factors—do not just differ in the number of factors. They vary to such a degree that they demonstrate a fundamental conflict in approach that leads to different outcomes depending on where the case was filed.

1. The Circuits Apply Varying Multi-Factor Tests.

The First, Seventh and Eighth Circuits apply a two-factor test, but each test meaningfully differs from the other. The First Circuit asks first "whether the state has indicated an intention—either explicitly by statute or implicitly through the structure of the entity—that the entity share the state's sovereign

immunity." *Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 12 (1st Cir. 2011) (quoting *Redondo Constr. Corp. v. P.R. Highway & Transp. Auth.*, 357 F.3d 124, 126 (1st Cir. 2004)). Only if the results of this first factor are inconclusive does the court "proceed to the second stage and consider whether the state's treasury would be at risk in the event of an adverse judgment." *Id.* (citation omitted). The Seventh Circuit employs a substantially different two-factor test from the First Circuit, that addresses "(1) the extent of the entity's financial autonomy from the state; and (2) the 'general legal status' of the entity." *Burrus v. State Lottery Comm'n of Ind.*, 546 F.3d 417, 420 (7th Cir. 2008) (citing *Kashani v. Purdue Univ.*, 813 F.2d 843, 845-47 (7th Cir. 1987). The Eighth Circuit applies still a different test of "the agency's degree of autonomy and control over its own affairs and, more importantly, whether a money judgment against the agency will be paid with state funds." *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006).

Other circuits employ a three-factor test. The Third Circuit examines "(1) the source of the money that would pay for the judgment; (2) the status of the entity under state law; and (3) the entity's degree of autonomy." *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 551 F.3d 193, 198 (3d Cir. 2008). The Tenth Circuit looks to "(1) the state's legal liability for a judgment; (2) the degree of autonomy from the state—both as a matter of law and the amount of guidance and control exercised by the state; and (3) the extent of financing the agency receives independent of the state

treasury and its ability to provide for its own financing." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006). And the D.C. Circuit assesses "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008).

Still other circuits employ a four-factor test. The Fourth Circuit asks (1) whether a judgment would be paid by the state; (2) the degree of autonomy exercised by the entity, including who appoints the entity's directors or officers, who funds the entity, and whether the state has veto control over its actions; (3) whether the entity is involved with state or local concerns; and (4) how the entity is treated under state law. *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 580 (4th Cir. 2012). The Sixth Circuit employs a substantially different four-factor test, addressing "(1) the State's potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government." *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (citations omitted). The Eleventh Circuit examines "(1) how state law defines the entity; (2) what degree of control the State maintains

over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir. 2014) (citation omitted).

The Ninth Circuit employs a five-factor test, examining "[1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity." *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005) (citation omitted).

The Fifth Circuit employs a six-factor test that considers "(1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of the funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide problems; (5) whether the entity has authority to sue and be sued in its own name; [and] (6) whether the entity has the right to hold and use property." *Richardson v. S. Univ.*, 118 F.3d 450, 452 (5th Cir. 1997) (alteration in original) (citation omitted).

Finally, the Second Circuit cannot decide whether it employs a two-factor or six-factor test. Its two-factor test examines "(1) 'the extent to which the state would be responsible for satisfying any judgment that might

be entered against the defendant entity,' and (2) 'the degree of supervision exercised by the state over the defendant entity.'" *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004) (quoting *Pikulin v. City Univ. of N.Y.*, 176 F.3d 598, 600 (2d Cir. 1999)). Its six-factor test examines "(1) how the entity is referred to in its documents of origin; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's financial obligations are binding upon the state." *Gorton v. Gettel*, 554 F.3d 60, 62 (2d Cir. 2009) (citation omitted). Acknowledging the "lack of clarity" in its approach, the court of appeals recently applied *both* tests simultaneously. *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 136-37 (2d Cir. 2015).

The circuits do not simply apply different multi-factor tests; they use different approaches when the factors point in different directions. In *Hess*, the Court explained that when the "indicators of immunity point in different directions," courts must analyze the ultimate question of whether immunity applies by looking to the purposes of the Eleventh Amendment. 513 U.S. at 47. Many circuits have adopted the *Hess* approach. *See*, *e.g.*, *Karns v. Shanahan*, 879 F.3d 504, 513-14 (3d Cir. 2018) ("We emphasize that courts should not simply engage in a formulaic or mechanical counting up of the factors, nor do we do so here. Rather, each case must be considered on its own terms, with courts determining and then weighing the qualitative

strength of each individual factor in the unique factual circumstances at issue."); *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 804 F.3d 646, 676-77 (4th Cir. 2015) ("Arm-of-state status, however, is a question of balance, not math. In cases like this one, where the arm-of-state 'indicators point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide' . . . 'the protection of state treasuries and respect for the sovereign dignity of the states.' " (citations omitted)). However, the Ninth Circuit refuses to follow the *Hess* approach, and instead tallies up its five factors to see which pile is larger. App. 17a-18a.

