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

REPLY BRIEF

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Respondents have highlighted issues that support granting of the Petition.

A. There is a Circuit Split Regarding Whether a State Official Can Be Liable in an Individual Capacity under the FLSA.

Respondents incorrectly assert that there is "no circuit split." Resp. at 4. The Eleventh Circuit's holding that a public official in his individual capacity cannot be an FLSA "employer" regardless of circumstances, *Austin v. Glynn Cnty., Georgia*, 80 F.4th 1342, 1346 (11th Cir. 2023), puts it sharply at odds with the Fourth, Fifth, and Seventh Circuits, which have each held (1) that a public official *can* be individually liable for violations of the FLSA; and (2) that determining whether such public official acted in his individual capacity requires close attention to the facts and circumstances of the particular case.

The Fifth Circuit articulated these principles in a fairly recent decision. *See Stramaski v. Lawley*, 44 F.4th 318 (5th Cir. 2022). It cited its own precedent and the FLSA definition of "employer" when holding "that governmental employees can be sued in their individual capacity for FLSA violations generally, such as for failure to pay overtime wages." *Id.* at 326; *see also Lee v. Coahoma Cnty.*, 937 F.2d 220, 226 (5th Cir. 1991) (holding public official liable in his individual capacity for failure to pay overtime wages under the FLSA). *Stramaski* used sound reasoning to arrive at its holding:

> Holding public officials individually liable for retaliation under the FLSA also is consistent with our prior holdings regarding individual

> liability in other FLSA contexts. Some of those opinions did not make the distinctions we have here, but we need not sort through all such issues in order to resolve the present appeal. We have held, for example, that governmental employees can be sued in their individual capacity for FLSA violations generally, such as for failure to pay overtime wages. *Lee v. Coahoma Cnty.*, 937 F.2d 220, 226 (5th Cir. 1991). We explained that "individual[s] with managerial responsibilities" could be held jointly and severally liable for damages if the individual failed to comply with the FLSA because that kind of employee fit within the FLSA's definition of "employer." *Id.* In *Lee*, we recognized that a sheriff "clearly f[ell] within" that definition and therefore could be individually liable. *Id.*

Id. at 326. The Fifth Circuit in *Stramaski* and *Lee* split from the Eleventh Circuit on public official individual capacity liability under the FLSA.[1]

The Seventh Circuit also splits from the Eleventh Circuit on this issue as to FLSA liability against public employees in their individual capacity. *Luder v. Endicott*, 253 F.3d 1020 (7th Cir. 2001). In *Luder*, the plaintiffs' allegations put the defendants, who were public officials sued in their individual capacity, "precisely" under the FLSA's definition of "employer." *Id.* at 1022. The

1. The *Stramaski* court also analyzed the Eleventh Amendment and held that the public employee was not immune from the FLSA suit against him in his individual capacity. *Stramaski*, 44 F.4th at 326. The court noted that Eleventh Amendment liability is case determinative. *Id.* at 321.

Seventh Circuit treated the application of the Eleventh Amendment as a separate issue from whether a public official can be liable in an individual capacity under the FLSA and held, consistent with the Fifth Circuit, that "the Eleventh Amendment question . . . cannot be answered in the abstract." *Id.* "The application of the amendment to suits against state officials in their individual capacity depends on the circumstances. The general rule is that such suits are not barred by the amendment[.]" *Id.*

The Fourth Circuit has also split with the Eleventh Circuit. *See Martin v. Wood*, 772 F.3d 192 (4th Cir. 2014). *Martin*, like the present case, involved FLSA claims against state officials in their individual capacity. *Id.* at 193-94. The *Martin* court acknowledged that the claims against individuals can proceed so long as the Eleventh Amendment is not violated. *Id.* at 194-95. *Martin* disagrees with the Eleventh Circuit's determination that a public official can never be individually liable under the FLSA. After acknowledging that public officials can be liable in their individual capacity, *Martin* examined whether there was Eleventh Amendment immunity based on the "real, substantial party in interest." *Id.* at 195-96. The Fourth Circuit clearly splits with the Eleventh Circuit on this issue.

B. Respondents' *Hafer* Analysis Supports Granting the Petition.

Respondents invest lengthy argument on the merits issue of whether *Hafer* applies to FLSA claims, asserting that the difference between § 1983 claims in *Hafer* and FLSA claims makes *Hafer* inapplicable to FLSA claims. Resp. at 9-12; *see also Hafer v. Melo*, 502 U.S. 21 (1991).

