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 Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In the decision below, the Court of Appeals applied the same "economic realities" totality of the circumstances test as its sister circuits. The Court of Appeals made a fact-bound and interlocutory determination that Petitioner failed to establish that it was entitled to summary judgment on Respondents' FLSA claims based on the totality of the circumstances, including evidence that Respondents worked at a for-profit and revenue-generating recycling center that competed with private businesses.

The question presented is whether the Court of Appeals erred in applying the economic realities test in denying summary judgment to Petitioner.

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This Court should deny certiorari review. The case does not implicate any circuit split nor does it meet any of the Court's other certiorari criteria. *See* Sup. Ct. R. 10. Petitioner contends merely that the Court of Appeals reached the wrong result on the particular facts of the case. Review of that fact-bound, interlocutory, and wholly correct determination is not warranted.

In the decision below, the Fourth Circuit held that Petitioner failed to establish that it was entitled to summary judgment on Respondents' FLSA claims. In reaching that conclusion, the Court of Appeals assessed Respondents' employment status under the Fair Labor Standards Act using the same "economic realities" totality of the circumstances test that this Court has established and reaffirmed, and that all circuits apply to myriad types of work relationships. The Fourth Circuit expressly explained that its decision did not create a circuit split and instead turned on the application of the controlling economic realities test to the particular facts of this case. *See* Pet. App. 24a.

Petitioner's arguments for certiorari are meritless. Petitioner does not and cannot contend that the decision below created or expanded a circuit split. Yet Petitioner suggests that other circuits cases stand for the proposition that work for a government entity by inmates is *categorically* exempted from FLSA coverage, regardless of the facts of the case. Tellingly, Petitioner cites no case endorsing its supposed categorical rule. Petitioner also insinuates that tension exists among the lower courts by characterizing the Fourth Circuit's decision as an "unprecedented and unwarranted

extension of the FLSA." Pet. 4. That is simply quarrelling with the Fourth Circuit's case-specific application of a standard test, and provides no basis for review either.

Nor for that matter is Petitioner correct to contend that the decision below applied the economic realities test in an "unwarranted" manner. On the contrary, the Fourth Circuit was wholly justified in concluding that Petitioner failed to carry its burden at summary judgment based on the economic realities of Petitioner's enterprise and Respondents' work. The Fourth Circuit carefully examined a multitude of facts in the summary judgment record in this case—including facts going to whether the relationship had the hallmarks of an employer-employee relationship, whether the purposes of the FLSA call for its application to this labor, and whether the putative employer had a pecuniary interest in the labor. *See* Pet. App. 13a.

In this case, the Baltimore County Department of Public Works (DPW) operated a recycling facility that sold recycled goods to commercial purchasers at auction. Pet. App. 5a. It was able to undercut competitors in the market, including private businesses, by using inmate labor at very low pay. Pet. App. 19a. The record evidence at summary judgment demonstrated that this was a profit-seeking enterprise with the intention of maximizing revenue; that the enterprise was purposefully designed to make millions of dollars in the recycling business; that incarcerated workers served as a 1-to-1 replacement for non-incarcerated workers performing the same jobs; and that the use of incarcerated persons had an anti-competitive impact on

the free enterprise of private industries engaged in the same work. Pet. App. 18a-21a, 59a. The cases cited by Petitioner as supposedly disagreeing with the determination below involved quite different facts—facts that the Fourth Circuit distinguished in its opinion.

Not only is this case a poor candidate to be granted certiorari, but it is a poor candidate for summary judgment review. The Fourth Circuit's holding in this case was a narrow one: that taking the record evidence in the light most favorable to Respondents, Petitioner had not met its burden of showing that it was entitled to summary judgment. Pet. App. 28a. The Fourth Circuit made clear that it was *not* holding that Respondents were employees subject to the FLSA, and that it was instead remanding the case to the district court to answer this question on a subsequent summary judgment motion or at trial. *Id.* The Petitioner is obligated to fairly characterize what this case is actually about: Petitioner not only overstates the extent of the Fourth Circuit's ruling, it ignores the limiting principle of the Fourth Circuit's decision that once the County engaged in interstate commerce and competed against private industry for revenue seeking purposes, the County may be prohibited from using incarcerated labor at rates below the FLSA prescribed statutory minimum.[1] The Court's review thus would be premature even if it were otherwise warranted, which it is not.