2. This Circuit Split Is Outcome Determinative.

These disparate tests are not simply varying formulations of the same underlying principles. They demonstrate a real conflict in the circuits' approaches. For example, the First Circuit gives significant deference to how the state treats the entity, particularly whether the state intended to "share the state's sovereign immunity." *Irizarry-Mora*, 647 F.3d at 12 (citation omitted). This factor would weigh heavily in favor of immunity here because the California Legislature expressly declared that the County is immune from any liability resulting from implementation of the new IHSS overtime laws following the DOL Final Rule. Cal. Welf. & Inst. Code § 12300.4(i). But this is irrelevant under the Ninth Circuit's five-factor test, and thus the Ninth Circuit did not cite, let alone analyze, the

express grant of sovereign immunity under section 12300.4(i) in its opinion. App. 11a.

Moreover, many circuits, including the Ninth Circuit, place more weight on whether a money judgment would be satisfied with state funds, but other circuits have recognized that this Court has held that the "primary function of sovereign immunity" is "not to protect state treasuries . . . but to afford the States the dignity and respect due sovereign entities." *Fed. Mar. Comm'n*, 535 U.S. at 769; *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (noting that sovereign immunity is "designed to protect" "the dignity and respect afforded a State").

To that end, the Third and Fourth Circuits have modified their arm-of-the-state tests so that the state's dignity and respect are "co-equal" with the protection of the state treasury. *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 239-40 (3d Cir. 2005); *see also United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 137 n.4 (4th Cir. 2014) (observing that protection of the state treasury "does not deserve dispositive preeminence"). This matters, particularly here, where the County would be the entity technically obligated to satisfy a money judgment, but such judgment would be based solely upon a state policy judgment and actions (or inactions) over which the County had neither "discretionary powers" nor "substantial autonomy." App. 16a. The case therefore implicates the state's dignity and respect in that it will require a federal court to sit in judgment of a state's policy decision.

There are many instances where a county official, sued in his or her official capacity, would be required to satisfy a money judgment out of personal or county funds. But many circuits have recognized that if a county official is nevertheless sued for non-discretionary implementation of state law, the county official is an arm of the state. *See Fuesting*, 470 F.3d at 579 (citing *Chatham County* for the proposition that a municipality can be immune from suit if acting as an arm of the state); *see also Jones*, 838 F.3d at 783 (holding that a county sheriff was entitled to sovereign immunity in connection with his implementation of state policy); *Manders*, 338 F.3d at 1328 (holding that a sheriff responsible for operating a county jail acted as an arm of the state for purposes of adopting and implementing the use-of-force policy at the jail and thus was entitled to sovereign immunity); *Scott*, 975 F.2d at 369-71 (holding that county sheriff and his deputy "were effectively acting as state officers" in enforcing state court eviction orders and thus were entitled to sovereign immunity); *cf. Echols*, 909 F.2d at 801 ("A county official pursues his duties as a state agent when he is enforcing state law or policy. . . . It may be possible for the officer to wear both state and county hats at the same time, but when a state statute directs the actions of an official, as here, the officer, be he state or local, is acting as a state official." (citation omitted)).

C. The County Acts As An Arm Of The State In Supporting The State's IHSS Program.

The Ninth Circuit correctly held, citing *Chatham County*, that the County's claim of sovereign immunity should be evaluated based on the circumstances which gave rise to potential liability. In *Chatham County*, a boat owner claimed that a drawbridge malfunctioned and a portion of the bridge fell and collided with the plaintiff's boat. 547 U.S. at 192. Chatham County owned, operated and maintained the bridge; and on that basis, the plaintiff sued the county in federal court. *Id.* Although the county conceded that it was not entitled to sovereign immunity in that case, the Court explained that the county could be immune from suit if "it was acting as an arm of the State, as delineated by this Court's precedents, *in operating the drawbridge.*" *Id.* at 194 (emphasis added).

This is critical because the County is not claiming that it is an arm of the state as a general matter. *See Moor*, 411 U.S. at 719 ("[A] detailed examination of the relevant provisions of California law . . . convinces us that the County cannot be deemed a *mere agent* of the State of California." (emphasis added)). Rather, the County claims that it is an arm of the state for the limited purpose of supporting the state in its administration of the IHSS program. As a matter of state law, the County is an agent of the state for purposes of administering the IHSS program at a local level, *Guerrero*, 213 Cal. App. 4th at 934 ("[I]n administering the IHSS program, counties act as agents of the state."); *In-Home Supportive Servs.*, 152 Cal. App. 3d at 729-30 ("When

the state delegates the duty to provide IHSS services, as here, to the county, the relation between them is one of principal and agent."), and it is immune from all lawsuits regarding the implementation of the state's overtime payment system for IHSS providers. Cal. Welf. & Inst. Code § 12300.4(i).

The primary purpose of the doctrine of sovereign immunity is to ensure that the states are afforded the dignity and respect due to them as sovereign entities, which is violated when a state is haled into court without its consent. That is essentially what has happened in this case, as federal courts have sat, and will continue to sit, in judgment of a state policy over which the County had no control. The arm-of-the-state doctrine was created for cases just like this one, where a plaintiff has crafted her lawsuit to avoid suing the state directly but nonetheless sues a state agent merely for following state policy. The Ninth Circuit's decision should be reversed.

