No. 23-

IN THE

Supreme Court of the United States

LANGSTON AUSTIN and ERNEST FULLER III,

Petitioners,

v.

GLYNN COUNTY, GEORGIA and E. NEAL JUMP,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER B. HALL
Counsel of Record
HALL & LAMPROS, LLP
300 Galleria Parkway, Suite 300
Atlanta, GA 30339
(404) 876-8100
chall@hallandlampros.com

Counsel for Petitioners

326134

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This case presents a clear conflict among the circuit courts regarding the interpretation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* The Fourth, Fifth, and Seventh Circuits hold that state officials can be "employers" under the FLSA and that they can therefore be liable in their individual capacity for violations of the FLSA. The Eleventh Circuit holds that state officials are never employers in their individual capacity under the FLSA and are thus immune from liability, regardless of what the officials did, or did not do.

The questions presented seek to resolve clear circuit splits relating to liability of public officials under the FLSA.

The questions presented are:

1. Whether state officials are subject to liability as employers in their individual capacity for violations of the FLSA.

2. Whether the Eleventh Amendment to the United States Constitution grants immunity to all state officials for liability in their individual capacity as employers under the FLSA; and if not, what is the Eleventh Amendment analysis the courts must apply.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Langston Austin and Ernest Fuller III.

Respondents are Glynn County, Georgia and E. Neal Jump.

RELATED PROCEEDINGS

United States District Court (S.D. Ga.):

Langston Austin and Ernest Fuller, III v. Glynn County, Georgia and E. Neal Jump., No. 220-073 (01/07/2021)

United States Court of Appeals (11th Cir.)

Langston Austin and Ernest Fuller, III v. Glynn County, Georgia and E. Neal Jump., No. 21-10162 (09/14/2023)

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JURISDICTION

The judgment of the court of appeals was entered on September 14, 2023. The deadline to file this petition is December 13, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FLSA are 29 U.S.C. § 203(d) and 29 U.S.C. § 216(b). (App., *infra* 29a-31a). The relevant provisions of the Family and Medical Leave Act ("FMLA") are 29 U.S.C. 2601 *et seq.* and 29 U.S.C. § 2611(4) (App., *infra* 32a-33a).

The Eleventh Amendment to the United States Constitution reads:

> 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.

U.S. Const. amend. XI.

STATEMENT

At issue is whether federal courts must adhere to the text of the FLSA's definition of "employer" when determining whether a state official sued in his individual capacity is an employer under the FLSA, and the extent of Eleventh Amendment immunity to such liability. The majority of circuit courts have held that courts must apply the FLSA's definition of "employer" to determine whether individual liability can be attached to a state official. Additionally, this Court's own opinion in *Hafer v. Melo*, 502 U.S. 21, 28 (1991), indicates that courts must apply textual analyses when evaluating individual liability under federal statutes. But the Eleventh Circuit has avoided any such textual analysis of the controlling FLSA statute, instead holding simply that state officials can never be individually liable as employers under the FLSA.

The FLSA provides that an "employer" must pay overtime wages to non-exempt employees for hours worked over 40 hours per week. In defining an "employer," the FLSA expressly provides that an individual working in the interest of the employer in relation to the employees is an "employer":

> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 203. Such an individual should, therefore, be individually liable for violations of the act. 29 U.S.C.

§ 203(d) (definition of employer); § 216(b) (employers liable for damages for violation of FLSA).

Petitioners Langston Austin and Ernest Fuller III filed this lawsuit seeking unpaid overtime under the FLSA. (District Court Doc. 1). Petitioners alleged in a first amended complaint that they worked for the Glynn County Sheriff's Office as non-exempt detention officers and were routinely denied the overtime wages required by the FLSA. (District Court Doc. 7 at ¶¶ 17, 18, 51). The first amended complaint named as defendants Glynn County, Georgia, and E. Neal Jump (sheriff of Glynn County) in his individual capacity because he acted individually in the interest of the sheriff's office, controlled many aspects of the Petitioners' employment including hours worked, and controlled decisions to not pay required overtime. (District Court Doc. 7 at ¶¶ 33-39) As such, Petitioners alleged Jump individually was Petitioners' employer under the FLSA.

Glynn County and Jump moved to dismiss on the grounds that (1) Glynn County was not the Petitioners' employer; and (2) Jump could not be individually liable under the FLSA pursuant to Eleventh Circuit precedent. (District Court Doc. 11).

Petitioners moved to file a second amended complaint that would add claims against Jump in his official capacity as sheriff. (District Court Doc. 13). The district court denied leave to file a second amended complaint on grounds of futility because Jump in his capacity as a state official was protected by the Eleventh Amendment from FLSA liability. (District Court Doc. 20).

The district court then dismissed the first amended complaint on the grounds that (1) the state office of sheriff – and not Glynn County – was the Petitioners' employer; and (2) Jump could not be liable in his individual capacity as an "employer" pursuant to Eleventh Circuit precedent, namely *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995), and *Wascura v. Carver*, 169 F.3d 683, 686 (11th Cir. 1999). *Austin v. Glynn Cnty., Georgia*, No. CV 220-073, 2021 WL 210850, at *2-5 (S.D. Ga. Jan. 7, 2021), *aff'd*, 80 F.4th 1342 (11th Cir. 2023).

The district court explicitly based its conclusions as to individual liability solely on Eleventh Circuit precedents, without applying the text of the FLSA, including its definition of "employer," to the Petitioners' allegations. *Austin*, 2021 WL 210850, at *4-5. The district court thus committed error.

Petitioners appealed the dismissal and denial of leave to file a second amended complaint. The Eleventh Circuit affirmed the district court, holding that (1) denial of leave to amend was proper because the Eleventh Amendment precluded liability against Jump in his official capacity; (2) Georgia's waiver of immunity for breach-of-contract claims did not waive its Eleventh Amendment immunity; and (3) Jump was not Petitioners' employer under the FLSA in his individual capacity and thus could not be liable under the FLSA. *Id.* at 1345-51. *Austin v. Glynn Cnty., Georgia*, 80 F.4th 1342, 1344-45 (11th Cir. 2023).

This petition seeks review only of the third holding: that Jump cannot be individually liable as an employer. In affirming the dismissal of individual claims against

Jump, the Eleventh Circuit failed to address the broad definition of employer under the FLSA. *Id.* at 1346-47. The Eleventh Circuit provided no analysis or reasoning for holding that Jump cannot be liable individually as Petitioners' employer. *Id.* The Eleventh Circuit instead relied solely on precedent and the conclusions of *Welch* and *Wascura*: "Our precedent holds that a sheriff acting in his individual capacity has 'no control over [the plaintiff's] employment and does not qualify as [the plaintiff's] employer.'" *Id.* at 1346. The Eleventh Circuit acknowledged its disagreement with other circuits but did not address the textual basis for other circuits' holdings:

> The Officers argue that other circuits disagree. So be it. Our precedent controls, and we remain impotent as a panel to deviate from it. *Wascura*, 169 F.3d at 687 ("[W]e are bound by the *Welch* decision regardless of whether we agree with it."); *Thompson v. Alabama*, 65 F.4th 1288, 1301 (11th Cir. 2023) ("Later panels must faithfully follow the first panel's ruling even when convinced the earlier panel is wrong." (citations and quotations omitted).

