No. 23-748

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 Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. No appellate court has held that a government official who is entitled to Eleventh Amendment immunity if sued in his official capacity may be held liable in his individual capacity on a wage claim under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. Is review warranted on the ground that the courts have not employed identical analyses in reaching this conclusion?

2. To the extent that appellate courts have reached differing conclusions about whether a government official in his individual capacity meets the definition of "employer" under the FLSA, is this case – in which the government official is entitled to Eleventh Amendment immunity regardless of whether he meets that definition – an ideal vehicle for examining this issue?

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RESPONSE TO PETITIONERS' STATEMENT OF THE CASE[1]

The crux of the Petition appears in the final paragraph of the Statement of the Case, wherein Petitioners argue that the Eleventh Circuit "avoided two required analytical steps" in reaching its conclusion that Sheriff Jump cannot be held liable in his individual capacity under the FLSA. Petition, p. 7. Even if these steps were, in fact, "required" – and the authority cited by Petitioners themselves indicates that they were not – Petitioners do not argue that the failure to perform them was outcome-determinative. The Petition is devoid of any showing that the *result* reached by the Eleventh Circuit is at odds with those reached by other appellate courts under similar facts, or at odds with this Court's prior rulings.

The Petition repeatedly conflates the question of whether a state official in his individual capacity may meet the definition of "employer" under the FLSA with the question of whether liability may actually attach to such a defendant. The former inquiry is one in which some, but not all, courts have engaged en route to resolving the latter. Notably, although Petitioners cite

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[1] Respondents do not dispute or disagree with the portion of Petitioners' Statement of the Case setting forth the underlying facts and course of proceedings, beginning with the second paragraph on page two of the Petition and continuing through the last full paragraph on page four, save for the statement in the second paragraph of page four that the district court erred. The remainder of Petitioners' Statement of the Case consists of argument and citations of authority, which are addressed in the following section of this brief.

with approval a Fourth Circuit case addressing an individual-state-defendant FLSA claim, that court did not actually engage in any analysis of whether the individual defendants met the FLSA definition of "employer" before holding that they were not subject to liability under the FLSA in their individual capacities. *Martin v. Wood*, 772 F.3d 192, 195 (4th Cir. 2014).

Although the appellate courts have employed different analytical approaches in resolving the overarching question of whether liability may attach under these circumstances, they have reached identical results. Petitioners have not identified a single case, from any court, imposing liability against a government official in his individual capacity on an FLSA wage claim.

Petitioners disapprove of the manner by which the Eleventh Circuit reached its conclusion, and argue that cases from the Seventh, Fifth, and Fourth Circuits provide superior analytical frameworks. But all of these courts have ultimately held that Eleventh Amendment immunity bars FLSA wage claims against state officials in their individual capacities, and Petitioners have not preserved any argument that the same result would not be warranted in this case.

Here, the Eleventh Circuit held, after a detailed analysis, that Eleventh Amendment immunity would have barred Petitioners' claims against Sheriff Jump had he been sued in his official capacity. *Austin v. Glynn Cnty., Georgia*, 80 F.4th 1342, 1350 (11th Cir. 2023). Petitioners do not challenge this ruling. Petition,

p. 4. They likewise do not point to any authority suggesting that the outcome of an Eleventh Amendment immunity analysis would be different with respect to Jump in his individual capacity. Indeed, the closest Petitioners come to addressing this issue is a single sentence suggesting that "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." Petition, p. 11. This argument was considered and rejected by the Eleventh Circuit, and Petitioners have not sought certiorari from that ruling. *Austin*, 80 F.4th at 1349-50.

The Petition thus does not actually raise, and Petitioners have not preserved, the issue identified in Petitioners' second "question presented": whether Eleventh Amendment immunity applies to state government officials sued in their individual capacities under the FLSA, "and if not, what is the Eleventh Amendment analysis the courts must apply." Petition, p. i. And there is no disagreement among the appellate courts with respect to the only issue actually raised by the Petition, which is identified in Petitioners' first "question presented": whether state officials in their individual capacities may be held liable on FLSA wage claims.

Rather, the appellate courts differ only on the tangential question of whether a state official in his individual capacity meets the FLSA definition of "employer." This secondary analysis, on which the Petition focuses nearly exclusively, is neither sufficient nor necessary for determining the ultimate question of

liability. As Petitioners tacitly acknowledge, it is not dispositive in this case, and to take it up in this context would thus be a purely academic exercise. The Petition fails to raise any legitimate question for the Court's review and should be denied.