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[1] Even a cursory review of the Fourth Circuit's decision reveals the County mischaracterization of the nature of the work in this case. For example, the characterization of the recycling center being a "public works project" is a term never used by the party in either of

STATEMENT OF THE CASE

I. Factual Background

Respondents worked at a recycling center named the "Material Recovery Facility" (MRF). Pet. App. 30a. Workers at the MRF sort recyclable materials from waste, and then further sort recyclable materials into bales of different metals, papers including cardboard, and four types of plastic. Pet. App. 5a, 31a-32a. The bales are then sold at auction to "commercial purchasers." Pet. App. 5a. Baltimore County operates the MRF, and DPW oversees the facility. *Id.* The MRF recycling facility generated over $40 million in revenue for the County between 2014 and 2020. Pet. App. 59a. The MRF is not operated at all by the Baltimore County Department of Corrections (DOC), which operates the Baltimore County Detention Center, a prison facility.

During the period at issue, materials were sorted by two types of workers at the MRF. Pet. App. 5a. The first were temporary workers provided by a staffing agency. *Id.* Those workers were "paid not less than the statutory minimum wage, as well as overtime compensation for hours worked in excess of forty ... hours per week." *Id.*

The second were workers provided by the DOC's community corrections program. Pet. App. 5a. In contrast to the temporary employees paid in accordance with the FLSA, the incarcerated workers were paid $20 per day despite regularly working nine-to-ten hours

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the lower courts. This characterization, appropriately suited for work involving the construction of a building or road, is vastly at odds with the actual business enterprise operated by Petitioner, as further discussed *infra*.

shifts, and up to twelve-hours shifts during the busier holiday season. Pet. App. 5a-6a, 32a. The Fourth Circuit noted that "[t]he record contains evidence that the County sought to 'get rid of the temp workers' at the recycling center—thereby eliminating what would have been at least minimum wage paying jobs—and thus 'decrease costs' by getting 'more consistent inmate[] numbers' to do the work instead." Pet. App. 20a. The Fourth Circuit also observed that "after the County stopped using incarcerated workers at the onset of the COVID-19 pandemic (and this lawsuit), it hired more temporary workers for the recycling center and paid them the minimum wage." Pet. App. 20a-21a. The record evidence "reflects DPW's concern that a lack of inmate labor "severely [a]ffects [MRF's] operating efficiency, and [] costs the county a great deal of money." Pet. App. 60a.

The incarcerated workers did not perform any of this work behind "prison walls." Pet. App. 11a. They instead performed their job duties at the MRF facility, located away from the Detention Center. Pet. App. 29a. The incarcerated workers would stand at the facility's "conveyor belts picking out trash from the recycled material brought into the facility." Pet. App. 32a. During their regular nine-to-ten hour shifts, the incarcerated workers worked alongside their temporary and minimum-wage paid counterparts in street clothes. *Id.* As the Fourth Circuit noted, "although officers from the detention center were present during work detail shifts, it was recycling center staff—'not .... [corrections] officer[s]'—who assigned the incarcerated workers' workstations, set the work schedule, provided safety

and work equipment, and kept attendance records." Pet. App. 15a (internal citation omitted).

Incarcerated persons opted to work at the recycling center, and the County labeled the program a "work detail." Pet. App. 8a. The MRF facility was run entirely by DPW, which had no custodial responsibilities for the incarcerated workers. *See* Pet. App. 15a, 31a-32a. Incarcerated persons had the opportunity to work for various work detail programs, but for this specific work detail, DPW incentivized MRF work detail by rewarding incarcerated workers with higher stipends and better food if DPW met production quotas. Pet. App. 31a, 34a-35a.

The recycling facility's operations were principally motivated by pecuniary interests and competed with private corporations like Waste Management, which had contracts with other jurisdictions to provide the same types of services as the MPF. Pet. App. 19a. But since the MPF "import[ed] cheap labor from a prison," it was less expensive "for the County to run the recycling center itself than it would have been to use Waste Management." *Id.* By reducing labor costs, "the County's artificially low labor costs meant it could provide recycling services more cheaply than private providers, making it more difficult for private providers to secure business they otherwise might have won." *Id.* The pecuniary and competitive nature of the MRF is highlighted by the fact "the County also sorted recycling for two other counties and was trying to secure business from four more." Pet. App. 19a.

While Petitioner's operation disadvantaged private businesses providing the same services, Petitioner's

operation also served to harm non-incarcerated workers. As observed by the Fourth Circuit, Petitioner's use of incarcerated workers "increased the risk of 'unfair competition' for free workers," because the "incarcerated workers fill[ed] jobs outside a detention facility." Pet. App. 20a. There was "evidence that DPW and DOC negotiated a 'quota,' or minimum number of inmate workers," and that in order to address "struggle[s] to recruit enough inmates to reach this quota," Petitioner "at times had to reshuffle detail assignments to meet the quota, for example pulling workers from the Animal Shelter to place them at the recycling facility." Pet. App. 59a. As the District Court noted, "[n]o evidence suggests that this inmate-labor quota existed to ensure the maximum number of inmates received the best possible rehabilitative training." Pet. App. 59a-60a.

