No. 24-515

IN THE

Supreme Court of the United States

BALTIMORE COUNTY, MARYLAND,

Petitioner,

v.

MICHAEL A. SCOTT, *et al.*,

Respondents.

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

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") is the nation's largest association of local government attorneys, comprising more than 3,000 members. Serving local governments since 1935, IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

This case is of significant concern to local governments because the expansive ruling below, if left unchecked, will undermine work programs intended to facilitate the re-entry of incarcerated persons into society. Although many such programs can be run within the prison, many others, such as the county recycling activities here, require deploying inmates outside prison walls. For outside programs, the Fourth Circuit created a new test that confuses the governmental employer's identity, overstates the required elements of governmental custody, and infers a nonexistent effect on commerce. The resulting costs—including a sixfold increase here—will jeopardize many other work-detail programs.

Providing inmates a pathway back to gainful employment and reintegration into society is one of the

1. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution intended to fund the brief 's preparation or submission. This brief is filed at least 10 days prior to its deadline. Rule 37.2.

many laudable objectives that local governments are expected to achieve. In an era of ever-increasing demands on the public fisc, government-run out-of-prison work programs will be curtailed due the Fourth Circuit's misapplication of the FLSA.

SUMMARY OF ARGUMENT

This Court should grant this petition for a writ of certiorari to rein in the Fourth Circuit's startling expansion of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* It held that incarcerated persons, when working for the exclusive benefit of the local government charged with their custody and care, may qualify as employees under the FLSA. The decision below will impose significant burdens on the 356 counties and independent cities in the Fourth Circuit. Outside the Fourth Circuit, cash-strapped local governments may shutter similar programs to avoid risking retroactive FLSA liability and untenable labor costs for unskilled jobs typically filled by incarcerated persons.

The Fourth Circuit's analysis turned on supposed distinctions between two agencies of the same county: the Baltimore County Department of Corrections, which is charged with custody of incarcerated persons, and the Baltimore County Department of Public Works, which operated the recycling center. No court has previously recognized such a distinction, which would dramatically expand the FLSA. Trying to cabin its holding, the Fourth Circuit said it was not ruling that that all incarcerated individuals working outside the prison walls are covered under the FLSA. But in the same breath it signaled that the subsidiary factual questions to its new legal test are likely triable issues, not amenable to summary judgment.

Such uncertainty makes its purported limitations on its holding ring hollow and will result in local governments across five states discontinuing programs.

The Fourth Circuit's decision thus jeopardizes programs that are intended to benefit incarcerated individuals. As courts have held time and again, employing incarcerated people provides rehabilitative benefits, reduces idleness, and thereby supports the overall mental health of an incarcerated population. Many states have similar programs operated by a single local government employer. Before this decision, no court applied the FLSA to prison labor programs operated by a single local government employer.

IMLA's members, as counsel to local governments, understand the financial and legal concerns of their clients, as well as the fact that local governments need flexibility and certainty in forming work programs for incarcerated persons. IMLA submits this brief to articulate the concerns of local governments. Expanding the FLSA to cover the program here, and similar single-government-employer programs, will harm such programs. If the FLSA is stretched to cover this program, it should be the legislature, not a court, that makes that decision.

ARGUMENT

A. Certiorari is Warranted Because the Fourth Circuit's Decision Risks the Elimination of Prison Work Programs.

Permitting and encouraging incarcerated individuals to work reduces idleness in correctional facilities and

supports rehabilitation. Incarceration, by design, can lead to malaise across the inmate population as inmates are removed from the community as a means of deterrence and to hold offenders accountable for their actions. To combat the "enforced idleness of incarcerated individuals," the Maryland General Assembly found it was "necessary and desirable" for prisoners to complete public works projects. Md. Code, Corr. Servs. Art. § 9-502. A primary goal of incarceration is to rehabilitate the offender, avoid recidivism, and prepare the individual to reenter society with the ability to be self-supporting. *See*, *e.g.*, Justice Reinvestment Act, 2016 Maryland Laws Ch. 515 (S.B. 1005). Nationwide, departments of correction seek rehabilitation through prison work programs.[2] The Federal Bureau of Prisons states that one of its "objectives [is to] provide productive work, education,

2. The Nebraska Department of Correctional Services publicizes its commitment to inmate rehabilitation through its website, https://corrections.nebraska.gov/about/rehabilitation (last accessed November 23, 2024). Other states have similar language on their websites, including Maryland's Department of Public Safety and Correctional Services ("DPSCS"), https://dpscs.maryland.gov/rehabilitation/index.shtml (last accessed November 23, 2024), California's Department of Corrections and Rehabilitation, https://www.cdcr.ca.gov/rehabilitation/ (last accessed November 23, 2024), and Florida's Department of Corrections, https://fdc.myflorida.com/development/index.html (last accessed November 23, 2024). In Kentucky, Governor Andy Beshear established a "prison-to-work" initiative in 2022 to help inmates find incarcerated work opportunities with the goal of reducing barriers to employment for inmates once they are released from custody. See Associated Press, Kentucky governor promotes 'prison-to-work' program (Nov. 7, 2022), available at https://spectrumnews1.com/ky/louisville/news/2022/11/08/kentucky-workforce (last accessed November 23, 2024).