REASONS FOR DENYING THE PETITION

I. There is no circuit split on the question of whether a government official entitled to immunity in his official capacity may be held liable in his individual capacity on a wage claim under the FLSA.

Petitioners cite at length from an opinion by Judge Posner criticizing the Eleventh Circuit's conclusion in *Welch* that a government official in his individual capacity cannot be an "employer" under the FLSA. Petition, p. 9, citing *Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2001), citing *Welch v. Laney*, 57 F.3d 1004 (11th Cir. 1995). What the petition downplays, because it undermines the argument that there is a circuit split on the question presented, is the ultimate holding of *Luder*: an individual-capacity FLSA wage claim against a state actor "is transparently an effort at an end run around the Eleventh Amendment," and is subject to dismissal for that reason. *Luder*, 253 F.3d at 1025.

In *Luder*, the plaintiffs – 145 state prison employees – brought FLSA overtime claims against the prison's warden and several other supervisors in their

individual capacities. *Id.* at 1022-23. The plaintiffs acknowledged that claims against the defendants in their official capacities would be barred by Eleventh Amendment immunity. *Id.* at 1023. After holding that a government official may be subject to suit under the FLSA in his individual capacity,[2] Judge Posner went on to evaluate whether such a claim would be barred by Eleventh Amendment immunity, noting that "even when a suit is against a public officer in his or her individual capacity, the court is obliged to consider whether it may really and substantially be against the state." *Id.* at 1023, quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997). "[A] suit nominally against state employees in their individual capacities that *demonstrably* has the *identical* effect as a suit against the state is . . . barred." *Luder*, 253 F.3d at 1023 (emphasis in original).

The *Luder* court went on to analyze the practical difficulties that would be presented by an individual-capacity judgment against a prison administrator for 145 plaintiffs' wages. *Id.* at 1024. Although Judge

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[2] In disagreeing with the Eleventh Circuit's ruling in *Welch*, the Seventh Circuit pointed without any substantive analysis to *Hafer v. Melo*, and offered a single-sentence analogy to a hypothetical 42 U.S.C. § 1983 claim. *Luder v. Endicott*, 253 F.3d 1020, 1022 (7th Cir. 2001), citing *Hafer v. Melo*, 502 U.S. 21, 28, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). For the reasons set forth in the below discussion of *Hafer*, the Seventh Circuit's conclusion on this issue is unpersuasive. In any event, the ultimate holding of *Luder* suggests that the Seventh Circuit would have reached the same result as did the lower courts in this case, albeit by a different route.

Posner focused primarily on whether money would "flow from the state treasury to the plaintiffs," the ultimate question was whether the effect of letting the plaintiffs proceed against the individual-capacity defendants would "be identical to a suit against the state." *Id.* The court concluded that it would, rendering the suit nothing more than an attempt to get around the Eleventh Amendment immunity to which the defendants would be entitled in their official capacities, and remanded the case with instructions that the case be dismissed with prejudice.

Likewise, Petitioners cite two Fifth Circuit cases for the broad proposition that "a state official can be liable in his individual capacity under the FLSA." Petition, p. 9. Neither case so holds. *Stramaski v. Lawley* was, the Fifth Circuit noted, "a single-plaintiff, retaliation case in which the defendant is said to have terminated [the plaintiff] for complaining about a delay in receiving her pay." 44 F.4th 318, 325 (5th Cir. 2022). Under the specific facts of that case, where the supervisory defendant took individual actions directed solely at the plaintiff, the Fifth Circuit held that the supervisor "was the true party in interest." *Id.* The *Stramaski* court explicitly distinguished – and noted that its ruling did not extend to – cases presenting a "doomsday scenario for potential state individual 'employers'" due to multiple employees asserting wage claims that would be "too large for an individual to be able to pay." *Id.* The second Fifth Circuit case cited by Petitioners did not specify the capacity in which the sheriff defendant was sued, and contained no mention,

let alone any analysis, of Eleventh Amendment immunity. *Lee v. Coahoma Cnty., Miss.*, 937 F.2d 220, 226 (5th Cir. 1991), amended, 986 F.2d 100 (5th Cir. 1993), opinion amended and superseded, 37 F.3d 1068 (5th Cir. 1993), and amended, 37 F.3d 1068 (5th Cir. 1993).

