No. _____

In The

Supreme Court of the United States

LOS ANGELES COUNTY
DEPARTMENT OF PUBLIC SOCIAL SERVICES,

Petitioner,

v.

TRINA RAY; SASHA WALKER, individually,
and on behalf of all others similarly situated,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Nothing is more foundational to the Fair Labor Standards Act (FLSA) than what it means to employ someone, yet this threshold question has been mired in confusion for decades, particularly in the joint employment context. The Courts of Appeals determine employer status by applying conflicting multi-factor tests to assess an amorphous touchstone, "economic reality," with unpredictable and inconsistent results. The Department of Labor (DOL) left a regulatory void after proposing, then rescinding, a rule defining joint employment under the Act. And the definition of "employ" under the FLSA—"to suffer or permit to work," which turns on whether a putative employer allows or tolerates unlawful work conditions, while having the power to prevent them—generally has not figured into the Courts of Appeals' analysis at all. From this chaos, the Ninth Circuit applied *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983)—despite the DOL's rejection of the *Bonnette* factors as "not the most appropriate standard"—to conclude the County of Los Angeles was liable, as the joint employer of 170,000 home care providers in the State of California's In-Home Supportive Services program, for overtime wages that the State, in its sole discretion, decided not to pay.[1]

The question presented is:

Whether a county may be deemed a joint employer under the FLSA when it plays a mere administrative

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[1] *Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule*, 86 Fed. Reg. 40,939, 40,947 (July 30, 2021).

QUESTION PRESENTED—Continued

role in a State's social services program by legislative mandate and has no power to prevent the State's decision not to pay overtime wages.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceedings below are:

- County of Los Angeles, erroneously named as Los Angeles County Department of Public Social Services, defendant in the district court, appellee in the Ninth Circuit, and petitioner here; and
- Trina Ray and Sasha Walker, individually and on behalf of all others similarly situated, plaintiffs and appellants below and respondents here.

There are no publicly held corporations involved in this proceeding.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Central District of California:

- *Ray, et al. v. County of Los Angeles*, United States District Court for the Central District of California, No. 2:17-cv-04239-PA-SK, order denying motion to dismiss entered September 28, 2017.
- *Ray, et al. v. County of Los Angeles*, United States Court of Appeals for the Ninth Circuit, Nos. 17-56581 & 18-55276, judgment entered August 22, 2019.
- *Los Angeles County v. Ray*, United States Supreme Court, No. 19-856, order denying petition for writ of certiorari entered February 24, 2020.

STATEMENT OF RELATED PROCEEDINGS
—Continued

- *Ray, et al. v. County of Los Angeles*, United States District Court for the Central District of California, No. 2:17-cv-04239-PA-SK, judgment entered October 27, 2020.
- *Ray, et al. v. County of Los Angeles*, United States Court of Appeals for the Ninth Circuit, No. 20-56245, judgment entered November 4, 2022.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

This case presents the latest example of the Ninth Circuit disregarding statutory text and this Court's precedent to extend the FLSA beyond recognition. Petitioner, the County of Los Angeles (the "County"), locally administers the State of California's in-home supportive services program (IHSS) which, by legislative design, makes the recipients—elderly, blind, or disabled individuals—the sole employers of the providers, with the State paying for the recipients' obligations as employers and the State responsible for administering and calculating the providers' compensation.

After the State delayed implementation of a DOL regulation that made IHSS providers eligible for overtime, Respondents sued the County as a joint employer under the FLSA. The Ninth Circuit recognized that the County was powerless to override the State's decision on overtime, but nonetheless held the County responsible for those wages as a joint employer. Unable to hold the State, the decisionmaker with sovereign immunity, responsible, and with no recourse against the indigent IHSS recipients, the court chose rough justice to make the County liable in a per curiam decision that has far-reaching and troubling implications that warrant this Court's intervention.

By imposing FLSA liability on the County—which indisputably had no say in the State's decision as to when to start paying overtime; no means to overrule the State's decision; and no way to prevent the liability

from recurring or even mitigate its damages—the court fashions a novel species of joint employer that is antithetical to both the FLSA's text and objectives: the captive local government entity. The court has passed off the obvious injustice of its ruling by directing the County to air its grievance in Sacramento and change California's Welfare and Institutions Code. But a directive from a federal appellate court to rewrite state law only makes the Ninth Circuit's error more concerning. "Because there are 'few things closer to the core of a state's political being and its sovereignty than the authority and right to define itself and its institutions in relation to each other,'" federal appellate courts "must act with particular care and hesitation" when "asked to override those distinctions the state has adopted." *Peppers v. Cobb County*, 835 F.3d 1289, 1299 (11th Cir. 2016) (citation omitted).

The Ninth Circuit did the opposite, casting aside the Welfare and Institutions Code's express provisions and California Supreme Court precedent—both of which specify that the County may *not* be deemed a joint employer of IHSS providers—in service of its view that the FLSA's remedial purposes must be served at all costs. This Court squarely rejected that premise in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018), and admonished the Ninth Circuit that it does not have license to interpret the FLSA, untethered from its text. The court's decision here shows it has not gotten the memo.

The starting point for any joint employment analysis must be the FLSA and its definition of employ—to

"suffer or permit to work." 29 U.S.C. § 203(g). Whether a putative employer has the power to prevent unlawful conditions is central to the analysis. It is also particularly important in the public entity context because states have the power to conscript local government entities to administer state programs, and they regularly do. Where a local government entity is simply complying with a legislative mandate, it is not acting as an employer under the FLSA. That the Ninth Circuit's analysis did not even factor in the County's inability to pay the overtime at issue demonstrates just how dysfunctional the legal framework for determining joint employment has become.