Id.

In *Welch*, the Eleventh Circuit held—also without considering the textual definition of "employer" provided by the FLSA—that a public official has no control or authority over employees in an individual capacity and thus cannot be liable under the FLSA. *Welch*, 57 F.3d at 1011. And in *Wascura*, the Eleventh Circuit merely re-stated the *Welch* holding and applied it to the FMLA:

> Thus, *Welch* establishes as the law of this circuit that a public official sued in his individual capacity is not an "employer" subject to individual liability under the FLSA. Because "employer" is defined the same way in the FMLA and FLSA, *Welch* controls this case.

Wascura, 169 F.3d at 686.

The Eleventh Circuit thus held that Jump cannot be individually liable as an employer without giving any consideration to Petitioners' allegations and the definition of employer under the FLSA. This appears to be a decision (though it is unclear) that the state official has Eleventh Amendment immunity without any analysis whatsoever as to the definition of "employer" under the FLSA, and without any analysis of the factors to be considered as to Eleventh Amendment immunity for individual conduct. The Eleventh Circuit – without analysis – concludes that *all* state officials (regardless of the facts of the case) are entitled to Eleventh Amendment immunity under the FLSA, regardless of whether the official individually satisfies the FLSA definition of employer. The holding leaves Petitioners without a remedy, and is contrary to holdings in the Fourth, Fifth, and Seventh Circuits. The holding also is inconsistent with this Court's holding in *Hafer v. Melo*, 502 U.S. at 28.

In *Hafer*, a Pennsylvania auditor general fired several employees of that office, and the employees sued the auditor general under §1983. The auditor general argued that state officials could not be held liable in their personal capacity for actions they took in their official capacity. *Hafer*, 502 U.S. at 27. The Supreme Court

explicitly rejected that view. *Id.* The Court also rejected the auditor general's argument that public officials could only be liable in their individual capacity if their actions were outside of official's authority or were not necessary to the performance of governmental functions. *Id.* at 28. In rejecting this view, the Court noted that it would give individual-capacity public officials absolute immunity for actions that were within their authority and necessary to the performance of governmental functions—a result that would be contrary to the Court's prior holdings and the language of §1983. *Id.*

Thus, the Supreme Court in *Hafer* explicitly rejected the notion that individual-capacity public official defendants are immune from suit for actions that are within their authority or are necessary to the performance of their government function. Although *Hafer* involved a §1983 claim, its rationale extends to the to individual-capacity FLSA claims.

In concluding that a sheriff can never be an employer under the FLSA when he acts in the interest of the sheriff's office with regard to employees, the Eleventh Circuit ignores the FLSA's definition of employer. While the Eleventh Circuit appears to base its conclusion on Eleventh Amendment immunity, it conducts none of the analysis that is required to reach such a conclusion. Moreover, it is not perfectly clear what conclusion such analysis should lead to, as the circuit courts do not uniformly apply Eleventh Amendment immunity principles to this issue. *See Luder v. Endicott*, 253 F.3d 1020, 1022 (7th Cir. 2001) (Posner, J.) (finding first that the state official was an employer in individual capacity, and then applying Eleventh Amendment immunity analysis);

Martin v. Wood, 772 F.3d 192, 195–96 (4th Cir. 2014) (same but applying a different Eleventh Amendment analysis than *Luder*).

The Eleventh Circuit thus avoided two required analytical steps: (1) does the individual conduct of the state official meet the definition of employer to impose liability under the FLSA; and (2) does Eleventh Amendment immunity apply based on the possible imposition of ultimate liability against the state. The Fourth and Seventh Circuits properly proceed by first determining whether individual liability exists under the FLSA. *Id.* Only then can they determine the applicability of the Eleventh Amendment. The Eleventh Circuit erred when it failed to apply the definition of employer found in the text of the FLSA to the Petitioners allegations, so as not to properly analyze the Eleventh Amendment immunity issue as to individual conduct.

REASONS FOR GRANTING THE PETITION

A. The Eleventh Circuit Court of Appeals Decision Conflicts with the Decisions of other United States Courts of Appeals on this Important Matter.

The Fourth, Fifth, and Seventh Circuits conflict with the Eleventh Circuit holding. In *Luder*, 253 F.3d at 1022, the Seventh Circuit squarely addressed the conflict, noting the Eleventh Circuit's holdings were at odds with the text of the FLSA and with Supreme Court precedent. The Seventh Circuit described *Welch* and *Wascura* as holding that "a public officer sued in his individual capacity cannot be an employer because it is only in his official capacity that he has authority over

the employees' terms of employment." *Id.* The Seventh Circuit went on to explain its disagreement:

> With respect, we think that this cannot be right, as it would imply that a police officer who used excessive force against a person he was arresting could not be sued in his individual capacity because it was only by virtue of his office that he had the authority to make the arrest. Power and authority are not synonyms. If the allegations of the complaint are true (as we must assume they are, given the posture of the case), the defendants had and exercised the raw power to deny the plaintiffs their rights under the FLSA. In any event, the distinction on which the Eleventh Circuit relied had been swept away by the Supreme Court in *Hafer v. Melo*, 502 U.S. 21, 28, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), which neither of the Eleventh Circuit cases cited.

Luder, 253 F.3d at 1022. *Luder* thus held that a state official can be individually liable as an employer under the FLSA.

The Fifth Circuit in *Stramaski v. Lawley*, 44 F.4th 318, 326 (5th Cir. 2022), and *Lee v. Coahoma Cnty.*, 937 F.2d 220, 226 (5th Cir. 1991), provided a textual analysis for individual liability under the FLSA and held that a state official can be liable in his individual capacity under the FLSA. The Fourth Circuit held the same in *Martin.* 772 F.3d at 195–96 (state official can be liable under the FLSA in individual capacity but requiring analysis of real party in interest); *see also*

MacIntyre v. Moore, 335 F.Supp.3d 402, 419-20 (W.D.N.Y. 2018) ("[A]n examination of *Wascura* indicates that the Eleventh Circuit failed to undertake a textual analysis of the FLSA, finding itself bound by principles set forth in prior precedent—principles that should no longer be considered good law in light of prevailing Supreme Court precedent.").

Another wrinkle of uncertainty applies to this issue of individual liability for state officials under the FLSA. The Seventh Circuit (in *Luder*) and Fourth Circuit (in *Martin*) examined – after properly finding the state official was an individual employer under the FLSA – whether the Eleventh Amendment immunity nevertheless attached to the individual actions of the "employer" state official.