Despite their insistence that a case asserting FLSA claims against state-official defendants requires a textual analysis of whether those defendants meet the definition of "employer" under the FLSA, Petitioners cite with approval a Fourth Circuit case that undertook no such analysis. Petition, p. 10. In *Martin v. Wood*, the Fourth Circuit proceeded briskly past the definition of "employer" without ever making a determination as to whether the state officials named in their individual capacities met that definition. 772 F.3d 192, 195 (4th Cir. 2014). Rather, the court delved directly into analyzing whether the plaintiff was attempting to "circumvent the Eleventh Amendment by naming [the] defendants in their individual capacities [when], in reality, she is suing them for actions taken by them in their official capacities" on behalf of the state. *Id.* After applying factors derived from this Court's opinion in *Pennhurst State Sch. & Hosp. v. Halderman*, the Fourth Circuit concluded that the state was the real party in interest and that Eleventh Amendment immunity thus barred the plaintiffs' claims. *Id.*, citing 465 U.S. 89, 102, 104 S. Ct. 900, 909, 79 L. Ed. 2d 67 (1984).

Suit against Sheriff Jump under the FLSA, in his individual capacity, would be functionally identical to suit against him in his official capacity – in either case,

Plaintiffs would be seeking the same relief, and the extent to which the interests of the State are implicated would be unchanged. In any event, Petitioners did not argue below, and do not sincerely attempt to argue now, that an analysis of Eleventh Amendment immunity against Jump in his individual capacity would differ from the analysis performed by the lower courts of the identical claims against him in his official capacity. Petitioners have conceded that Jump, in his official capacity, is entitled to immunity. The Petition does not squarely raise the question of whether a different result *could*, as a matter of law, be reached with respect to Jump in his individual capacity – let alone attempt to show that such a result was *required* under the facts of the case.

Because Eleventh Amendment immunity bars any official-capacity FLSA suit against Sheriff Jump, allowing the same claims to go forward against him in his individual capacity would result in an "end run around the Eleventh Amendment"– a result that both the Seventh and Fifth Circuits have held must be avoided. Although those courts diverge from the Eleventh Circuit on the question of whether a government employee may be held personally liable under the FLSA generally, all three courts reach the same result with respect to the actual issue presented by this case: Sheriff Jump cannot be liable in his individual capacity for Petitioners' overtime claims under the FLSA.

II. The ruling of the Court of Appeals does not conflict with this Court's ruling in *Hafer v. Melo.*

In *Hafer v. Melo*, former employees of the Pennsylvania auditor general sued under 42 U.S.C. § 1983 after their employment was terminated, seeking money damages against her in her individual capacity. *Hafer v. Melo*, 502 U.S. 21, 23-24, 112 S. Ct. 358, 361, 116 L. Ed. 2d 301 (1991). The Court granted certiorari "to address the question whether state officers may be held personally liable for damages *under § 1983* based upon actions taken in their official capacities." *Id.* at 24 (emphasis supplied).

The Court began by explaining the differences between individual-capacity and official-capacity suits, noting that under § 1983, "officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law." *Id.* at 25. Next, the Court noted that liability under 42 U.S.C. § 1983 is *only* available against "persons," and reiterated its then-recent ruling that government officials sued in their official capacities are not "persons" for the purposes of that statute. *Id.* at 27, citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). Against this backdrop – the complete unavailability of official-capacity liability against government officials under § 1983, and the promise of "personal immunity defenses" for anyone sued in her individual capacity under § 1983 – the Court held that a public official may be sued in her

individual capacity under § 1983 for acts taken in her official capacity. *Hafer*, 502 U.S. at 31.

The *Hafer* Court readily acknowledged that "imposing personal liability on state officers may hamper their performance of public duties." *Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 364-65, 116 L. Ed. 2d 301 (1991). Concerns that the looming possibility of individual liability under § 1983 could interfere with government officials' performance of their duties, the Court reiterated, "are properly addressed within the framework of our personal immunity jurisprudence." *Id.*, citing *Forrester v. White*, 484 U.S. 219, 223, 108 S. Ct. 538, 542, 98 L. Ed. 2d 555 (1988). After bookending its analysis with assurances about the availability of personal immunity defenses, the Court announced its narrowly tailored ruling:

> We hold that state officials, sued in their individual capacities, are "persons" *within the meaning of § 1983*. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability *under § 1983* solely by virtue of the "official" nature of their acts.

Hafer v. Melo, 502 U.S. 21, 31, 112 S. Ct. 358, 365, 116 L. Ed. 2d 301 (1991) (emphasis supplied).