Deciding joint employment under the FLSA has bedeviled the Courts of Appeals for decades. The doctrine was enacted to prevent wage chiselers from avoiding compliance with overtime requirements by having their employees perform any overtime hours for a separate employer that was separate in name only. It was never intended to be used as a workaround for state sovereign immunity or to hold a local public entity liable for employer conduct it could not control.

This case presents the Court with an opportunity to tether the employer determination to the FLSA's text and purpose and resolve an important and recurring question that affects virtually all employers. This Court's intervention is further warranted to address the unique federalism concerns that arise with joint employment under the FLSA when public entities play an administrative role in a state program. Unlike private employers, the County does not have the option of

simply going out of business in the face of unsustainable liability that it cannot control or mitigate. Instead, municipal decision making is impacted across a broad spectrum of public services. This Court should grant certiorari to correct the Ninth Circuit's flawed interpretation of the joint employment doctrine and provide uniformity to this significant area of the law.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 52 F.4th 843 (9th Cir. 2022) and reproduced at App.1-32. The unpublished order denying rehearing en banc is reproduced at App.117-118. The district court's opinion is available at 2020 WL 5498060 and reproduced at App.33-58. The Ninth Circuit's August 22, 2019 opinion is reported at 935 F.3d 703 and reproduced at App.62-90. The order amending the opinion is reported at 939 F.3d 1062 and reproduced at App.59-61. The district court's September 28, 2017 opinion is available at 2017 WL 10436062 and reproduced at App.91-116.

JURISDICTION

This Court has jurisdiction to review the Ninth Circuit's November 4, 2022 opinion on writ of certiorari under 28 U.S.C. § 1254(1). The petition is timely filed within 90 days of entry of the December 20, 2022 denial of rehearing en banc.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the appendix to this petition. App.119-121.

STATEMENT OF THE CASE

A. Statutory Background

1. The Fair Labor Standards Act

Enacted during the Great Depression, the FLSA was intended to combat "wages too low to buy the bare necessities of life" and "long hours of work injurious to health." 29 U.S.C. § 202(a); S. REP. NO. 81-640, at 3 (1949). The Act established, *inter alia*, that individuals working more than forty hours in a "workweek" are entitled to time-and-one-half pay for those additional hours. 29 U.S.C. §§ 206, 207.

To "employ" under the FLSA is to "suffer or permit to work" and an employer "includes any person acting directly or indirectly" in the employer's interest. *Id.* § 203(d), (g). The suffer or permit standard derives from state child labor laws designed "to reach businesses that used middlemen to illegally hire and supervise children." *Antenor v. D & S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996). The test for accountability was whether the business owner had the means of knowing about the work and had power to prevent it. *See, e.g.*, *People ex rel. Price v. Sheffield Farms-Slawson Decker Co.*, 121 N.E. 474 (N.Y. 1918) (Cardozo, J.). While protective of workers, the FLSA was also intended to

protect "complying employers from the unfair wage competition of the noncomplying employers." *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 807-808 (D.C. Cir. 1983) (emphasis omitted) (quoting H.R. REP. NO. 75, at 28, 87th Cong., 1st Sess. (1961)).

The basis for liability under the "suffer or permit" definition of employment must factor in the failure to prevent unlawful conditions "while having the power to do so." *See, e.g., Salazar v. McDonald's Corp.*, 944 F.3d 1024, 1034 (9th Cir. 2019) (Thomas, J., dissenting) (citation omitted); *Martinez v. Combs*, 49 Cal. 4th 35, 70 (Cal. 2010) (in wage actions, "the basis of liability is the defendant's knowledge of and *failure to prevent* the work from occurring"; held: where a party lacks power to prevent plaintiffs from working, it cannot be liable for unpaid wages).

Instead, courts generally rely upon an "economic reality" standard to determine employer status. This standard derives from *Rutherford Food Corp. v. McComb*, which co-opted the analysis used to distinguish between an employee and independent contractor and directed courts to look at the "circumstances of the whole activity" to assess "economic realities." 331 U.S. 722, 727, 730 (1947). The Courts of Appeals have since been locked in perpetual disagreement as to which factors should apply to make this determination. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 135-39 (4th Cir. 2017) (describing "numerous multifactor balancing tests, none of which has achieved consensus support"); *see* § I, *post*.

a. Joint employment under the FLSA

Although the FLSA does not reference joint employment, the DOL has long recognized that two employers may be so interconnected that they function as a single, joint employer. A year after the FLSA's enactment, the Wage and Hour Division first addressed the concept in an interpretive bulletin, addressing would-be wage chiselers from avoiding the overtime provisions of the Act by having employees work overtime hours for a nominally "separate" employer. 86 Fed. Reg. at 40,939. The DOL subsequently published a rule, explaining that joint employment exists when employment by one employer is not "completely disassociated" from employment by the other employer. *Joint Employment Under the Fair Labor Standards Act of 1938*, 23 Fed. Reg. 5905 (Aug. 5, 1958) (formerly codified at 29 C.F.R. § 791.2); *see also* 86 Fed. Reg. at 40,939-40.

Decades later, the DOL published a Notice of Proposed Rulemaking (NPRM) with revisions to the joint employer rule. *Joint Employer Status Under the Fair Labor Standards Act*, 84 Fed. Reg. 14,043 (Apr. 9, 2019). The NPRM expressed concern that the DOL had not adequately explained what it means for two employers to be "completely disassociated." *Id.* at 14,044. The DOL also elected to revise the 1958 regulation, considering the competing and inconsistent tests for joint employer status adopted by the courts, to "promote fairness and predictability for organizations and employees." *Id.* at 14,047.