occupational training, and recreational activities which prepare inmates for employment opportunities and a successful reintegration upon release, and which have a clear correctional management purpose which minimizes inmate idleness."[3]

Courts have held that prisoners engaged in work programs contribute to the goal or purpose of rehabilitation. *See Danneskjold v. Hausrath*, 82 F.3d 37, 44 (2d Cir. 1996) (inmate's work as tutor "served only the institutional purpose of prisoner rehabilitation"); *Abdullah v. Myers*, 52 F.3d 324 (6th Cir. 1995) (unpublished opinion) (declining to extend the FLSA to prisoners housed in a facility managed by a private contractor "because the prison has a rehabilitative rather than a pecuniary interest in encouraging inmates to work"); *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (upholding the premise that prison work has a training and rehabilitative purpose rather than a purely pecuniary one).

Empirical data has confirmed the rehabilitative benefits of such work programs. Prisoners who work while incarcerated are less likely to recidivate and more likely to obtain gainful employment upon release.[4]

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3. *Accomplishments and Goals*, U.S. Department of Justice Federal Bureau of Prisons, https://www.bop.gov/resources/pdfs/sob02.pdf (last accessed November 23, 2024).

4. *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, The United States Department of Justice Archives, https://www.justice.gov/archives/prison-reform (last accessed November 25, 2024). *See also* Kerry L. Pyle, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 Boston U. L. Rev. 151, 174-75 (Feb. 1997) (noting that working while incarcerated lowers recidivism rates which, in turn,

Such programs ensure that prisoners have structure to their day, develop a work ethic to facilitate future employment in the community, and substantively participate in vocational training to enable them to find gainful employment upon release. Consistent with these objectives, the Baltimore County work-detail program at issue afforded inmates the opportunity to ensure they qualified for and were prepared for work release. Inmates in the program also earned sentence reduction credits that expedited their return into society. As the District Court recognized, prison work programs provide an avenue to accomplish all these goals.

The Fourth Circuit, however, disregarded the Department of Corrections' and the County's rehabilitative interests in the program and instead asked only whether the interest of the *Department of Public Works* was primarily rehabilitative rather than pecuniary. Work-detail programs often involve partnerships with other local agencies that have primary responsibility for parks, transportation, waste management, and public works. By focusing on the partner agency's interest, the Fourth Circuit's analysis inevitably will result in expanding the FLSA to some of the most important work-detail programs. This Court should grant certiorari to prevent the Fourth Circuit's expansive FLSA ruling from undermining the important societal goals of rehabilitative prison work programs.

"exemplifies prison employments' rehabilitative effect."); Jonathan M. Cowen, *One Nation's "Gulag" is Another Nation's "Factory Within A Fence": Prison-Labor in the People's Republic of China and the United States of America*, 12 UCLA PAC. BASIN L.J. 190 (Fall 1993) ("Rehabilitative objectives are probably the single greatest motivating factor for the practice of prison-labor in the U.S.").

B. Because Many States and Local Governments Have Similar Programs, the Fourth Circuit's Decision Creates Vast Uncertainty.

In 2019, about 53 percent of public and for-profit correctional facilities offered work programs under the category "public works assignments," which includes work outside the facility relating to road, park, or other general maintenance work.[5] State departments of corrections collaborate with departments of transportation,[6] departments of the environment,[7] departments of agriculture,[8] and departments of motor vehicles to permit prisoners to work on public works projects while still under the supervision and custody of a department of corrections. For example, the New York State Department of Corrections contracted with the state department of motor vehicles to arrange for inmates to provide call center services.[9] The local governments overseeing and maintaining these programs—which are substantially

5. *2019 Census of State and Federal Adult Correctional Facilities*, Bureau of Justice Statistics, (published November 2021), https://bjs.ojp.gov/content/pub/pdf/csfacf19st.pdf (last accessed November 25, 2024) ("2019 Census").

6. *See*, *e.g.*, *Corrections At A Glance*, Arizona Department of Corrections, Rehabilitation and Reentry, September 2022, https://corrections.az.gov/sites/default/files/documents/reports/CAG/2022/cagsep-22.pdf (last accessed November 23, 2024).

7. *See*, *e.g.*, *Participation by Program Summary*, Washington State Department of Corrections https://www.doc.wa.gov/docs/publications/reports/700-SR002-second-quarter.pdf (last accessed November 24, 2024).

