No. 22-918

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**

**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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REPLY BRIEF

Respondents urge this Court to ignore a fundamental question of FLSA jurisprudence that they concede has long divided circuit courts and broadly impacts employers around the country. Their rationale for denying review—that there is no need to clarify the law because courts have long mixed and matched any combination of factors they want to decide joint employer status—should come as cold comfort to this Court. It only underscores the joint employment doctrine has no rhyme or reason.

After decades, the Courts of Appeals cannot reach consensus on a coherent standard. The DOL tried and failed to provide regulatory guidance, then walked away. The unfortunate upshot is public and private employers are left to protracted litigation, where the question of joint employment ends up turning more on geography and judicial idiosyncrasy than a reasoned application of the law.

This is precisely the type of situation where this Court's review is both warranted and needed. It is even more important where, as here, the issue presented—the scope of joint employment under the FLSA for local government entities carrying out a non-discretionary administrative role under state legislative mandate—concerns the deference owed to a sovereign state's statutory scheme. If the Eleventh Amendment is to have the force and meaning intended by this Court's jurisprudence, lower federal appellate courts must weigh state autonomy and the states' use of local government

entities to carry out state legislative schemes in assessing joint employer liability.

This Court should grant review.

ARGUMENT

I. RESPONDENTS FAIL TO REFUTE THE ACKNOWLEDGED CIRCUIT SPLIT

Rather than meaningfully confront the circuit courts' conflicting approaches to the FLSA's joint employment doctrine, Respondents insist there is no meaningful disagreement in the law because the factors articulated in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983) are "non-exhaustive," and any other factor may be included in a fact-intensive analysis of the "totality-of-the-circumstances." (Opp. 9, 12 [characterizing contradictory multi-factor tests as adding "nuance" to the governing *Bonnette* standard].) That is not a legal standard capable of rational application. It is barely managed chaos that all but guarantees arbitrary and unpredictable results and calls for this Court's intervention.[1]

[1] Respondents cite Fourth, Sixth, and Seventh Circuit Title VII and ADA decisions as supporting the ubiquity of the *Bonnette* standard, even though they argue elsewhere in the Opposition that joint employment cases arising under other statutes are irrelevant. (Opp. 10, 12.) None of those cases even cite *Bonnette*. But even if they did, other decisions from the same circuits applying different multi-factor tests, cited in the Petition, only demonstrate disarray in the law. (Pet. 22-27 (collecting cases).)

Respondents know they benefit from this confusion in the law. When it is always a toss-up whether a defendant may be deemed a joint employer under an excessively malleable and essentially meaningless legal standard—and there are statutory attorneys' fees and liquidated damages under the FLSA on the line—plaintiffs have every motivation to exploit the risks of litigation to their advantage. FLSA cases have mushroomed as a result. In 2022 alone, plaintiffs filed 4,311 FLSA actions, comprising more than half of all federal question employment cases initiated. *See* Admin. Office of U.S. Courts, Fed. Judicial Caseload Statistics, tbl. C-2 (2022); Justia Dockets & Filings (dockets.justia.com). Joint employment questions frequently arise in these cases—with scores of district court decisions addressing the issue each year.[2]

Respondents attempt to minimize the circuit split, painting *Bonnette* as a beacon that has guided federal courts and the DOL alike. (Opp. 1, 10-11.) The effort is misguided. Many Courts of Appeals have described *Bonnette* as either wrong or the source of confusion over the joint employment doctrine. *See*, *e.g.*, *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 135, 137 (4th Cir. 2017) ("genesis of the confusion over the joint employment doctrine's application" stems from *Bonnette*, which "incorrectly frame[s] the joint employment inquiry"); *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 69 (2d Cir. 2003) (*Bonnette* test is "unduly narrow" and cannot be reconciled with " 'suffer or permit' language"

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[2] A Westlaw search of district court decisions in 2022 revealed 161 decisions addressing joint employment under the FLSA.

in the FLSA). Even the Ninth Circuit has discarded the *Bonnette* test as too "narrow," making the court's error in applying it here all the more apparent. *Moreau v. Air France*, 356 F.3d 942, 950, 953 (9th Cir. 2004) (analyzing 13 factors). Others have noted the essential limits of *Bonnette* and its failure to address the "more fundamental" threshold question of whether a plaintiff may "plausibly be said to be 'employed' in the relevant sense at all." *E.g.*, *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992).

Just as *Bonnette* "primarily shed[s] light on just one boundary of the definition of 'employee,'" it does not address the fundamental question of what it means to be an employer under the FLSA. 974 F.2d at 810. That question also is not an easy one to answer. The joint employment standard has been opaque from the start. The FLSA "nowhere defines 'employer' in the first instance," and its definitions of "'employer' and 'employee' are 'circular or vacuous.'" *New York v. Scalia*, 490 F. Supp. 3d 748, 780 (S.D.N.Y. 2020) (citations omitted); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947) (FLSA has "no definition that solves problems as to the limits of the employer-employee relationship under the Act"). These muddy waters turn turbulent because the Courts of Appeals sidestep the statutory language of the FLSA altogether in favor of a nebulous "economic realities" standard, co-opted from inapposite 1940s authority distinguishing employees and independent contractors. *Rutherford*, 331 U.S. at 727, 730 (citation omitted).