The DOL issued a final rule in 2020 (the "Joint Employer Rule"), explaining that application of the *Bonnette* factors—whether the putative employer: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records—"should determine joint employer status in most cases." *Joint Employer Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 2820, 2821 (Jan. 16, 2020). Seventeen states, including California and the District of Columbia, sued to vacate the Final Rule and enjoin its implementation. *New York v. Scalia*, 490 F. Supp. 3d 748, 765 (S.D.N.Y. 2020).

The district court partially vacated the Joint Employer Rule as arbitrary and capricious. 490 F. Supp. 3d at 757, 796. The following year, the DOL rescinded the rule as "inconsistent with the FLSA's text and purpose" and determined the *Bonnette* factors were not consonant with the "'suffer or permit' language of the statute." 86 Fed. Reg. at 40,943, 40,946. The DOL did not propose any regulatory guidance to replace the vacated rule. *Id.* at 40,954.

b. The DOL's regulations and guidance regarding joint employment for in-home domestic care workers

When the FLSA was first enacted, "domestic service" workers—like IHSS providers—were specifically excluded from the Act's coverage and were not eligible

for overtime pay. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 162 (2007). In 1974, Congress amended the FLSA to extend coverage to "domestic service" workers, but added a "companionship exemption" directing that workers who provided in-home services to elderly or infirm persons, as defined by the DOL, were still exempted from the FLSA's overtime requirements. 29 U.S.C. § 213(a)(15).

In 2013, the DOL published new regulations (the "Overtime Rule") that curtailed the scope of the companionship exemption and expanded the eligibility of domestic service workers entitled to overtime. *Application of the Fair Labor Standards Act to Domestic Service*, 78 Fed. Reg. 60,454 (Oct. 1, 2013) (to be codified at 29 C.F.R. § 552). Due to the complexities of implementing such a change across the "Federal and State systems" that provided a "significant portion" of home care services across the country, the DOL delayed implementation of the Overtime Rule until January 1, 2015. *Application of the Fair Labor Standards Act to Domestic Service; Announcement of Time-Limited Non-Enforcement Policy*, 79 Fed. Reg. 60,974 (Oct. 9, 2014) (to be codified at 29 C.F.R. § 552).

The DOL also issued an Administrator's Interpretation addressing how joint employment should apply in the home care context. *See* Administrator's Interpretation No. 2014-2 (June 19, 2014) ("Home Care AI"), 2014 WL 2816951. The guidance provided that states and statewide agencies could be employers under the FLSA, without acknowledging or assessing the impact of states' immunity under the Eleventh Amendment.

Id. at *6. The DOL rescinded the Home Care AI shortly before the Joint Employer Rule took effect. *See* https://go.usa.gov/xAyMG.

The district court vacated the Overtime Rule as arbitrary and capricious prior to its effective date, but the D.C. Circuit reversed and reinstated the rule. *Home Care Ass'n of Am. v. Weil*, 76 F. Supp. 3d 138, 148 (D.D.C. 2014) (*Weil I*), *rev'd*, 799 F.3d 1084, 1087 (D.C. Cir. 2015) (*Weil II*). Following the D.C. Circuit's reversal, the DOL issued guidance stating that it would not begin enforcing the Overtime Rule until November 12, 2015. App.6.

c. The FLSA and public entities

The FLSA, as originally enacted, specifically excluded the States and their political subdivisions from its coverage. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 836 (1976). The Act was amended in 1966 and 1974 to cover most public employers. *Moreau v. Klevenhagen*, 508 U.S. 22, 25-26 (1993). Following the 1974 amendments, the Supreme Court initially held that Congress did not have the power to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Nat'l League of Cities*, 426 U.S. at 849, 852 (1976) (noting the degree to which the FLSA interferes with "traditional aspects of state sovereignty" is at its apex with the overtime requirements of the Act, as it "may substantially restructure" the ways in which "local governments have arranged their affairs").

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 554 (1985), changed course, holding a local public transit authority was subject to the FLSA's minimum wage and overtime requirements because there was nothing "destructive of state sovereignty" in such a requirement. Although the majority rejected the prospect of unwarranted federal encroachments on state authority as "horrible possibilities that never happen in the real world," Justice O'Connor's dissent had little trouble discerning them. *Id.* at 587 (O'Connor, J., dissenting) (citation omitted). To address this problem, Justice O'Connor proposed "weighing state autonomy as a factor," finding it "insufficient" to "ask only whether the same regulation would be valid if enforced against a private party." *Id.* at 588.

The pendulum partially swung back in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), when this Court held Congress lacked power under Article I to abrogate a State's sovereign immunity from suit in federal court. Applying that immunity to state court actions, *Alden v. Maine*, 527 U.S. 706, 712 (1999) held the Eleventh Amendment bars private actions against States for overtime claims under the FLSA. Following *Alden*, state employers are immune from private collective actions under the FLSA, but local government employers—unless they are acting as an arm of the state—are not. *Id.* at 756.

After *Garcia* was decided, Congress passed the Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (1985). *See Moreau*, 508 U.S. at 25-26. The Amendments reflected "a desire to apply

the FLSA to state and local government employers while at the same time making some of its requirements less burdensome given their unique situation." *Misewicz v. City of Memphis*, 771 F.3d 332, 338 (6th Cir. 2014). The DOL also promulgated regulations to ease the burden on local government employers by providing them greater flexibility in FLSA compliance than might be available to private employers, including for overtime. *Id.* at 338-39.