8. *See*, *e.g.*, *2019 Census*, *supra* note 5.

9. *Corcraft Products*, New York State, https://corcraft.ny.gov/call-center-services (last accessed November 25, 2024).

similar to the County program[10]—require legal certainty to continue.

Before the Fourth Circuit's decision, no court had applied the FLSA to programs like the County's. Given the number of such programs across the United States, the Fourth Circuit's decision unsettles the legality of those programs nationwide. Letting the Fourth Circuit's opinion stand casts doubt on the viability of those programs—because of the increased labor costs associated with rehabilitative programs and the risk of liability under the FLSA. This Court should grant certiorari to keep these programs intact and set consistent guideposts, so that local governments know when prison work programs are subject to the FLSA.

The FLSA's applicability has never turned on whether inmates perform work inside or outside prison walls. The location where inmate labor is performed is not a significant factor in determining whether the FLSA applies to a program. *See, e.g.*, *Danneskjold*, 82 F.3d at 44 (concluding "that whether the labor is performed inside or outside the physical walls of the institution is irrelevant"); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 685-86 (D.C. Cir. 1994) (rejecting the notion that analyzing prisoner work through the lens of inside versus outside the prison "provides an adequate answer to which prisoner work situations should be covered by the FLSA.").

The nature of the custodial relationship, rather than the location of the work, is more important in determining whether the FLSA applies. For example, the FLSA

10. *2019 Census*, *supra* note 5.

generally applies to inmates working in work-release programs, where prisoners work under the direction and supervision of a private employer, rather than a government agency. *See Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990); *Carter v. Dutchess Cmty. College*, 735 F.2d 8 (2d Cir. 1984). In those cases, the inquiry did not hinge on the work location, but rather on the private employer reaping the economic benefit from lower wages while having responsibility to oversee and manage the prisoners at the work sites.

Yet the Fourth Circuit hypothesized that the distinction between inside and outside the prison walls was critical because of the increased risk of unfair competition to other businesses and free workers. It speculated that free workers were better able to perform services and more willing to accept employment outside of prison walls. The Fourth Circuit overlooked how custodial facilities regularly contract with private parties to perform services necessary to operate the facility, and employ free workers for a whole host of jobs other than custodial officers, such as janitors, food workers, librarians, and administrative staff. *See*, *e.g.*, *Sutton v. City of Philadelphia*, 21 F. Supp. 3d 474, 478 (E.D. Pa. 2014) ("Aramark is the food provider for the [Philadelphia Prison System] and is tasked with preparing meals[.]").

Thus, the distinction between labor performed inside and outside the prison should be subordinate to interpreting whether a custodial relationship exists, and should not determine whether the FLSA applies to specific prison work programs.

C. This Court Should Grant Certiorari Because the Fourth Circuit's Decision Will Make Work-Detail Programs Financially Untenable.

Applying the FLSA to an inmate work program outside the prison where there is no third-party employer, and only a sister agency of the same government, will hurt incarcerated persons and their local government employers. Here, application of the FLSA and Maryland's Wage and Hour Act would require that the County pay work-detail participants at the MRF not less than $15.00 an hour for up to forty hours per week, *see* Md. Code, Lab. & Empl. § 3-413(b)(1)("[E]ach employer shall pay: (1) to each employee who is subject to both the federal Act and this subtitle . . . the State minimum wage[.]")[11] For a workweek exceeding forty hours, the County would have to pay "an overtime wage of at least 1.5 times the usual hourly wage," *id.* § 3-415(a), or $22.50 per hour. As relevant here, the inmates working at the MRF were paid $20 a day for 8-10 hours of work.

If a corrections facility attempted to create a new work-detail program or revise an existing program to avoid application of the FLSA, it would risk significant financial liability. An employer who violates the FLSA or Maryland's Wage and Hour Act by failing to pay minimum wage or overtime is liable for the amount of unpaid minimum wages and overtime, an equal amount as liquidated damages, reasonable attorney's fees, and costs. *See* 29 U.S.C. § 216(b); Md. Code, Lab. & Empl. § 3-427. The costs—both immediate and future—will be

11. As of January 1, 2024, the State minimum wage in Maryland is $15.00 per hour. *Id.* § 3-413(c)(1)(ii).

high if the FLSA is held applicable to work programs just because they occur outside prison walls.

Because of the extraordinary costs of complying with the FLSA and state wage acts, and the damages available for unpaid wage violations, it is likely that local governmental budgets will require corrections facilities to simply cease work-detail programs like the program here. As discussed above, work-detail programs benefit both the incarcerated workers and the corrections facility. Imposing the FLSA on such programs will impose a quandary on facilities and local governments.