The Seventh Circuit held that the state official was immune under the Eleventh Amendment from individual liability under the FLSA because the lawsuit was "nominally against state employees in their individual capacities that demonstrably has the identical effect as a suit against the state is." *Luder*, 253 F.3d at 1023. Key to the determination was that the *Luder* plaintiffs sought payment from the state. *Id.* at 1024.

The Fourth Circuit, in *Martin*, also examined Eleventh Amendment immunity after finding that the state official was an individual employer under the FLSA. The *Martin* court appeared to apply a different standard than *Luder*. The *Martin* court sought to identify the "real, substantial party in interest:"

> To identify the real, substantial party in interest, we thus examine *the substance* of the

> claims stated in the complaint, positing inquiries such as: (1) were the allegedly unlawful actions of the state officials "tied inextricably to their official duties," *Lizzi,* 255 F.3d at 136; (2) if the state officials had authorized the desired relief at the outset, would the burden have been borne by the State, *cf. Pennhurst,* 465 U.S. at 109 n. 7, 104 S.Ct. 900; (3) would a judgment against the state officials be "institutional and official in character," such that it would operate against the State, *id.* at 108, 104 S.Ct. 900; (4) were the actions of the state officials taken to further personal interests distinct from the State's interests, *id.*; and (5) were the state officials' actions *ultra vires, id.* at 111, 104 S.Ct. 900; *Lizzi,* 255 F.3d at 136.

Martin, 772 F.3d at 196. The *Martin* court determined that the state was the real party in interest, and held that Eleventh Amendment immunity applied to the state official as to his individual acts.

The Eleventh Circuit does not address the question of Eleventh Amendment immunity relating to the individual acts of the state official Jump. It is unclear (as shown by *Luder* and *Martin*) how such analysis should proceed. Because Petitioners in this case were paid by Glynn County (and not the state), it appears to be a case of no Eleventh Amendment immunity. (District Court Doc. 7 at ¶ 32) The primary issue here is whether courts must apply the FLSA definition of "employer" to the allegations in the complaint. As to this issue the Eleventh Circuit conflicts with the Fourth, Fifth, and Seventh Circuits and appears to contradict the reasoning of *Hafer.* Because Eleventh

Amendment immunity is so closely entwined with the issue, this Court also should provide guidance relating to potential Eleventh Amendment immunity relating to such individual acts of state officials that violate the FLSA.

B. There Is a Similar Circuit Split Relating to the FMLA.

There also is a circuit split relating to the almost identical issue under the FMLA. The FLSA and FMLA have very similar definitions of employer (*compare* Appendix 29a with 32a) and the Third, Fifth, and Eighth Circuits hold that public officials can be "employers" in their individual capacity under the FMLA. *Haybarger v. Lawrence Cty. Adult Prob. & Parole,* 667 F.3d 408, 417 (3d Cir. 2012) ("Because the FLSA explicitly provides that an employer includes 'any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency,' we agree that the FMLA similarly permits individual liability against supervisors at public agencies"); *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002) (permitting individual liability under the FMLA and noting that the same conclusion would apply to the FLSA).

The Eleventh and Sixth Circuits, however, do not permit individual liability under the FMLA. *Wascura*, 169 F.3d at 685 (public official cannot be liable in an individual capacity under the FMLA); *Mitchell v. Chapman*, 343 F.3d 811, 832 (6th Cir. 2003) (a public official cannot be an employer under the FMLA). There is thus a circuit split regarding the FMLA as well as the FLSA. The importance of these statutes' text and the reasoning of *Hafer* requires that this Court take up the

issue, resolve the circuit splits, and provide guidance to the courts.

C. The Application of *Hafer* to the FLSA and FMLA is Unclear.

The petition also should be granted because the relationship of *Hafer* to the FLSA and FMLA is unclear. When does individual liability attach under the FLSA and FMLA, and when does the Eleventh Amendment preclude individual liability? This Court should resolve the circuit split and provide guidance to the courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Christopher B. Hall
Counsel of Record
Hall & Lampros, LLP
300 Galleria Parkway, Suite 300
Atlanta, GA 30339
(404) 876-8100
chall@hallandlampros.com

Counsel for Petitioners

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED SEPTEMBER 14, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-10162

LANGSTON AUSTIN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, ERNEST FULLER, III, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

versus

GLYNN COUNTY, GEORGIA, E. NEAL JUMP, INDIVIDUALLY

Defendants-Appellees.

September 14, 2023, Filed

Appeal from the United States District Court
for the Southern District of Georgia.
D.C. Docket No. 2:20-cv-00073-LGW-BWC.

Before WILLIAM PRYOR, Chief Judge, MARCUS, Circuit

Judge, and MIZELLE,* District Judge.

MIZELLE, District Judge:

This appeal turns on whether Sheriff E. Neal Jump of Glynn County, Georgia, and other sheriffs like him, act as arms of the State of Georgia when making compensation decisions for their employees. Under our precedent, the answer is yes. Because Sheriff Jump is entitled to Eleventh Amendment immunity when performing that function, we affirm the district court's denial of leave to amend and subsequent dismissal of the amended complaint.

I. BACKGROUND

Langston Austin and Ernest Fuller III worked as detention officers for Glynn County under Sheriff Jump's supervision. Their duties included maintaining order in Glynn County jails and prisons, supervising inmate activities, inspecting facilities, searching inmates for contraband, reporting on inmate conduct, and escorting and transporting inmates. Although it is unclear from the record whether the Officers are formally deputy sheriffs, *see Manders v. Lee*, 338 F.3d 1304, 1311 n.14 (11th Cir. 2003) (en banc) (explaining that Georgia "[s]heriffs also may appoint persons to serve as jailers who are not deputy sheriffs"), it is undisputed that they are at minimum direct employees of Sheriff Jump, in his official capacity, akin to deputies.

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* Honorable Kathryn Kimball Mizelle, United States District Judge for the Middle District of Florida, sitting by designation.

The Officers brought a Fair Labor Standards Act (FLSA) collective action alleging that the County "illegally calculated [their] and other [d]etention [o]fficers' overtime wages." The County moved to dismiss for failure to state a claim. In response, the Officers amended their complaint to include Sheriff Jump in his individual capacity. The County and Sheriff Jump then moved to dismiss the amended complaint for lack of subject-matter jurisdiction and for failure to state a claim, arguing that neither defendant was the Officers' employer under the FLSA.

With our precedent against them about who qualified as an employer under the FLSA, the Officers moved for leave to file a second amended complaint to add Sheriff Jump, in his official capacity, as a defendant. The district court denied the motion, reasoning that amendment would be futile because Sheriff Jump was entitled to Eleventh Amendment immunity in his official capacity. The district court then dismissed the amended complaint and entered final judgment against the Officers because neither the County nor the Sheriff, in his individual capacity, were "employers" under the FLSA. The Officers timely appealed.