2. California's In-Home Supportive Services Program

"IHSS is a social welfare program that, through a combination of state and federal funding, provides in-home supportive care for aged, blind, and disabled persons" and is "specifically 'designed to avoid institutionalization of incapacitated persons.'" *Skidgel v. Cal. Unemployment Ins. Appeals Bd.*, 12 Cal. 5th 1, 11 (Cal. 2021) (citation omitted). "Almost every State has established such a program." *Harris v. Quinn*, 573 U.S. 616, 621 (2014) (state-run in-home services program is designed "to prevent the unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at a lesser cost to the State" (citation omitted)).

a. The respective roles of the State, counties, and recipients in the IHSS program

The California Department of Social Services ("State Social Services") administers the IHSS program in compliance with state and federal law and promulgates regulations to implement the relevant statutes. Cal. Welf. & Inst. Code §§ 12301(a), 12301.1(a); *Skidgel*, 12 Cal. 5th at 11. Counties administer the program locally on behalf of the State in accordance with state law and regulations and may select from the "authorized methods" to engage IHSS providers. *Skidgel*, 12 Cal. 5th at 11.

The County of Los Angeles uses the direct payment method for 170,000 IHSS providers who provide care to more than 200,000 recipients. App.5-6, 14-15. Under this method, the recipient is *the* employer: he or she has the power to hire and fire the IHSS provider, supervises the work, and sets the work schedule. Cal. Welf. & Inst. Code §§ 12300.4(d)(1)(A), 12301.6(c)(2)(B). Because the recipient cannot fulfill other traditional employer roles, State Social Services controls payroll and is responsible to "[c]alculate accurate wage and benefit deductions." *Id.* § 12317(b)(2). State Social Services is also responsible for all "rights, duties, and obligations" of the recipient as an employer, including unemployment compensation, disability benefits, and workers' compensation. *Id.* § 12302.2(a)(1).

In determining eligibility for unemployment insurance coverage, the California Supreme Court has decided that neither the county nor the State may be deemed a joint employer of IHSS providers; by design, the recipient is the sole employer, even though public funds are used to pay the providers' wages. *Skidgel*, 12 Cal. 5th at 17 (statutory scheme forecloses the "view that a public entity is simultaneously an employer"). The California Legislature amended the Welfare and Institutions Code in *response* to "courts and enforcement agencies holding counties liable as 'employers'" of IHSS providers, with the express legislative intent that counties should *not* be deemed employers because that inured to the State's benefit, compared to other, more costly options that counties would be forced to pursue if they were considered employers. *Id.* at 17-18.

Thus, counties have a narrowly defined, strictly administrative role in the IHSS program. The State delegates to the counties the day-to-day administrative tasks, such as assisting recipients with initial onboarding and collecting recipient and provider information and uploading it to the State's record-keeping database. Cal. Welf. & Inst. Code §§ 12301.1(b), 12301.15-12301.17, 12301.24. As part of a county's onboarding duties, a social worker performs an initial in-home assessment of the recipient's needs and determines how many service hours the recipient is eligible to receive based upon the State's guidelines. *Id.* §§ 12300, 12300.4(d)(3)(C), 12301.1, 12301.2(b).

Counties also must act as or establish a public authority that serves as the employer of record for providers for collective bargaining purposes and may provide other administrative services, such as criminal background checks.[1] *Id.* §§ 12301.6(c)(2)(A), 12301.8(a)(1), 12302.25(a). But the Welfare & Institutions Code specifies this role does not make counties "the employer of in-home supportive services personnel."[2] *Id.* §§ 12301.6(f)(1), 12301.8(a)(2).

Conscripted by the State in the role of local administrator, counties do not have the power to prevent unlawful wage and hour practices or to redress wrongdoing by IHSS providers:

- The decision to pay overtime—or not—in response to DOL regulations is made by State Social Services alone. *Id.* § 12317(b); All-County Letter No. 15-10 (Jan. 23, 2015) (halting implementation of overtime changes and directing counties to "continue to operate under the requirements and regulations for payment of wages" previously in effect).
- Counties "may terminate" an IHSS provider who violates the State Social Services' rules but exercises no discretion in this regard. Cal. Welf. & Inst. Code § 12300.4(b)(5). Under the rules, counties *must* terminate a provider who receives four violations according to State-designated guidelines.

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[1] Los Angeles elected to establish a public authority, the Personal Assistance Services Council. App.5.

[2] The FLSA likewise specifies that labor organizations are not employers. 29 U.S.C. § 203(d).

All-County Letter No. 16-01 (Jan. 7. 2016); All-County Letter No. 16-36 (Apr. 21, 2016). Even if a county suspects provider fraud, it has no power to terminate the IHSS provider. A county's only recourse is to make a referral to the State. Cal. Welf. & Inst. Code § 12305.82(d).

- Counties are forbidden from reducing recipient hours to pay increased wages. *Id.* § 12302.25(f); All-County Letter No. 00-68 (Sept. 20, 200), p. 5. The State must approve any wage increases negotiated by a county or public authority. Cal. Welf. & Inst. Code § 12306.1(a).

In recognition of the counties' narrow and conscripted role, the Legislature chose to insulate counties from liability arising from wage and hour practices. *Id.* § 12300.4(i) (expressly immunizing counties from "any liability resulting from implementation" of the statutory provision governing IHSS providers' wages, rates, and hours); *see Serv. Emps. Int'l Union v. County of Los Angeles*, 225 Cal. App. 3d 761, 772-73 (Cal. Ct. App. 1990) (county, acting "as the agent of the state," does not jointly employ IHSS providers).