Rather than complying with the FLSA and incurring massive increases in operational costs, a state or locality's more prudent and realistic option may be to shutter work programs. Extinguishing such programs will decrease work opportunities for inmates, diminish their rehabilitation opportunities, and increase idleness. That, in turn, could lead to increased costs for prison facilities through increased security expenses arising from disciplinary problems and a higher demand for inmate mental health treatment.

D. The Determination of Fair Wages for Incarcerated Persons Working on Public Works Projects Is Properly Made by the Legislature Rather Than Through Judicial Extension.

The Fourth Circuit—through judicial extension of the FLSA—risks rendering work-detail programs operated by local government employers fiscally unsustainable. Requiring local governments to pay an incarcerated person a minimum wage intended to cover an individual's

costs of living in the free world may extinguish such programs. Such a determination is a legislative function. Congress or state legislatures are better suited to appropriately weigh the multiple considerations that must be considered in regulating such programs and able to fashion a solution, if one is required, as to payment and allocation of inmate wages.

In fact, Congress has considered whether to raise UNICOR wages above sub-minimum wages, but has thus far declined to do so.[12] Likewise, the Maryland General Assembly has in recent years considered whether to pay inmates working in the Maryland Correctional Enterprises a minimum wage and has declined to enact such a requirement.[13] If Congress or the Maryland

12. H.R. 938, 111th Cong. (2009); H.R. 2098, 113th Cong. (2013).

13. Correctional Services—Maryland Correctional Enterprises—Minimum Wage and Inmate Financial Accounts, H.B. 1123, Reg. Sess. (2023); *Letter of Information Bill 1123*, Department of Public Safety and Correctional Services, Maryland Correctional Enterprises (Mar. 3, 2023), *available at* https://mgaleg.maryland.gov/cmte_testimony/2023/jud/10KuGYTYBiClhDlF_xQ9neReTsEV3-Isb.pdf; Jack Hogan, *Bill Would Require Minimum Wage Pay for Maryland Inmates*, NBC Washington (Feb. 5, 2021), *available at* https://www.nbcwashington.com/news/local/bill-would-require-minimum-wage-pay-for-maryland-inmates/2563185/ (last accessed November 25, 2024); *see* Correctional Services—Inmates—Labor, Job Training, and Educational Courses, H.B. 0102, Reg. Sess. (2021); Correctional Services—Inmates—Labor, Job Training, and Educational Courses, S.B. 0194, Reg. Sess. (2021); Correctional Services—Inmates—Labor, Job Training, and Educational Courses, H.B. 1245, Reg. Sess. (2022). The DPSCS submitted a letter in opposition to House Bill 1245 and concluded that annual

Legislature wanted to require local governments to pay incarcerated individuals a minimum wage and overtime for work-detail programs to address historic or systematic wrongs, they know how to enact inmate protections and, here, they have chosen not to do so.[14] A legislature could also provide the proper funding for such a program if it were to require localities to pay incarcerated individuals a minimum wage and overtime.

If the FLSA is going to be interpreted in a way that will upend the employment programs available to incarcerated persons and potentially create unintended consequences for facilities and local governments by increasing the number of idle inmates, Congress or a state legislature is the appropriate body to make such fundamental change, not the federal judiciary.[15]

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expenditures would increase by a minimum of $11 million and would "undoubtedly" bankrupt the program. *Opposition to House Bill 1245 (Cross file Senate Bill 0964)*, DPSCS, Maryland Correctional Enterprises (Mar. 2, 2022), *available at* https://mgaleg.maryland.gov/cmte_testimony/2022/jud/1g9QMu5O_4EzSi9LiDQJ0zpfH1sJBClaw.pdf.

14. The Maryland General Assembly, for example, has proven itself capable of enacting statutes regulating correctional facilities. It has enacted statutes that ensure that state correctional facilities provide educational and workplace training programs, Md. Code, Lab. & Empl. § 11-901, *et seq.*, prenatal and postnatal recovery care, Md. Code, Corr. Servs. § 9-601, and menstrual products, Md. Code, Corr. Servs. § 9-616, and deploy an opioid use disorder evaluation and treatment program, Md. Code, Corr. Servs. § 9-603

15. Recent data available indicates that in no state or in the federal prison system are individuals paid minimum wage for prison work assignments, whether those assignments are jobs supporting the institutions or jobs in state-owned businesses.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Prison Policy Initiative, Table Summarizing Wage Policies as of April 10, 2017, *available at* https://www.prisonpolicy.org/reports/wage_policies.html (last accessed Nov. 23, 2024). The fact that neither state legislatures nor the federal government has deemed it appropriate to pay minimum wage where an inmate works for a single employer (the institution) or a state-owned business entity associated with the institution bears on the narrow question presented here. Those legislative bodies are free to make that change, but such a drastic change to the FLSA should be made through the legislature and not the federal judiciary.