II. STANDARDS OF REVIEW

Each issue raised in this appeal receives *de novo* review. We review dismissals for failure to state a claim *de novo*, accepting all factual allegations as true and considering them in the light most favorable to the plaintiff. *Blevins v. Aksut*, 849 F.3d 1016, 1018-19 (11th

Cir. 2017). We also review rulings regarding Eleventh Amendment immunity and statutory interpretation *de novo*. *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1199 (11th Cir. 2016); *Abusaid v. Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 405 F.3d 1298, 1303 (11th Cir. 2005). And we review *de novo* a determination that a particular amendment to a complaint would be futile. *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) (per curiam).

III. DISCUSSION

The FLSA requires that employers engaged in interstate commerce meet minimum labor standards and working conditions, including paying covered employees a minimum wage and overtime. 29 U.S.C. §§ 202, 206, 207; *see Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1298 (11th Cir. 2011). If an employer fails to pay required wages, the FLSA provides employees a private cause of action to collect those unpaid wages. *See* 29 U.S.C. § 216(b). But the FLSA allows suits against "employers" only as defined by the Act. *Id.* § 203(d). Moreover, the Eleventh Amendment bars FLSA actions against arms of the State absent consent. *See Alden v. Maine*, 527 U.S. 706, 712, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999); *Manders*, 338 F.3d at 1308-09.

The Officers advance three arguments—none are meritorious. The Officers first urge us to overturn Eleventh Circuit precedent holding that public officials, in their individual capacities, are not their subordinates' "employers" under the FLSA. Second, the Officers argue that the district court was wrong to conclude

that a Georgia sheriff, in his official capacity, is entitled to Eleventh Amendment immunity when making compensation decisions regarding his employees. Finally, the Officers argue that, even if Sheriff Jump was entitled to Eleventh Amendment immunity, Georgia has waived that immunity in federal court. We explain in turn why each argument fails.

A. Sheriff Jump, in his Individual Capacity, is Not an "Employer" under the FLSA

The district court correctly dismissed the Officers' complaint against Sheriff Jump in his individual capacity because he is not an "employer" under the FLSA. *See Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995) (holding that an Alabama sheriff was not an employer in his individual capacity under the Equal Pay Act); *Wascura v. Carver*, 169 F.3d 683, 686 (11th Cir. 1999) ("The Equal Pay Act is simply an extension of the FLSA and incorporates the FLSA's definition of 'employer.'"). Under the FLSA, an employer "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). Our precedent holds that a sheriff acting in his individual capacity has "no control over [the plaintiff's] employment and does not qualify as [the plaintiff's] employer." *Welch*, 57 F.3d at 1011; *Wascura*, 169 F.3d at 686 ("*Welch* establishes . . . that a public official sued in his individual capacity is not an 'employer' subject to individual liability under the FLSA.").

The Officers argue that other circuits disagree. So be it. Our precedent controls, and we remain impotent as a

panel to deviate from it. *Wascura*, 169 F.3d at 687 ("[W]e are bound by the *Welch* decision regardless of whether we agree with it."); *Thompson v. Alabama*, 65 F.4th 1288, 1301 (11th Cir. 2023) ("Later panels must faithfully follow the first panel's ruling even when convinced the earlier panel is wrong." (citations and quotations omitted)).

In sum, because Sheriff Jump, in his individual capacity, is not the Officers' "employer" under the FLSA, we affirm the district court's dismissal of the Officers' amended complaint on that ground.

Two peripheral points to note. First, although the Officers' amended complaint named the County as a defendant, the Officers have not argued on appeal that the district court erred in concluding that the County was not the Officers' employer under the FLSA. Thus, the Officers have forfeited that issue. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) ("When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground."). Second, Sheriff Jump and the County at times before the district court framed the "employer" question in terms of subject-matter jurisdiction. That is likely on account of our holding in *Wascura* that "where a defendant in an FMLA suit does not meet the statutory definition of 'employer,' there is no federal subject matter jurisdiction over the claim against that defendant." 169 F.3d at 685. But although *Wascura* drew on *Welch*'s analysis of the FLSA to interpret the FMLA, *Wascura* did not backfill its jurisdictional holding on the FMLA into the FLSA.

B. Sheriff Jump is Entitled to Immunity under the Eleventh Amendment when Making Compensation Decisions for Employees

The district court denied the motion to amend to include Sheriff Jump in his official capacity, concluding that Sheriff Jump would be entitled to Eleventh Amendment immunity when making compensation decisions for his employees. We agree with the district court.

"The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials" when they act as "an arm of the State." *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Whether an official is an "arm of the State" "depends, at least in part, upon the nature of the entity created by state law." *Id.; see also Manders*, 338 F.3d at 1308 ("To receive Eleventh Amendment immunity, a defendant . . . need only be acting as an 'arm of the State,' which includes agents and instrumentalities of the State."); *cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2366-68, 216 L. Ed. 2d 1063 (2023) (explaining that, in the standing context, MOHELA was "[b]y law and function . . . an instrumentality of Missouri"). For over twenty years, our Court has applied a four-factor test to determine whether public officials act as arms of the State for purposes of the Eleventh Amendment: "(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." *Manders*, 338 F.3d at 1309; *Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n*, 226 F.3d 1226, 1231 (11th Cir. 2000).

We keep in mind, though, that entities and officials act as an "arm of the State" by "carrying out a particular function." *Manders*, 338 F.3d at 1309. Therefore, courts applying the *Manders* factors must engage in a "function-by-function inquiry" while remaining vigilant that the "key question" is not "what powers sheriffs have, but *for whom* sheriffs exercise that power." *Pellitteri v. Prine*, 776 F.3d 777, 781-82 (11th Cir. 2015) (alterations adopted and quotations omitted). We have previously held that a Georgia sheriff acts as an arm of the State when making personnel decisions, *see id.* at 783, and when promulgating policies and procedures governing conditions of confinement, *Andrews v. Biggers*, 996 F.3d 1235, 1236 (11th Cir. 2021). This appeal requires us to decide whether compensation decisions by Georgia sheriffs are likewise acts of the State. For the following reasons, we hold that they are.

1. How State Law Defines the Entity

We first examine how Georgia law defines the entity and the authority to engage in the particular function at issue. *Manders*, 338 F.3d at 1309, 1319-20. The district court concluded that compensation is an "employee-related decision[]" that constitutes a State function under *Pellitteri*. This appeal differs from *Pellitteri*, which addressed personnel decisions distinct from the compensation-setting functions present here. But we agree that the first *Manders* factor weighs in favor of immunity, if for a slightly different reason than the district court articulated.