The IHSS program is primarily funded with federal and state monies; but under legislative mandate, counties contribute 35 percent of the non-federal funding. Cal. Welf. & Inst. Code § 12306(a).[3] Any increase

[3] Since 1991, the State has allocated to the counties dedicated revenue streams to compensate them for almost their entire 35 percent share of non-federal IHSS funding. This includes revenue to counties from state-wide sales taxes, Cal. Welf. & Inst. Code § 17602, and state-wide vehicle license fees, *id.* § 17604.

in provider wages that is locally negotiated by a county-created public authority is paid with county-only funds. App.13, 65.

b. The State's implementation of the Final Rule

After *Weil I* vacated the Overtime Rule, State Social Services decided not to implement overtime payments for IHSS providers "'until further notice.'" App.3, 6. When *Weil II* reversed the district court's decision and reinstated the rule, the DOL announced it would not bring enforcement actions until November 2015. App.6. The State notified all counties that it would implement the Overtime Rule in February 2016, and began paying overtime wages to IHSS providers on February 1, 2016. App.6-7.

B. Factual Background And Procedural History

Respondents filed a putative collective action against the County seeking relief for unpaid overtime wages between January 1, 2015 and February 1, 2016. App.7. Respondents originally named, but then voluntarily dismissed, State Social Services as a defendant. App.68. More than 10,000 providers opted in as plaintiffs. App.7.

1. *Ray I*

The County moved to dismiss the complaint on Eleventh Amendment immunity grounds, and in the alternative, moved to strike all references to overtime wages allegedly earned before the mandate issued in *Weil II*. App.68-69. The district court held the County had no Eleventh Amendment immunity as an arm of the state but narrowed the putative collective period to extend from November 12, 2015, the effective date announced by the DOL, through January 31, 2016. App.69-70, 91-116.

The Ninth Circuit affirmed in part and reversed in part (*Ray I*). App.62-90. The court assumed without deciding that it was possible for a county to receive Eleventh Amendment immunity. App.73-74. The court also acknowledged the County "had no choice in the matter of the overtime wages" because the "State mandated the payment start date," which weighed in favor of immunity. App.77-78. But other factors—whether a money judgment would be satisfied out of state funds; the County's ability to sue or be sued; the County's power to take property in its own name; and the corporate status of the County—persuaded the court that the County was not an arm of the state. App.74-78.

The Ninth Circuit recognized the unfairness of the result—denying immunity to the County even though the State indisputably and solely controlled the wages at issue—but indicated "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.81. *Ray I* held the County to the Final Rule's original January 1, 2015 effective date, concluding the date was not impermissibly retroactive because the "State and its counties were well aware" an appellate court could reverse *Weil I*. App.83-89.

This Court denied the County's petition for certiorari on *Ray I* on February 4, 2020. *Los Angeles County v. Ray*, 140 S. Ct. 1124 (2020).

2. *Ray II*

Both parties moved for partial summary judgment on the issue of whether the County was an employer of IHSS providers under the FLSA. App.8.

The district court granted summary judgment in the County's favor. App.33-58. The court used *Bonnette*, which was decided in 1983—*before* this Court's decisions in *Garcia* and *Alden*—as the starting point. App.40-42; *Bonnette*, 704 F.2d at 1470 (the State of California and three of its counties, combined, were joint employers under an earlier iteration of the IHSS program).

Applying the *Bonnette* factors, the district court weighed the significant changes to the IHSS program and the distinct context presented to conclude the County was not an employer under the FLSA. App.42-57. The court considered that: (1) the County had no power, absent State authority, to hire or fire IHSS providers; (2) the IHSS recipients controlled the providers'

work schedules and conditions of employment; (3) the County's "minor role in supporting IHSS providers in adjusting wage rates," "subject to State approval," did not demonstrate control over the rate and method of payment; and (4) the requirement that the County "maintain certain records as part of its quality control function" could not be equated with maintaining employment records. *Id.* The district court also denied summary judgment to Respondents on the issue of liquidated damages and ruled a two-year statute of limitation, rather than the three-year period for willful violations, applied. App.7-8.

In a divided, per curiam opinion, the Ninth Circuit affirmed in part and reversed in part. App.1-32. The court concluded the County should be deemed a joint employer under the FLSA. App.17. But the majority determined it was an issue of fact whether the County acted in "good faith" when it failed to pay overtime wages, as a defense to liquidated damages, and affirmed the two-year limitation period applied. App.17-20. Judge Berzon issued a separate opinion, concurring and dissenting in part. App.21-32.

Relying on the concept that "'joint employment should be defined expansively under the FLSA,'" the majority doubled down on *Bonnette*'s "analysis and result," notwithstanding the substantial differences in the IHSS program since 1983 and the intervening sea change in this Court's sovereign immunity jurisprudence. App.9-10. The court based its conclusion on the County's purported "economic and structural control over the employment relationship," considering that it

contributed funding to the IHSS program; negotiated providers' wages in its capacity as a public authority; authorized the tasks and service hours that recipients were entitled to receive in its onboarding role; provided orientation and training materials to providers; and maintained some provider records, including a copy of the providers' identification and social security cards. App.11-17.

Because the County had "no ability to pay overtime wages" and "the only reason that the County failed to pay the required overtime wages sooner" was "because the State controlled the purse strings," the majority affirmed the district court's rulings in the County's favor on the issues of willfulness and liquidated damages. App.18, 20.