That issue is key to the Petition. This Court should grant the Petition and consider, with the benefit of full briefing from both sides, the applicability of *Hafer* to the FLSA (and by extension to the FMLA). The Eleventh Circuit erred by applying a blanket rule that a public official can never be liable in an individual capacity, ignoring both *Hafer* and the FLSA's definition of "employer." Petitioners will fully brief their opposition to Respondents' merits argument after the Petition is granted.

The inquiry does not end with *Hafer*, however. The Fourth, Fifth, and Seventh Circuits all looked to *Hafer* to determine that a public official can be liable in his individual capacity under the FLSA. But each of the circuits applied a different Eleventh Amendment analysis to determine whether a particular individual-capacity claim was, in essence, a claim against the state barred by the Eleventh Amendment. *See Stramaski*, 44 F.4th at 326 (basing decision on Eleventh Amendment immunity in FLSA individual-capacity suit on whether the actions of the individual had roots in "policy or other state-initiated action"); *Luder*, 253 F.3d at 1023 (basing decision on Eleventh Amendment immunity in an FLSA individual-capacity suit on whether the lawsuit "demonstrably has the identical effect as a suit against the state"); *Martin,* 772 F.3d at 195-96 (basing decision on Eleventh Amendment immunity in FLSA individual-capacity suit on five "inquiries" into whether the state is the "real, substantial party in interest").

This Petition raises first the easier question of whether a public official can ever be liable in an individual capacity under the FLSA (the Eleventh Circuit is wrong here, and the Fourth, Fifth, and Seventh Circuits are correct). A

tougher, second question also involving a circuit split is what, if any, Eleventh Amendment analysis follows that determination.

C. The Eleventh Circuit Reached an Indefensible Conclusion.

Respondents argue that Petitioners complain merely that the Eleventh Circuit skipped analytical steps, and that it did not reach an indefensible conclusion. Resp. at 13. Respondents mischaracterize the Petition. At issue here is the Eleventh Circuit's error in determining that a public official cannot be liable in an individual capacity under the FLSA. This holding led directly to an indefensible conclusion at odds with *Hafer*.

The Eleventh Circuit dispensed with the claims against the sheriff in his individual capacity due to binding precedent holding that a public official can never be an employer under the FLSA. *Austin*, 80 F.4th at 1346; *see also Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995). It came to its conclusion without considering the text of the FLSA, the differing views of other circuits, its own agreement or disagreement with the prior case, and without considering the appropriate Eleventh Amendment analysis for an individual capacity claim against a public official. *See id.*

The Eleventh Circuit also affirmed the district court's denial of a proposed motion to amend the complaint to add claims against Sheriff Jump in his official capacity. *Id.* at 1345. The court never performed an Eleventh Amendment analysis of the individual-capacity claims, holding only that the claims against Sheriff Jump in his

official capacity were barred by the Eleventh Amendment. *Austin*, 80 F.4th at 1347. The court applied the Eleventh Amendment based on an "arm-of-the-state" test derived from an earlier decision. *Id.*; *see also Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003). The Eleventh Circuit in *Manders* expressly limited application of its "arm-of-the-state test" to official-capacity claims, stating that the case "involves only the sheriff '*in his official capacity*' and does not affect in any way claims against sheriffs or their deputies in their individual capacities." *Id.*

As shown in the prior section, the circuits are split as to what Eleventh Amendment analysis should be applied to allegations of individual capacity FLSA liability. But the present case is strong for Petitioners under any of the Eleventh Amendment tests. Here, the real party in interest is not the state. The "sheriff" is only technically a state official; and the Georgia Constitution specifically provides that sheriffs are "county officers" who are elected by the voters of their respective counties, not through a statewide vote. Ga. Const. art. IX, § 1, ¶ III. The sheriff's department derives its funding from Glynn County rather than the state of Georgia. *See* District Court Doc. 7-1 (pay statement from Glynn County Board of Commissioners)); Amended Complaint, Doc. 7 at ¶ 31 ("Defendant Glynn County maintains employment records of Plaintiffs."); Amended Complaint, Doc. 7 at ¶ 32 ("Glynn County provides the funds used to pay Plaintiffs for their work at issue in this lawsuit."). Additionally, the state did not pay Petitioners' wages and the state would not and could not be responsible or liable for a judgment for a shortfall in wages in this case. *Id.*

Respectfully submitted,

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