In *Manders*, we distilled "the essential governmental nature" of Georgia sheriff's offices to be enforcement of the law on behalf of the State and the performance of "specific statutory duties, directly assigned by the State, in law enforcement, in state courts, and in corrections." 338 F.3d at 1319. As such, "sheriffs in Georgia derive their power and duties from the State, are controlled by the State, and counties cannot, and do not, delegate any law enforcement power or duties to sheriffs." *Pellitteri*, 776 F.3d at 780 (quoting *Manders*, 338 F.3d at 1313). To be sure, "[t]he sheriff's office is not a division or subunit of [the] [c]ounty or its county governing body," but is "a separate constitutional office independent from [the] [c]ounty and its governing body." *Manders*, 338 F.3d at 1310 (citing Ga. Const. art. IX, § II, ¶ I(c)(1)). Thus, sheriffs constitute "county officers" only in the sense that they ordinarily possess limited geographic jurisdiction and are elected by county voters. *Pellitteri*, 776 F.3d at 780; *see also* Ga. Const. art. IX, § I, ¶ III(a) (labeling sheriffs "county officers").

As evidence of sheriff's offices' independence from counties, the Georgia Constitution prohibits a county from taking any "[a]ction affecting any elective county office, the salaries thereof, or the personnel thereof, except the personnel subject to the jurisdiction of the county governing authority." Ga. Const. art. IX, § II, ¶ I(c)(1). And the Georgia Supreme Court has held that, although the Georgia Constitution permits "[t]he governing authority of each county" to "fix the salary, compensation, and expenses of those employed by such governing authority," *id.* ¶ I(f), setting salaries for the sheriff or sheriff's office

personnel is "not subject to the jurisdiction of the county governing authority," *Warren v. Walton*, 231 Ga. 495, 202 S.E.2d 405, 409 (Ga. 1973).

How Georgia law defines Sheriff Jump's office—in particular, his authority over the salaries of his employees—favors viewing Sheriff Jump as "an arm of the State" when making compensation determinations. Here, the Officers assist Sheriff Jump in carrying out his statutorily assigned corrections duties on behalf of the State and are personnel working under Sheriff Jump's supervision. Because compensation decisions for overtime pay constitute "[a]ction affecting [an] elective county office, the salaries thereof, or the personnel thereof," the County lacks authority to directly interfere in those decisions. *Pellitteri*, 776 F.3d at 780 (quotations omitted). Thus, Georgia law indicates that Sheriff Jump acts on behalf of the State—not the County—when making compensation decisions for his employees. *See* Ga. Const. art. IX, § II, ¶ I(c)(1). The first *Manders* factor weighs in favor of immunity.

2. Degree of Control the State Maintains

We next analyze the degree of control that Georgia "maintains over the entity." *Manders*, 338 F.3d at 1309, 1320-22. The district court concluded that the second *Manders* factor weighed in favor of immunity because Georgia exercises substantial control over the hiring and firing of deputy sheriffs and because sheriffs exercise those personnel-related powers on behalf of the State. Again, we agree with the district court's conclusion but for a slightly different reason.

We explained in *Pellitteri* that "the State of Georgia exercises substantial control over a sheriff's personnel decisions." 776 F.3d at 781. The same is true for a sheriff's compensation-related decisions concerning his employees. Although the County approves Sheriff Jump's budget and pays his employees' salaries, Georgia limits how much a county can restrict a sheriff's ability to pay his employees. While a county "may remove *some* funds from a sheriff's budget," it may not remove "*all* funds." *Chaffin v. Calhoun*, 262 Ga. 202, 415 S.E.2d 906, 908 (Ga. 1992) (emphasis in original). Instead, county commissioners are "under a duty to adopt a budget making reasonable and adequate provision for the personnel and equipment necessary to enable the sheriff to perform his duties of enforcing the law and preserving the peace." *Id.* at 907-08 (quoting *Wolfe v. Huff*, 233 Ga. 162, 210 S.E.2d 699, 700 (Ga. 1974)). Neither can the County fix Sheriff Jump's, or his employees', salaries. *See Warren*, 202 S.E.2d at 409; *Pellitteri*, 776 F.3d at 782. Instead, that aspect of the power of the purse lies with Sheriff Jump, who exercises his authority on behalf of the State.

Moreover, the Governor of Georgia and the General Assembly have the power to discipline sheriffs. *Manders*, 338 F.3d at 1321 ("[T]he Governor has broad investigation and suspension powers regarding any misconduct by a sheriff in the performance of any of his duties." (citation and footnote omitted)). Georgia law provides specific procedures for the Governor to investigate and discipline sheriffs for any alleged misconduct. *See* Ga. Code § 15-16-26. Counties, by contrast, "do[] not, and cannot, direct the [s]heriff" on "how to hire, train, supervise, or discipline

his deputies, what policies to adopt, or how to operate his office." *Grech v. Clayton Cnty.*, 335 F.3d 1326, 1347 (11th Cir. 2003). The County lacks the authority to discipline Sheriff Jump for the way that he manages his office because Georgia maintains control over sheriff discipline. And we must remember that a Georgia sheriff pays (or allegedly underpays at times) employees, including detention officers, to assist him in executing his statutory duties *for the State*, not for a county. Thus, when a Georgia sheriff makes compensation decisions for his employees, he remains under the control of the State in doing so. The second *Manders* factor weighs in favor of immunity.

3. Where the Entity Derives its Funds

We next consider where Sheriff Jump derives the funds used to compensate his employees. *Manders*, 338 F.3d at 1309, 1323-24. The district court concluded that the third *Manders* factor weighed in favor of immunity because Georgia requires the County to set Sheriff Jump's budget according to the State's specifications and the County cannot dictate how Sheriff Jump uses that budget. We agree for both reasons.

First, although the County pays the salaries of Sheriff Jump's employees, Georgia law mandates that the County do so. Georgia requires that expenses for deputies "shall" come from funds separate from the funds that a county must spend on a sheriff's salary. Ga. Code § 15-16-20(c). In addition, the County must provide the Sheriff's Office with a "reasonable and adequate" budget to carry out Sheriff Jump's legal duties. *Chaffin*, 415 S.E.2d at 907-08; *see also Wolfe*, 210 S.E.2d at 700.

Second, although the County has the authority to approve or deny Sheriff Jump's budget, it cannot dictate *how* Sheriff Jump uses the funds provided for his office. *See Bd. of Comm'rs of Randolph Cnty. v. Wilson*, 260 Ga. 482, 396 S.E.2d 903, 904-05 (Ga. 1990); *Pellitteri*, 776 F.3d at 782. Thus, when Sheriff Jump designates portions of his budget for compensating employees like the Officers, he is exercising his authority for the State and operating with substantial independence from the County.