Judge Berzon concurred that the County was a "joint employer" within the meaning of the FLSA but disagreed on the issue of liquidated damages and willfulness. App.21-32. Even though the County had "'no discretion'" to pay the overtime wages, Judge Berzon asserted the FLSA compelled liability for liquidated damages because to hold otherwise would "risk undermining the statute's remedial purposes." App.29-30.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Reflects The Courts Of Appeals' Persistent Confusion Regarding The Scope Of Joint Employment And Squarely Conflicts With Decisions From The Second, Sixth, Seventh, And Eleventh Circuits

The Ninth Circuit's decision is profoundly wrong. Aside from summarily reciting the FLSA's "suffer or permit" definition of employ once at the outset, the court never returned to, let alone construed, the relevant statutory language. The court instead improperly relied on *Bonnette*'s multi-factor test and holding.

This was a mistake. The DOL had just rescinded its Joint Employer Rule, concluding the *Bonnette* factors, and their focus on control, were inconsistent with the Act's "suffer or permit" definition of employ. 86 Fed. Reg. at 40,946-47. Other Courts of Appeals have widely criticized *Bonnette* as the "genesis of the confusion over the joint employment doctrine's application," *Salinas*, 848 F.3d at 135, and recognized that, as applied to a public entity, it "would be foolhardy" to suggest *Bonnette* set forth the "*only* relevant factors, or even the most important." *Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr.*, 536 F.3d 640, 644 (7th Cir. 2008). And the Ninth Circuit itself has recognized that the *Bonnette* analysis is, at best, incomplete. *Moreau v. Air France*, 356 F.3d 942, 952-53 (9th Cir. 2004) (applying eight additional factors to determine joint employment).

In this disorder, the court rubberstamped *Bonnette*'s substantive holding—which also concerned joint employment for the IHSS program. But *Bonnette* was decided before *Alden*; and so its conclusion that the state and the counties, collectively, held the requisite power indicating employer status is largely irrelevant to the very different question of whether the County may be held liable, along with the IHSS recipients, as a joint employer under the FLSA. The IHSS program also significantly changed after *Bonnette*. Among other changes, the California Legislature amended the IHSS statutes to further divest counties of any meaningful power over providers by prohibiting them from hiring, firing, or supervising providers. Cal. Welf. & Inst. Code §§ 12301.6(c)(1), 12302.5(b).

The Ninth Circuit applied the wrong analysis and reached the wrong result. But this is not the only, or even the primary, reason for this Court's review. The court's errors have far deeper roots that require this Court's intervention, dating back to *Rutherford*'s judicial creation of the amorphous "economic reality" standard, which is not tied to the FLSA's definitions of employ, employer, or employee. The Courts of Appeals have been locked in disagreement ever since as to what factors should inform "economic reality," with many courts failing to even reference, let alone tie the relevant statutory definitions to, their analyses, in favor of a nebulous standard that is not capable of reasoned application.

The panoply of conflicting circuit court tests show just how broken the economic reality test has become:

- The First, Third, and Fifth Circuits have adopted the *Bonnette* factors, which focus on the putative employer's exercise of control over the employee, with caveats. *See Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468-69 (3d Cir. 2012) (courts should consider all relevant evidence); *Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir. 2014) (an individual need not establish all four factors).

- The Second and Eleventh Circuits have determined the *Bonnette* factors are too narrowly focused on direct control and have articulated additional factors to assess employees' economic dependence. *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 72, 75-76 (2d Cir. 2003) (giving "content to the broad 'suffer or permit' language in the [FLSA]" by considering "functional control" over workers); *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1178-81 (11th Cir. 2012) (applying eight-factor test).

- The Fourth Circuit does not use the economic reality test and instead assesses six factors to decide the scope and allocation of power between two putative joint employers and whether they are "completely disassociated" with respect to the worker. *Salinas*, 848 F.3d at 141-42.

- Other courts take a mix and match approach. Some apply joint employer tests under the NLRA or Title VII, while others apply an independent contractor analysis, apply DOL regulations

directly without a factor-based test, or create their own tests.[4]

As the DOL recognized when it proposed the Joint Employer Rule, "the greater the number of factors in a multi-factor test, the more complex and difficult the analysis may be in any given case, and the greater the likelihood of inconsistent results in other similar cases." 85 Fed. Reg. at 2831.

This case is exemplary. The Ninth Circuit applied a squishy, multi-factor standard to impose expansive liability for conduct that the County indisputably did not control and was, in fact, statutorily *prohibited* from controlling. Given this absurdity, it should be entirely unsurprising other courts, faced with similar circumstances, have come to the opposite conclusion.

Godlewska v. HDA, 916 F. Supp. 2d 246, 251 (E.D.N.Y. 2013), *aff'd*, 561 F. App'x 108 (2d Cir. 2014), evaluated the New York corollary of the IHSS program, under which the state delegated the administration of personal care services to local government entities, including New York City and its Human Resources Administration (collectively, the "City"). State regulations

[4] *See, e.g., Keeton v. Time Warner Cable Inc.*, 2011 WL 2618926, at *3 (S.D. Ohio July 1, 2011) (applying NLRA joint employment test); *Bacon v. Subway Sandwiches & Salads LLC*, 2015 WL 729632, at *4 (E.D. Tenn. Feb. 19, 2015) (applying Title VII joint employment test); *Matrai v. DirecTV, LLC*, 168 F. Supp. 3d 1347, 1355 (D. Kan. 2016) (independent contractor analysis); *Brown v. Creative Rests., Inc.*, 2013 WL 11043343, at *3-4 (W.D. Tenn. Feb. 19, 2013) (applying DOL regulations); *Sutton v. Cmty. Health Sys., Inc.*, 2017 WL 3611757, at *5-6 (W.D. Tenn. Aug. 22, 2017) (devising its own test).