The DOL has only made things worse, by enacting and then a year later rescinding, a Joint Employer Rule. *See Joint Employer Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 2820, 2823 (Jan. 16, 2020) (noting the "variety of multi-factor tests to determine joint employer status" used in the circuit courts, "have resulted in inconsistent treatment of similar worker situations, uncertainty for organizations, and increased compliance and litigation costs"); *Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule*, 86 Fed. Reg. 40,939, 40,947 (July 30, 2021) (rejecting *Bonnette* factors as "not the most appropriate standard," because they run contrary to Congress's rejection of the "common law control standard for employment" in enacting the FLSA, but declining to articulate a new standard).

Where, as here, a federal agency has essentially abdicated its role and failed to resolve the ambiguities of the joint employer doctrine over many years, there is no authoritative policy to defer to and every reason for this Court to intervene.

II. RESPONDENTS FAIL TO IDENTIFY ANY VEHICLE PROBLEM

Respondents do not and cannot dispute that the question presented was squarely pressed and passed upon below, was resolved on undisputed facts, and will be legally dispositive here. (Pet. 34.) Given all that, their vehicle objection—that "the outcome would be

the same" under any of the circuits' conflicting joint employer tests—is makeweight.

The Petition identified cases in the Second, Sixth, Seventh, and Eleventh Circuits rejecting that a local government entity's performance of administrative tasks made it a joint employer under the FLSA. (Pet. 25-27.) Respondents give those cases the back of the hand, characterizing them as factually inapposite. (Opp. 13.) But that is intellectually dishonest. The local government entities in those cases were far more entwined than the County is in administering the IHSS program but were not found to be joint employers under the FLSA. (Pet. 12-17, 25-27, citing *Godlewska v. HDA*, 916 F. Supp. 2d 246, 259-61, 265 (E.D.N.Y. 2013) (city's administration of personal care services did not make it an employer of the providers under the FLSA, even though it determined recipient hours and undertook quality control measures), *aff'd*, 561 F. App'x 108 (2d Cir. 2014); *Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr.*, 536 F.3d 640, 645-46 (7th Cir. 2008) (city and county provided funding, payroll, workers' compensation, and retirement benefits); *Rhea v. W. Tenn. Violent Crime & Drug Task Force*, 2018 WL 7272062, at *5 (W.D. Tenn. Dec. 12, 2018) (county administered payroll and benefits, and plaintiff participated in county pension plan); *Krage v. Macon-Bibb County*, 2021 WL 5814274, at *5-7 (M.D. Ga. Dec. 7, 2021) (county administered payroll, gave guidance on pay rates, maintained employee records, and provided benefits and pension plans), *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 set budget, handled payroll and benefits, determined rate and method of payment, and maintained employment records).)

The different tests for determining joint employment under the FLSA were a driving factor in those disparate outcomes. *See, e.g.*, *Godlewska*, 916 F. Supp. 2d at 262-65 (applying six "functional control" factors to determine City "did not relate to plaintiffs as an employer"); *Moldenhauer*, 536 F.3d at 644 (limiting joint employer analysis to *Bonnette* factors would be "foolhardy")[3]; *Spears*, 2009 WL 2365188, at *6-12 (applying the Eleventh Circuit's "more involved test"; though four factors based on *Bonnette* were "evenly split," the "great weight" of other factors supported County Commission was not an employer under the FLSA); *Rhea*, 2018 WL 7272062, at *4-5 (in the absence of a Sixth Circuit test, cobbling together a joint employer standard based on "other contexts," analyzing seven factors). For the one case that applied a version of the *Bonnette* test, the diametrically opposite result only underscores how empty the standard has become and that it is not capable of consistent, reasoned application. *Krage*, 2021 WL 5814274, at *5-7.

More subtly, Respondents also suggest there is a vehicle problem by misconstruing the record. They argue *Bonnette* is directly on point and settled counties'

[3] Respondents ask the Court to ignore *Moldenhauer*, 536 F.3d at 642, because it arises under a "different statute" (Opp. 12 n.2); but the analysis remains relevant because the court used the FLSA joint employer standard.

joint employer status for IHSS providers more 40 years ago and that the only difference between now and then is that "payroll has been consolidated statewide." (Opp. 6, 18 [misstating that *Ray II* addresses "the *exact same* legal question in the *exact same program*"].) That is factually incorrect. As amicus explained below, the IHSS program was overhauled in 1992 and 1999, after *Bonnette* was decided. (Brief for California State Association of Counties ("CSAC") as Amicus Curiae In Support of Appellee, the County of Los Angeles (Nos. 81-4565, 82-4174).)