The Officers reply that, at the end of the day, the funds still primarily originate with the County. But that argument merely restates the conclusion of our unpublished decision in *Keene v. Prine*, 477 F. App'x 575, 578-79 (11th Cir. 2012), one that we expressly rejected in *Pellitteri*, 776 F.3d at 782 ("In *Keene*, we found that th[e third] factor weighed against immunity because the County is clearly the principal source of funding for the Sheriff's Office, including for personnel expenditures. Here again, we recognize that our prior unpublished opinion is inconsistent with this Court's published precedent." (alterations and quotations omitted)). Just as it did in *Manders* and *Pellitteri*, the third factor weighs in favor of immunity. *See id.* at 783; *Manders*, 338 F.3d at 1324.

4. Liability and Payment of Adverse Judgments

Finally, we consider who pays any adverse judgment against Sheriff Jump. *Manders*, 338 F.3d at 1309, 1324-28. The district court concluded that the fourth *Manders* factor weighs against immunity because the County

remains obligated to pay any liabilities incurred by Sheriff Jump. We agree "to the extent that the [S]tate treasury will be spared here from paying any adverse judgment." *Pellitteri*, 776 F.3d at 783. But because this factor is "certainly not necessary for a finding of immunity" and the first three factors weigh in favor of immunity, we hold that a Georgia sheriff acts as an arm of the State when making compensation decisions for his employees, including detention officers like Austin and Fuller. *Id.* & n.2; *see also Manders*, 338 F.3d at 1328 ("The State's 'integrity' is not limited to who foots the bill.").

Thus, Sheriff Jump, in his official capacity, is entitled to sovereign immunity under the Eleventh Amendment. Any amendment naming him in his official capacity would have been futile.

C. Georgia Has Not Waived Sovereign Immunity with Respect to the Officers' FLSA Claims

The Officers argue that even if Sheriff Jump acts on behalf of the State when making compensation decisions regarding his employees, Georgia has waived Eleventh Amendment immunity for employment suits. The Officers arrive at this conclusion by contending that all employment disputes sound in breach-of-contract and that the State has waived immunity for breach-of-contract claims. *See* Ga. Const. art. I, § II, ¶ IX(c). But the "State's consent to suit must be 'unequivocally expressed' in the text." *Sossamon v. Texas*, 563 U.S. 277, 284, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99, 104 S. Ct. 900,

79 L. Ed. 2d 67 (1984)). No such unequivocal expression exists, and certainly not as to FLSA claims like the Officers'. Moreover, the Georgia Constitution waives the State's immunity from suit for breach-of-contract claims in Georgia's courts, not in *federal* court.

As a threshold matter, Georgia has not expressly waived its sovereign immunity for claims under the FLSA. The standard for waiver of Eleventh Amendment immunity is an exacting one. A waiver "must employ language that is either explicit or else admits of no other reasonable interpretation." *Schopler v. Bliss*, 903 F.2d 1373, 1379 (11th Cir. 1990). The Officers never attempted to bring a breach-of-contract claim and alleged only federal question jurisdiction in their complaint. They cannot now transmute the claim that they brought—an FLSA claim for unpaid wages—into a breach-of-contract claim by arguing that the former is "close enough" to trigger Georgia's waiver provision. A state's waiver of sovereign immunity is neither horseshoes nor hand grenades—"close enough" is "not enough." We will not drastically expand Georgia's limited immunity waiver absent an explicit statement in Georgia law.

Even if we were inclined to agree with the Officers as to the general scope of Georgia's sovereign immunity waiver, that waiver would still not apply here because the State must "specify" that it intends "to subject itself to suit in *federal court*." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990) (emphasis in original) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L.

Ed. 2d 171 (1985), *superseded by statute on other grounds as recognized by Lane v. Pena*, 518 U.S. 187, 197-98, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996)). In other words, "a [s]tate does not consent to suit in federal court merely by consenting to suit in the courts of its own creation." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999).

Georgia has consented to breach-of-contract suits only in courts of its own creation. Georgia law provides that "[v]enue with respect to any [breach-of-contract] action shall be proper in the Superior Court of Fulton County, Georgia." Ga. Code § 50-21-1(b). The Georgia Constitution further provides that "[n]o waiver of sovereign immunity . . . shall be construed as a waiver of any immunity provided to the [S]tate or its departments, agencies, officers, or employees by the United States Constitution." Ga. Const. art. I, § II, ¶ IX(f). Thus, Georgia "retained its Eleventh Amendment immunity" from suits in federal court for breach-of-contract claims because no statute or constitutional provision "expressly consents to suits in federal court." *Barnes v. Zaccari*, 669 F.3d 1295, 1308 (11th Cir. 2012).

IV. CONCLUSION

Accordingly, both the district court's denial of the Officers' motion for leave to amend and its ultimate dismissal of the amended complaint are **AFFIRMED**.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION, FILED JANUARY 7, 2021

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CV 220-073

LANGSTON AUSTIN; AND ERNEST FULLER, III, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

GLYNN COUNTY, GEORGIA; AND
E. NEAL JUMP, INDIVIDUALLY,

Defendants.

January 7, 2021, Decided
January 7, 2021, Filed

HON. LISA GODBEY WOOD, UNITED STATES DISTRICT JUDGE.

ORDER

Before the Court is a motion to dismiss filed by Defendants Glynn County, Georgia and Sheriff E. Neal

Jump. Dkt. No. 11. The motion has been fully briefed and is ripe for review.

BACKGROUND

This case is a collective class action alleging violations of the Fair Labor Standards Act (the "FLSA" or the "Act"), 29 U.S.C. § 201, *et seq.* Plaintiffs Langston Austin and Ernest Fuller, III, are detention officers who allege Defendants withheld overtime and other pay in violation of the FLSA. Dkt. No. 7 ¶¶ 17, 30, 38, 55.

Plaintiffs initially sued Defendant Glynn County, Georgia (the "County"). Dkt. No. 1. The County moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. No. 5. Plaintiffs then amended their complaint as a matter of right to add Defendant Sheriff Neal Jump (the "Sheriff") in his individual capacity, dkt. no. 7, rendering moot the County's motion to dismiss, dkt. no. 10. The County and Sheriff then filed a motion to dismiss the amended complaint. Dkt. No. 11. Meanwhile, the Court denied as futile Plaintiffs' motion for leave to file a second amended complaint adding claims against the Sheriff in his official capacity, dkt. no. 13, due to sovereign immunity. Dkt. No. 20. Now, Defendants' renewed motion to dismiss, having been fully briefed, is ripe for review.