required the City to use a state-approved contract with home health care agencies that could only be changed with the state's permission and which specified the City was not an employer of the providers. *Id.* at 251-52. Even though the City determined the specific services and number of hours that recipients were entitled to and undertook quality control measures to ensure compliance with the State's regulations, it was not deemed an employer under the FLSA. *Id.* at 259-261, 265 (City's administrative role to ensure "quality service" and compliance "with legal requirements" "stemmed from the 'nature of the[] business' of providing heavily regulated, government-funded health services to patients in their homes—not from the nature of any employment relationship" between the City and providers (alteration in original) (citation omitted)).

Courts in the Sixth, Seventh, and Eleventh Circuits have similarly determined that a municipal entity's performance of administrative tasks does not transform it into a "joint employer." *See Moldenhauer*, 536 F.3d at 645-46 (city and county were not joint employers with non-profit corporation providing 911 services despite their provision of funding, payroll, workers' compensation, and retirement benefits, because they did not exercise any control over employee and there was no evidence the non-profit was created to evade the law);[5] *Rhea v. W. Tenn. Violent Crime & Drug Task Force*, 2018 WL 7272062, at *5 (W.D. Tenn.

[5] *Moldenhauer*, 536 F.3d at 644, addresses the Family Medical Leave Act but used the FLSA's joint-employer framework, which "mirrors that in the FMLA."

Dec. 12, 2018) (county's administration of payroll and benefits, maintenance of plaintiff's records, issuance of employee identification number, and plaintiff's participation in county pension plan did not support joint employer liability under the FLSA, where county only had administrative control over state task force); *Krage v. Macon-Bibb County*, 2021 WL 5814274, at *5-7 (M.D. Ga. Dec. 7, 2021) (county's administration of payroll, guidance on pay rates, maintenance of employment records, and provision of benefits and pension plans for sheriff did not make it a joint employer under the FLSA because county's duties were "best characterized as administrative functions" that the sheriff "delegated to the County to avoid the duplication of resources"), *aff'd*, 2022 WL 16707109 (11th Cir. 2022); *Spears v. Choctaw Cty. Comm'n*, 2009 WL 2365188, at *10-12 (S.D. Ala. July 30, 2009) (county commission's setting of the sheriff's budget, handling payroll and benefits, determining the rate and method of payment, and maintaining employment records were insufficient evidence of joint employment under the FLSA, characterizing functions as administrative).

II. The Ninth Circuit's Decision Misconstrues The FLSA's Definition Of Employ And Ignores The Unique Federalism Concerns Presented When Local Public Entities Are Conscripted By The State To Administer State Programs

The County is not a business, nor does it have any ownership interest in the IHSS program. And while

the FLSA can apply to local government entities, it does not apply in the same way. Congress chose to amend the Act in response to *Garcia* to make the FLSA's requirements less burdensome for local government employers "given their unique situation." *Misewicz*, 771 F.3d at 338-39. Among those unique aspects is states' use of their political subdivisions, including counties, to carry out their programs. The joint employer doctrine must work differently in this context than it does for private enterprise, given states' sovereign immunity and the deference that is owed to states' policy choices.

California's Welfare and Institutions Code precludes the County from being considered a joint employer with the IHSS recipients. This reflects the Legislature's deliberate policy choices in response to courts holding counties liable as the employer of IHSS providers. It also saved the state between $80 and $116 million per year (in 1970s dollars) to categorically exempt counties, as compared to the other, more expensive care delivery methods—such as engaging contract providers and hiring IHSS providers as county civil service employees—that counties would be forced to pursue if they were deemed employers. *Skidgel*, 12 Cal. 5th at 17-18. As the California Supreme Court explained, the Welfare and Institutions Code's statutory scheme was intended to "foreclose" the "view that a public entity" is an employer of IHSS providers. *Id.* at 17.

The Ninth Circuit did not weigh these deliberate choices reflected in the Welfare and Institutions Code

in its analysis. The court also dismissed the undisputed fact that the County had no power to prevent the failure to pay overtime as irrelevant, even though it should have been outcome determinative. The entire purpose of the "suffer or permit" standard to determine employer status is to prevent the improper evasion of liability and incentivize businesses with the means to prevent unlawful work conditions to assert their power to do so. But where an entity entirely lacks this power, the incentives are not just misaligned, they are wholly absent. There is, thus, no intelligible basis to impose liability. This Court should determine that the power to prevent unlawful work conditions is a bright line that delimits joint employer liability under the FLSA.

As this Court stated in *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004), federal legislation that threatens to "trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." Joint employment for public entities under the FLSA must be interpreted considering states' sovereignty to design their own institutions and programs. This case demonstrates that federal encroachments on state authority via the FLSA are not "horrible possibilities that never happen in the real world." *Garcia*, 469 U.S. at 556 (citation omitted). It does happen. It has here.

Paying domestic care workers overtime is a legitimate end.[6] But the Ninth Circuit erred when it ran roughshod over California's statutory scheme and ignored the textual foundation of the FLSA to make the County liable. As Justice O'Connor noted in her dissent in *Garcia*, "[i]t is not enough that the 'end be legitimate.'" *Garcia*, 469 U.S. at 585 (O'Connor, J., dissenting). The "means by which national power is exercised must take into account concerns for state autonomy." *Id.* at 585-86. The Ninth Circuit disregarded this fundamental tenet. State sovereign interests must be weighed as a "factor in the balance" in determining whether local government entities qualify as joint employers under the FLSA. *Id.* at 588.