Among those changes, counties were slated with a labor organizing role (at combined State and counties' expense) to improve IHSS providers' wages and benefits. This was the State's chosen approach to address the FLSA's prerogative to maintain livable wage standards. (CSAC Br. at 15-16 ["policy goal" of mandatory collective bargaining was to correct "wage inadequacies" and "instability in the provider workforce," while maintaining "uniform standards developed by the State" and "the fundamental principle" of "recipient self-determination over providers"].)

Bonnette, 704 F.2d at 1470, decided the State and the counties, *acting together*, had sufficient power to qualify as employers. But that was *before* this Court decided in *Alden v. Maine*, 527 U.S. 706, 712, 756 (1999), that the Eleventh Amendment bars private actions against States under the FLSA. The question of whether counties may be deemed joint employers under the FLSA for their nondiscretionary administrative role—established by State legislative mandate—

is a fundamentally different question than was presented or decided by *Bonnette*.

Respondents liken the State to the "very bad actors that joint employment principles are meant to capture" and accuse California of legislating with the intent to "avoid FLSA obligations within the IHSS program." (Opp. 17-18.) But that makes no sense. There is not a shred of support for Respondents' accusation in the Welfare & Institutions Code's legislative history. The false assertion also ignores that the State, with Eleventh Amendment immunity, has no dog in the fight.

III. RESPONDENTS FAIL TO ADDRESS THE SUBSTANTIAL FEDERALISM CONCERNS RAISED IN THE PETITION

Perhaps the Opposition's most glaring deficit is its complete failure to confront or refute the substantial federalism concerns raised by the Ninth Circuit upending a state legislative scheme. Respondents obscure the Ninth Circuit's errors and their broad and pernicious impacts by twisting the County's issue presented as a request for special treatment. (Opp. 14 [Petition asks the Court "to craft a county-specific joint employment rule" for "the specific nuances of this case"].)

Respondents also predict a fictional parade of horribles that does not comport with reality. On the public employer side, they assert that if State sovereign interests figure into the joint employment analysis, states will have carte blanche to legislate "out of the FLSA"

and "strip millions of police officers, fire fighters, court employees, and other civil servants from federal employment protections." (Opp. 22.) They then prophesy that a principled joint employer standard will cause private companies to "evade compliance by contractually limiting the rights and responsibilities of each entity involved in an employment relationship." (*Id.*) Neither is correct, and both essentially miss the point of the County's Petition.

With Eleventh Amendment immunity, States have no need to legislate out of the FLSA, either for themselves or their political subdivisions. The County also is not arguing that the FLSA *never* applies to local government entity employees, nor is it advocating for the creation of a loophole that invites employee abuse. Rather, the Petition's far more modest proposition is that the FLSA joint employment inquiry, as applied to local government entities, must consider whether a state has conscripted a local government entity to carry out its legislative objectives. To put it another way, courts must "weigh[] state autonomy" as a factor in assessing joint employment, along the lines Justice O'Connor proposed long ago in her concurrence in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 588 (1985). Otherwise, federal courts—as happened here—can upend state legislative schemes in a way that is deeply destructive of state sovereignty.

Local government entities are situated in a meaningfully different way than private employers for purposes of the FLSA. Opposing certiorari in *Hall v. DIRECTV, LLC*, 846 F.3d 757 (4th Cir. 2017)—which

raised the joint employment circuit split under the FLSA in the private employer context a few years ago—respondent plaintiffs argued the specter of courts extending "FLSA liability to entities unable to exert influence over the entities that interact directly with the workers" was speculative and should not be concerning because jointly liable employers "can protect themselves through indemnification agreements, and by monitoring the wage payment practices of those to whom they delegate such responsibilities." (Opposition to Petition for Certiorari, *DIRECTV v. Hall* (No. 16-1449) at 29.)

This case demonstrates the fallacies in such a position when it comes to local government entities. The harm inherent in extending FLSA liability to the County, which indisputably could not control or influence the State's decision to delay payment of overtime to IHSS providers, is concrete here. And the County, unlike a private employer, has no ability to obtain indemnity or otherwise protect itself, given its conscripted and statutorily defined role. The FLSA does not countenance the machinations of wage chiselers. But it likewise was not designed to turn local government entities, carrying out their legislatively mandated role to administer important state programs for the public benefit, into sitting ducks.

At bottom, and for all their gilding the lily, Respondents do not refute any of the key aspects of the IHSS program that demonstrate the County should not be deemed a joint employer under the FLSA: (1) the County did not have the power to prevent unlawful

wage and hour practices, or avoid the overtime liability at issue; (2) State guidelines strictly govern the County's role, including the termination of IHSS providers and approval of wage increases; and (3) the Legislature deliberately insulated counties from liability arising from wage and hour practices by design because it inured to the State's benefit to do so. (Pet. 13-16.) By nonetheless finding the County liable as a joint employer under these facts, by mechanistic application of the *Bonnette* factors, the Ninth Circuit reveals the failure of FLSA jurisprudence to answer the fundamental threshold question of what it means to be an employer.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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