II. District Court Proceedings

Respondent Michael Scott worked at the MRF while serving a short sentence at the Detention Center. Pet. App. 6a. Mr. Scott brought a collective action on behalf of himself and other current and former inmates of the Detention Center alleging that Baltimore County violated the Fair Labor Standards Act (FLSA) and state laws by failing to pay them minimum wage and overtime for their work detail employment at the MRF recycling facility. *Id.*, Pet. App. 38a. The district court conditionally certified a collective action. Pet. App. 6a. Following discovery, Baltimore County and Mr. Scott filed motions for summary judgment. Pet. App. 35a.

To determine whether the Respondents could be deemed "employees" for purposes of the FLSA, the

district court used the three-factor test created by the Seventh Circuit in *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992), which "[t]he majority of circuit courts ... have since adopted"—including the Fourth Circuit in *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir. 1993). Pet. App. 47a-49a, 55a. This test looks at "the (1) purpose of the inmate's work program, (2) the bargained-for nature of the working relationship, and (3) the purposes of the FLSA." Pet. App. 47a.

The district court found "that the County operated the facility as a business and benefited from using cheaper inmate labor." Pet. App. 58a. And as the district court noted, the County itself admitted this, "acknowledg[ing] that it hoped the recycling center could turn a profit." Pet. App. 59a. The district court also emphasized that the program "incorporated a greater degree of voluntariness" and the inmates had "more negotiating power than in other inmate-labor cases." Pet. App. 63a-64a. The district court nevertheless granted summary judgment to the County, concluding that Respondents were not employees because the program "reflects some rehabilitative purpose," the parties "have a custodial relationship," and the economic advantage from the enterprise "flowed up to the County." *See* Pet. App. 61a, 65a, 69a.

III. Circuit Court Proceedings

A unanimous three-judge panel of the Fourth Circuit reversed the grant of summary judgment. The Fourth Circuit emphasized "that any factual disputes—including those bearing on the degree of control exercised at the recycling center and DPW's primary purpose in using incarcerated workers—must be viewed

in the light most favorable to the non-moving party", which here, is Respondents. Pet. App. 27a-28a.

The panel decision "reiterate[d] [the Fourth Circuit's] previous holdings that 'work done by inmates behind prison walls for any type of prison-operated industry or for the prison itself' is 'categorically' outside the Fair Labor Standards Act." Pet. App. 28a. But the panel decision explained that this case involves neither work behind prison walls, nor work for a prison-operated industry, nor work for the prison itself. Pet. App. 11a. The Fourth Circuit also noted that there is no categorical rule in the Fourth Circuit or its sister circuits against applying the FLSA to work outside of prison walls, emphasizing that the County itself "acknowledges that *some* incarcerated workers fall within the Act's coverage" by requiring that work release participants in another DOC program be paid minimum wage. Pet. App. 11a-12a.

On appeal, the Fourth Circuit explained that courts look to the "economic realities" in deciding whether a particular worker is covered by the FLSA, and that this approach considers the "totality of the circumstances." Pet. App. 10a. The Fourth Circuit thus proceeded to examine the same *Harker* factors as the district court did in its analysis. Pet. App. 13a.

The Fourth Circuit found "[a]t least when viewed in the light most favorable to the non-moving parties, the evidence suggests that the recycling center exercised the kind of control typical to an employment relationship." Pet App. 15a. The Fourth Circuit noted that Respondent Scott "alleges that someone other than his detainer employed him." *Id.* And while officers from

the detention center were present during work detail shifts, "it was recycling center staff—'not … [correction] officer[s]'—who assigned the incarcerated workers' workstations, set the work schedule, and kept attendance records." *Id.* The Fourth Circuit thus concluded that, with respect to this factor, "there are—at a minimum—genuine disputes of material fact that bear on whether Scott's putative employer exercised so much control as to prevent Scott qualifying as an employee." Pet. App. 16a.

The Fourth Circuit then examined whether this case implicates the purposes of the FLSA. Pet. App. 17a. When determining whether an employer's actions create unfair competition in commerce, the FLSA is "concerned not only with the individual workers claiming coverage (here, Scott and those he represents) but also with the effect that the work they do has on other workers and businesses." Pet. App. 18a. The panel concluded that the scheme of sending inmates to work in a recycling center outside of prison walls created unfair competition between the recycling center and private recycling companies, and between inmate workers and minimum-wage paid non-incarcerated workers. Pet. App. 18a, 20a.