III. The Question Presented Is Exceptionally Important And Warrants This Court's Intervention

The question presented is exceptionally important and warrants this Court's intervention for several reasons.

First, the lack of a principled standard for determining joint employment under the Act creates confusion in the law that has far-reaching consequences for all employers. This Court has not hesitated to intervene when, as here, an erroneous lower-court decision allows a novel theory of FLSA liability that leads to

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[6] It is also a legitimate end that the DOL had the power to vindicate in an administrative action against the State. 29 U.S.C. §§ 216(e)(4), 217.

an "unfair surprise" for employers. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (rejecting employees' claim for overtime wages—which would "impose potentially massive liability" on the employer for conduct occurring before the agency's interpretation was announced—because doing so would "seriously undermine the principle" that regulated employers are entitled to fair warning of the prohibited conduct); *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 32 (2014) (noting judicial decisions broadly interpreting the FLSA in contravention of established customs and practices "creat[ed] wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers" (citation omitted)); *Encino Motorcars*, 138 S. Ct. at 1138 (rejecting Ninth Circuit's interpretation of the FLSA that disregarded the statutory text and would impose substantial unexpected liability on employers). The decision below saddles the County with administering a state program under legislative mandate, producing precisely the kind of unfair surprise against which this Court's FLSA decisions have long warned.

Second, this Court's intervention is equally imperative because the Ninth Circuit's decision interferes with a state's legislative scheme. This Court must provide lower courts with guidance on how joint employment under the FLSA works where a local government entity's non-discretionary role is established by state legislative mandate.

California's Welfare and Institutions Code established the IHSS program in an iterative process over

decades to address the particular needs, circumstances, and budgetary constraints of recipients, providers, the state, and the counties. *Skidgel*, 12 Cal. 5th at 16-18. The Ninth Circuit's opinion upends that statutory scheme. The court's directive, that the County should lobby the state legislature to change the law, and its assumption, expressed multiple times during oral argument, that the County should obtain reimbursement from the State, offend state sovereignty.[7] App.81. Given the complex interplay of state and local government and the crucial importance of the IHSS program to hundreds of thousands of individuals to obtain vital services, it is indefensible that the Ninth Circuit failed to consider the principles of comity in its application of the FLSA.

Third, the stakes are incredibly high from a human perspective. Because the IHSS program could not function without the counties taking on the administrative role they perform, the Legislature purposely exempted counties from employer status to protect the viability of the program and state and county coffers. IHSS is a massive program by any measure and the largest publicly-funded personal care program in the country. Even with the federal government paying more than half the cost, the governor's budget in 2022-23 included $18.5 billion for the approximately 600,000 aged, blind, and disabled Californians who

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[7] Oral Argument at 19:20-19:50, 36:43-37:01, *Ray v. L.A. Cty. Dep't of Pub. Soc. Servs.*, 52 F.4th 843 (9th Cir. 2022) (No. 20-56245), [https://www.ca9.uscourts.gov/media/video/?20211118/20-56245/].

obtain IHSS services for tasks such as bathing, dressing, housework, and meal preparation, enabling these individuals to remain safely in their own homes and communities.[8] The needs of this highly vulnerable population are also projected to continue to grow significantly, with the long-term care sector adding more jobs than any other occupation in the national economy.[9]

Fourth, and finally, if left unaddressed, the Ninth Circuit's decision has broad, unintended consequences. The County—with over 115,000 employees[10]—now has an additional 170,000 employees for purposes of the FLSA. An uptick in FLSA claims against counties for work conditions they cannot mitigate or control is a given. The decision also opens the County to liability under other federal laws, which have nearly identical provisions defining employer and employee. *See, e.g.*, Home Care AI, 2014 WL 2816951, at *6 ("In circumstances in which public entities are joint employers, they must also consider their obligations under other federal laws, including the Americans with Disabilities

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[8] Legislative Analyst's Office, *The 2022-23 Budget: In-Home Supportive Services*, Feb. 2022, at 1, https://lao.ca.gov/reports/2022/4512/IHSS-020222.pdf.

[9] Stephen Campbell et al., *PHI: Caring for the Future: The Power and Potential of America's Direct Care Workforce*, Jan. 12, 2021, at 18, https://www.phinational.org/caringforthefuture/.

[10] County of Los Angeles, *DHR Workforce Demographics (Dataset)* (Aug. 10, 2022), https://data.lacounty.gov/datasets/lacounty::dhr-county-of-los-angeles-workforce-demographics-dataset/explore?filters=eyJFTVBMT1lFRV9DT1VOVCI6WzEsMzk1M119&showTable=true.

Act (ADA), 42 U.S.C. § 12101 *et seq.*"); *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793, 796 (2d Cir. 1986) (the FLSA, Title VII, and the ADEA "carry nearly identical provisions defining 'employer' and 'employee'"; "cases construing the definitional provisions of one are persuasive authority when interpreting the others"), *abrogated on other grounds by Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003).

This case is an excellent vehicle for the Court to present guidance on these exceptionally important issues. The core legal issue—the scope of joint employment under the FLSA for local government entities acting under state mandate—is cleanly presented. The relevant facts are undisputed, and there are no extraneous issues to prevent the Court from decisively resolving the question presented. It is also outcome determinative: If the County is not an employer under the FLSA, this case is over. There is no reason for the Court to delay review. Certiorari is warranted here and now.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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