Petitioners state repeatedly that the ruling of the Eleventh Circuit in this case is inconsistent with *Hafer*. Petition, pp. 6, 11. But *Hafer* is distinct from this case in two ways that make it largely irrelevant here.

First, whereas § 1983 permits suit *only* against "persons" and precludes claims against state government actors in their official capacities, the FLSA includes no such restriction. A ruling in *Hafer* that a government actor in her individual capacity could not be held liable, coupled with the Court's earlier ruling that official-capacity claims are not cognizable under § 1983, would have rendered that statute essentially meaningless by barring the vast majority of claims it would otherwise permit. By way of contrast, the class of permissible defendants under the FLSA is very different,[3] and removing state officials in their individual capacities from that class does not preclude the statute from operating as intended.[4]

Second, the *Hafer* Court acknowledged twice that the potential for government officials to be held individually liable for actions taken in their official capacities could interfere with those officials' performance of their public duties. However, the Court held, that valid

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[3] As one of the appellate courts cited with approval by Petitioners has noted, the FLSA is "a very different statute" from 42 U.S.C. § 1983, and cases identifying proper defendants in one context are meaningless in the other. *Adams v. Ferguson*, 884 F.3d 219, 225 (4th Cir. 2018) (declining to extend "real party in interest" analysis used in FLSA cases, including *Martin v. Wood*, *supra*, to cases arising under 42 U.S.C. § 1983).

[4] Petitioners argue that they are "without a remedy," but this argument rings somewhat hollow given that Petitioners abandoned at the trial court their argument that Glynn County is their employer, and abandoned at the Eleventh Circuit their argument that Sheriff Jump is not entitled to Eleventh Amendment immunity in his official capacity. *Austin v. Glynn Cnty., Georgia*, 80 F.4th 1342, 1346 (11th Cir. 2023); Petition, p. 4.

concern was addressed by the availability of personal immunity defenses under § 1983. But whereas the potential for government officials to be held individually liable under the FLSA presents all of the same concerns, no such immunity defenses are available to individual-capacity defendants under the FLSA.[5] Consequently, the premise with which the *Hafer* Court began and ended its analysis is inapplicable here.

The Court's ruling in *Hafer* was narrowly tailored to the specific § 1983 context in which it arose. Because the permissible class of defendants in § 1983 actions is vastly different than that in FLSA actions, and because individual-capacity § 1983 defendants are entitled to immunity defenses that are not available to FLSA defendants, the rationale of *Hafer* does not control any analysis of FLSA claims.

III. To the extent that the issue the Petition attempts to raise might warrant review, this case is a poor vehicle.

Petitioners urge that "[t]he primary issue here is whether courts must apply the FLSA definition of 'employer' to the allegations in the complaint." Petition, p. 11. It is true that this is the issue upon which the Petition focuses, almost exclusively. But, as evidenced by

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[5] *See*, *e.g.*, *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002) (commingling analysis of FMLA claims with dicta regarding identical treatment of FLSA claims, and holding that qualified immunity is categorically unavailable for FMLA claims because the law "creates clearly established statutory rights").

the fact that one of the principal cases on which Petitioners rely did not apply this purportedly "required" test, this inquiry is merely tangential to the question actually presented by this case: whether a state official may be held liable in his individual capacity for FLSA wage claims. *Martin v. Wood*, 772 F.3d 192, 195 (4th Cir. 2014).

There exists a class of cases in which this secondary issue would be outcome-determinative, and thus a "primary issue." The Eleventh Circuit ruling in *Welch v. Laney* that "a public official sued in his individual capacity is not an 'employer' subject to individual liability under the FLSA" is broad, and is not limited to state officials. *Wascura v. Carver*, 169 F.3d 683, 686 (11th Cir. 1999), citing 57 F.3d 1004, 1011 (11th Cir. 1995). It is conceivable that a plaintiff could find himself in a situation where the only defendant for his FLSA wage claim is a county, municipal, or other non-state government official in his individual capacity. Dismissal of such a plaintiff's claims under *Welch*, on the ground that the individual official was not the plaintiff's employer, would set up an appeal in which the definition of "employer" under the FLSA is the primary issue.

Petitioners tacitly acknowledge that the question of whether a state official in his individual capacity meets the FLSA definition of "employer" is not outcome-determinative in this case. They argue that the Eleventh Circuit skipped "required analytical steps," not that it reached an indefensible conclusion. Petition, p. 8. To the extent that conflict among the appellate

courts in applying the FLSA definition of "employer" to public officials is an issue warranting the Court's review, a case in which this matter is dispositive would be a far superior vehicle.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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