II. The Ninth Circuit Erred In Holding That The County Could Be Liable For Alleged Violations During The DOL's Mandatory, Non-Enforcement Period.

In adopting its mandatory, non-enforcement policy, the DOL recognized that its Final Rule imposed significant administrative costs, particularly on state agencies administering home care programs, and that a non-enforcement period was necessary "to facilitate efficient and effective implementation of the Final

Rule."[3] 79 Fed. Reg. at 60,975 (stating that during the non-enforcement period, the DOL "will concentrate its resources on continuing to provide intensive technical assistance to the regulated community, in particular State agencies administering home care programs"). The Non-Enforcement Policy reflected the DOL's expert judgment that many employers, including state agencies administering home care programs, should not be subject to liability during the mandatory, non-enforcement period. *See id.*

According to the Ninth Circuit, the Non-Enforcement Policy had no effect on private actions, even those brought against agents of the state—like the County—sued because the state did not implement the Final Rule fast enough. The Ninth Circuit's decision undermines this DOL policy because the DOL expressly recognized that its Final Rule imposed significant burdens on state agencies and that those agencies needed more time to fully implement the Final Rule.

This Court has not squarely addressed the question of whether a defendant can be liable for alleged violations during a mandatory, non-enforcement period adopted by the federal agency responsible for administering the statute.[4] The County submits that, at

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[3] The DOL also recognized that many employers delayed implementation of the Final Rule after it was struck down in *Weil I*, and that these employers needed more time to finish implementing the rule after *Weil I* was reversed by the D.C. Circuit. 80 Fed. Reg. at 65,646-47.

[4] Indeed, in holding that the County could be liable for alleged non-payment of overtime wages during the DOL's mandatory,

least with respect to the DOL's mandatory, Non-Enforcement Policy at issue in this case, the legal effect of such policy is to preclude liability for any state employer or agent of the state.

First, as a general rule, where a public enforcement scheme exists, a private right of action does not apply to conduct beyond what the government may prosecute. *Skidmore*, 323 U.S. at 140 ("Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons."); *see also Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 467 n.5 (1999) ("We think it would be anomalous to assume that Congress intended the implied private right of action to proscribe conduct that Government enforcement may not check."). This general rule supports the proposition that a mandatory, non-enforcement period should limit the ability for private plaintiffs to pursue claims during that period.

This general rule applies with even greater force in the context of FLSA actions because Congress intended for public enforcement to be the primary enforcement mechanism. In *Employees of Dep't of Public*

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non-enforcement period, the Ninth Circuit relied solely on dicta from a distinguishable Fourth Circuit decision. App. 27a-28a (citing *Ohio Valley*, 845 F.3d at 145 (finding that the defendant failed to introduce evidence that the state agency gave any assurances that it would not enforce the environmental standards at issue, but stating that "even if" such evidence was submitted, it "would not foreclose" a private lawsuit)).

Health & Welfare, Missouri v. Dep't of Public Health & Welfare, Missouri, 411 U.S. 279, 286 (1973), this Court recognized that "private enforcement of [the FLSA] was not a paramount objective." This is shown by the fact that the DOL has the power to *terminate* private lawsuits by filing an action for unpaid minimum or overtime wages. 29 U.S.C. § 216(b). Thus, if the DOL brings an enforcement action for the non-payment of overtime wages, any parallel private actions are not stayed or consolidated; they are terminated.

Given that private lawsuits were not a paramount objective of the FLSA, it would be anomalous for a private plaintiff to be able to pursue a claim when the public enforcement agency decided—based on its expertise and years of experience—not to pursue violations for *any* reason. But that is the effect of the Ninth Circuit's decision.

Second, state employees, like respondents, do not have *any* private enforcement rights unless the state waives sovereign immunity. In *Alden v. Maine*, this Court held that Congress did not have the power to abrogate state sovereign immunity for lawsuits brought by private plaintiffs under the FLSA. 527 U.S. 706, 754 (1999). As a result, private plaintiffs cannot pursue FLSA claims against a state or an arm of the state either in state or federal court, unless the state waives sovereign immunity.

Alden did not leave private plaintiffs without a remedy, however, as state sovereign immunity does not bar *public* enforcement. *See Seminole Tribe of Fla. v.*

Florida, 517 U.S. 44, 71 n.14 (1996) (noting the important limitation on state sovereign immunity that the "Federal Government can bring suit in federal court against a State"). Thus, the DOL can bring an enforcement action against a state or an arm of the state for violations of the FLSA, including alleged violations of unpaid overtime wages. But the Ninth Circuit's decision turns this enforcement scheme on its head. It creates a loophole through which private plaintiffs—otherwise barred from suing the state in any forum—can nevertheless sue agents of the state for the same relief.

CONCLUSION

The Court should grant the petition on both questions presented.

Respectfully submitted,

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January 6, 2020