The following facts are taken from Plaintiffs' amended complaint and are assumed to be true for the purposes of this motion to dismiss. During various periods within the three years prior to filing this lawsuit, Plaintiffs were detention officers allegedly employed by Defendants

Sheriff Jump, in his individual capacity, and Glynn County. Dkt. No. 7 ¶¶ 1, 4, 5, 17, 20, 21, 25-27, 40-53. Plaintiffs' job duties included enforcing rules and keeping order within jails or prisons, supervising activities of inmates, inspecting facilities to ensure that they meet security and safety standards, searching inmates for contraband items, reporting on inmate conduct, and escorting and transporting inmates. *Id.* ¶ 40. The County determined Plaintiffs' rate and method of pay; it also maintained Plaintiffs' employment records and provided the funds used to pay Plaintiffs for their work. *Id.* ¶¶ 30-32. Sheriff Jump had control and direction over Plaintiffs› workplace conditions, operations, compensation, and hiring and firing decisions. *Id.* ¶ 34.

Defendants argue that neither the County nor the Sheriff is Plaintiffs' employer under the FLSA, and that, as such, the Court lacks subject matter jurisdiction over this matter pursuant Federal Rule of Civil Procedure 12(b)(1). Defendants also argue the amended complaint fails to state a claim for which relief may be granted pursuant to Rule 12(b)(6). Dkt. No. 11-1 at 2.

LEGAL AUTHORITY

"A court may dismiss a complaint when it lacks subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) or when the complaint does not state a facially plausible claim for relief under Rule 12(b)(6)." *Lee v. City of Walthourville*, No. 4:18cv90, 2019 U.S. Dist. LEXIS 13259, 2019 WL 339631, at *2 (S.D. Ga. Jan. 28, 2019).

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"Motions pursuant to 12(b)(1) take one of two forms: a 'facial attack' on subject matter jurisdiction based on the complaint's allegations taken as true or a 'factual attack' based on evidentiary matters outside of the pleadings." *Id.* Here, in the "facial attack" context, the court proceeds as if it were evaluating a 12(b)(6) motion. *Sinaltrainal v. Coca Cola Co.*, 578 F. 3d 1252, 1260 (11th Cir. 2009), *abrogated on other grounds, Mohamad v. Palestinian Auth.*, 566 U.S. 449, 132 S. Ct. 1702, 182 L. Ed. 2d 720 (2012).

In evaluating a Rule 12(b)(6) motion to dismiss, a court must "accept[ ] the allegations in the complaint as true and construe[] them in the light most favorable to the plaintiff." *Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009). "A complaint must state a facially plausible claim for relief, and '[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Wooten v. Quicken Loans, Inc.*, 626 F.3d 1187, 1196 (11th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action'" does not suffice. *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). While a court must accept all factual allegations in a complaint as true, this tenet "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are insufficient. *Id.*

Appendix B

DISCUSSION

The FLSA sets forth minimum wage and overtime requirements which must be adhered to by employers who are covered by the Act. *Donovan v. Barrett Convalescent Ctr., Inc.*, No. C-81-95-G, 1982 U.S. Dist. LEXIS 13704, 1982 WL 2185, at *1 (N.D. Ga. Apr. 28, 1982). Pursuant to the FLSA, the term "'employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency." 29 U.S.C. § 203(d). The outcome of Defendants' motion to dismiss rests on whether Defendants are Plaintiffs' employers. Defendants argue that they are not Plaintiffs' employers as a matter of law. Plaintiffs argue that either the County or the Sheriff is Plaintiffs' employer and thus liable for unpaid wages under the FLSA. Dkt. No. 14 at 3.

I. Plaintiffs' Claims Against the County

First, the Court will address Plaintiffs' contention that the County is their employer. To determine whether an individual or entity qualifies as an employer under the FLSA, courts in the Eleventh Circuit are charged with considering "the total employment situation." *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995). Such an inquiry includes weighing "whether or not the employment took place on the premises of the alleged employer; how much control [ ] the alleged employer exert[ed] on the employees; and, [whether] the alleged employer ha[d] the power to fire, hire, or modify the employment condition of the employees." *Id.* (quoting *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 669-70 (5th Cir. 1968)) (alterations in original).

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Plaintiffs argue that the County exercised the necessary authority and control over Plaintiffs to establish it as Plaintiffs' employer. Dkt. No. 14 at 6-7. Plaintiffs further argue dismissal is inappropriate at the motion to dismiss stage and the Court should permit discovery to determine whether the County is in fact Plaintiffs' employer. *Id.* at 7-8. Plaintiffs' discovery contention is generally supported by case law. *See Donovan*, 1982 U.S. Dist. LEXIS 13704, 1982 WL 2185, at *3 (noting that the term "employer" is defined broadly under the FLSA and "[w]hether a person is an 'employer' under the Act is a question of fact" (citing *Wirtz v. Lone Star Steel Corp.*, 405 F.2d 668, 669 (5th Cir. 1968))). However, while the County might have controlled aspects of Plaintiffs' employment, the Court concludes the County is not Plaintiffs' employer as a matter of law.

Under Georgia law, counties do not employ those working for an elective office. *See* GA. CONST. art. IX, § II ¶ I(c)(1) (stating that the power granted to counties shall not be construed to extend to "[a]ction affecting any elective county office, the salaries thereof, or the personnel thereof, except the personnel subject to the jurisdiction of the county governing authority"). Further, the Georgia Supreme Court has held that sheriffs' deputies are employees of the sheriff and not the county. *See Warren v. Walton*, 231 Ga. 495, 202 S.E.2d 405, 409 (Ga. 1973) ("[D]eputy sheriffs and deputy jailors are employees of the sheriff, whom the sheriffs alone are entitled to appoint or discharge."); *see also Brown v. Jackson*, 221 Ga. App. 200, 470 S.E.2d 786, 787 (Ga. Ct. App. 1996). Finally, the Eleventh Circuit has unequivocally held that Georgia "[d]eputies are . . . considered employees of the

sheriff and not the [c]ounty." *Pellitteri v. Prine*, 776 F.3d 777, 780 (11th Cir. 2015) (citing *Warren* and *Brown*). Like deputies, detention officers or "jailors" are employees of the sheriff. *See Drost v. Robinson*, 194 Ga. 703, 22 S.E.2d 475, 480 (Ga. 1942) ("Deputy sheriffs and deputy jailors are employees of the sheriff, whom the sheriffs alone are entitled to appoint or discharge.").

Plaintiffs argue that the County controls some aspects of their employment and that they should be allowed to conduct discovery to show the same. The Court finds instructive *Kicklighter v. Goodrich*, 162 F. Supp. 3d 1363 (S.D. Ga. 2016). There, former employees filed an FLSA claim against the county board of commissioners and clerk of superior court, contending that the county board was liable for unpaid overtime payments. In analyzing a motion for summary judgment, the Court held that, while the county "may provide [the clerk of court] with the funding . . . to pay . . . employees, [the county] is not [p]laintiff's employer." *Id.* at 1377 (citing GA. CONST. art. IX, § II ¶ I (stating that counties do not have the power to affect any elective county office)). The Court concluded that "[p]laintiff's FLSA claim against [the defendant county] cannot continue." *Id.* Though the *Kicklighter* court addressed a motion for summary judgment, it did not discuss the kind or amount of control the county had over plaintiffs, because, under the Georgia Constitution, counties lack the essential power required to employ employees of elected offices, with the exception of the county's own governing board. Like the county in Kicklighter, the County here might exercise some control or administration of Plaintiffs' employment, but that does not make the County Plaintiffs' employer.

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In *Peppers v. Cobb County, Georgia*, the Eleventh Circuit similarly held that plaintiff, who worked for the district attorney's office, was not the county's employee. 835 F.3d 1289, 1295-96 (11th Cir. 2016). There, the plaintiff brought gender discrimination claims under Title VII and the Equal Pay Act, which is part of the FLSA, against both the county and the district attorney's office. Though the county "provided paymaster, administrative, and budgetary functions for the district attorney's office," it lacked the authority to supervise, hire, or fire district attorney employees per the Georgia Constitution. *Id.* at 1297, 1301 (citing GA. CONST. art. IX, § II ¶ I). With regard to the separation of the two governmental entities, the court explained:

> "We should not brush aside a state's own distinctions between its governmental subdivisions, because even ostensibly formal distinctions are part of a government's ability to shape its own institutions within constitutional bounds, and we are obligated to respect a state's right to do so." [*Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1344 (11th Cir. 1999).] 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," *id.*, we must act with particular care and hesitation when we are asked to override those distinctions the state has adopted.

Id. at 1299.

Here, the County similarly might provide administrative and budgetary functions for the Sheriff's office and its detention officers, but the County lacks the authority to supervise, hire, or fire Sheriff's office employees per the Georgia Constitution. Both Eleventh Circuit and Georgia law dictate that Plaintiffs, as detention officers, are employees of the Sheriff and not the County. Accordingly, Defendants' motion to dismiss is **GRANTED** as to Plaintiffs' claims against Defendant Glynn County.

II. Plaintiffs' Claims Against the Sheriff in his Individual Capacity

The Court now turns to whether Sheriff Jump is Plaintiffs' employer. Plaintiffs state that the Sheriff had the power to hire and fire, supervised and controlled work schedules and conditions, determined the rate and method of payment, and maintained employment records. Dkt. No. 7 ¶¶ 33-39. Plaintiffs further argue that the Court should permit discovery to determine, based on the total employment situation, whether the Sheriff is Plaintiffs' employer. Dkt. No. 14 at 3; *Welch*, 57 F.3d at 1011. Defendant Sheriff argues that, as a public official, he cannot be sued in his individual capacity for FLSA violations and urges that the claims against him be dismissed as a matter of law. Dkt. No. 11-1 at 10.

A person may be held individually liable in an FLSA suit if he or she qualifies as an "employer" under the Act. 29 U.S.C. §§ 215(a)(2), 216(b); *see also Donovan*, 1982 U.S. Dist. LEXIS 13704, 1982 WL 2185, at *4. The FLSA definition of "employer" includes "any person

acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d); *see also Moore*, 708 F.3d at 1237.

The Court finds two Eleventh Circuit cases instructive. First, in *Welch v. Laney*, the Eleventh Circuit applied the total employment situation factors and held that a sheriff could not be held individually liable for an equal pay claim asserted under the FLSA by a dispatcher. 57 F.3d at 1011. The court explained that outside of his role as a public official, the sheriff "had no control over [the dispatcher's] employment" and therefore did not qualify, in his individual capacity, as the dispatcher's employer under the FLSA. *Id.*

Several years later, in *Wascura v. Carver*, the Eleventh Circuit hearkened back to its holding in *Welch*. 169 F.3d 683, 684-86 (11th Cir. 1999). The plaintiff in *Wascura* was a city clerk who asserted a retaliation claim pursuant to the Family and Medical Leave Act (the "FMLA") against the mayor, vice mayor, and two city commissioners—all in their individual capacities. *Id.* at 684. The public official defendants claimed they were entitled to dismissal because they were not "employers" under the FMLA. *Id.* The *Wascura* court, noting that the FLSA and the FMLA contain identical definitions for "employer," relied on *Welch* as controlling authority with regard to whether the defendants, in their individual capacities, qualified as "employers." *Id.* at 685-86. The court explained that *Welch* addressed the issue of "whether the term 'employer' includes a public official in his or her individual capacity" and concluded that "it does not." *Id.* at 686. As a result, the *Wascura* Court held that the plaintiff's FMLA claim

against the city officials should have been dismissed insofar as it was asserted against the officials in their individual capacities because, as a matter of law, they did not qualify as "employers." *Id.* at 687.

Pursuant to *Welch* and *Wascura*, Defendant Sheriff, as a public official, does not qualify in his individual capacity as an "employer" under the FLSA. Despite the Eleventh Circuit precedent, Plaintiffs urge the Court to consider and apply the reasoning and decisions of other circuits that do permit public officials to be held liable in their individual capacities under the FLSA. Dkt. No. 14 at 14-17; *see also, e.g., Luder v. Endicott*, 253 F.3d 1020, 1022 (7th Cir. 2001) (disagreeing with the holdings of *Wascura* and *Welch*); *Bonzani v. Shinseki*, 895 F. Supp. 2d 1003, 1007 (E.D. Cal. 2012) (discussing the split among circuits on the issue of individual liability). However, the Court is bound by the decisions of the Eleventh Circuit, and Plaintiffs do not cite any authority that would permit the Court to deviate from the Circuit's precedent. *See Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) ("[A] district court in this circuit is bound by this court's decisions."). Accordingly, the Court finds that Plaintiffs' FLSA allegations against Defendant Sheriff in his individual capacity do not state a claim for which relief may be granted and **GRANTS** Defendants' motion as to Plaintiffs' claims against Defendant Sheriff Jump.[1]

1. To the extent Plaintiffs argue that discovery is necessary to determine whether the Sheriff had control over the conditions of Plaintiffs' employment, their argument is unmeritorious. Under Eleventh Circuit precedent, whether the Sheriff is an employer in his individual capacity is a question of law, not fact.

Appendix B

CONCLUSION

Defendants' motion to dismiss, dkt. no. 11, is **GRANTED** in its entirety. Plaintiffs' amended complaint is **DISMISSED** with prejudice. The Clerk is **DIRECTED** to terminate all pending motions and close this case.

SO ORDERED, this 7th day of January, 2021.

/s/ Lisa Godbey Wood
HON. LISA GODBEY WOOD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — RELEVANT STATUTES EXCERPTS

29 U.S.C.A. § 203

***

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

***

Appendix C

29 U.S.C.A. § 216

***

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) or 218d of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) or 218d of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent

is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) or 218d of this title.

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Appendix C

29 U.S.C.A. § 2611

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(4) Employer

(A) In general

The term "employer"--

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes--

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the Government Accountability Office and the Library of Congress.

(B) Public agency

Appendix C

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

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