As the panel decision noted, it was cheaper for "the County to run the recycling center itself than it would have been to use Waste Management." Pet. App. 19a. Moreover, the ability to use "artificially low labor costs meant it could provide recycling *services* more cheaply than private providers, making it more difficult for private providers to secure business they otherwise might have won." Pet. App. 19a. And as the panel further

noted, "County officials acknowledged [that] there were 'third part[ies] like [W]aste [M]anagement'—a private corporation that does not use incarcerated labor—who 'had contracts with many jurisdictions' to provide the same kinds of services the County was providing for itself at the recycling center." Pet. App. 19a. The panel also explained that the "fact that the County also sorted recycling for two other counties and was trying to secure business from four more only confirms the potential competitive unfairness to private providers." *Id.*

The panel noted that DPW's use of inmate labor also created unfair competition for non-incarcerated workers seeking employment with the recycling center. Pet. App. 20a. The record showed that DPW planned to eventually fully staff the recycling center with inmate workers, which would eliminate minimum wage jobs for non-inmate temporary workers. Pet. App. 20a-21a. And whether the recycling center would hire minimum-wage workers was directly correlated with its ability to get enough inmate workers from DOC—when the recycling center had to stop using inmate workers during the COVID-19 pandemic, it filled those roles with temporary workers paid minimum wage. *Id.*

Finally, the panel examined whether the use of inmate labor is to "turn profits for their supposed employer" or "as a means of rehabilitation and job training." Pet. App. 21a, 26a. The panel rejected the County's argument that, because the County was the named defendant in the case, the County must be deemed to be Respondents' "custodian" and Respondents' work must be deemed to be for the purpose of rehabilitation. *See* Pet. App. 21a-24a. The

panel explained that the argument ran afoul of this Court's and Fourth Circuit authority. Pet. App. 21a-25a. The Fourth Circuit emphasized that the County's argument further "offers no persuasive way to distinguish a recent and closely analogous case from the Third Circuit," *Burrell v. Staff*, 60 F.4th 25 (3d Cir. 2023), *cert. denied sub nom. Lackawanna Recycling Ctr., Inc. v. Burrell*, 143 S. Ct. 2662, 216 L. Ed. 2d 1239 (2023), which held that detainees sorting trash at a recycling center run by a municipal authority and a private corporation had sufficiently alleged that they were employees of both entities for purposes of the FLSA. *See* Pet. App. 23a.

The Fourth Circuit remanded the case to the district court for further consideration of this and other issues in the case, "given the inherently fact-intensive nature of the relevant inquiry." Pet. App. 27a. The Fourth Circuit explained that "while we do not foreclose the possibility of renewed summary judgment proceedings on remand, we emphasize that any factual disputes—including those bearing on the degree of control exercised at the recycling center and DPW's primary purpose in using incarcerated workers—must be viewed in the light most favorable to the non-moving party." *Id.*

The Fourth Circuit made clear that "[w]e do not hold every incarcerated person who works outside the four walls of their prison is covered by the [FLSA], nor do we hold that every incarcerated person doing a job outside the prison walls that could be done by a free worker at a higher wage is covered." Pet. App. 28a. The Fourth Circuit further made clear that "[w]e do not even hold

that [Respondent] and those he represents are covered by the [FLSA]." *Id.*

Petitioner's request for *en banc* review was denied without dissent.

The case currently is proceeding in the district court. Thus, to date, neither the district court nor a jury has resolved these outstanding questions of fact or liability in this case, including disputed issues involving the measure of damages.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Present any Question of Law that Has Divided the Circuits.

A. The Petition Presents No Split of Authority.

As Petitioner concedes, this case does not implicate a circuit split. The circuits have long agreed that "the fact that [the plaintiff] is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of the FLSA." *Carter v. Dutchess Comm. Coll.*, 735 F.2d 8, 15 (2d Cir. 1984).[2]

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[2] *See also Burrell v. Staff*, 60 F.4th 25, 43 (3d Cir. 2023) (noting that "circuit courts have consistently held that prisoners as a class are not exempted from FLSA coverage"); *Villareal v. Woodham*, 113 F.3d 202, 206 (11th Cir. 1997) (noting that when evaluating FLSA claims by prison inmates, courts focus on "the economic reality of the situation as a whole"); *Danneskjold v. Hausrath*, 82 F.3d 37, 39-41 (2d Cir. 1996) ("[W]e do not disturb *Carter*'s rejection of a rule that a prisoner's labor is at all times and in all circumstances exempt from the FLSA."); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 685 (D.C. Cir. 1994) (recognizing that "courts refuse to hold that prisoners are *categorically* barred from every being 'employees'" under the

Every circuit looks to the totality of the circumstances in applying the "economic realities" test to decide whether an incarcerated individual who works outside of prison walls qualifies as an employee under the FLSA—as Petitioner's own cases demonstrate. *See, e.g.*, *Burrell*, 60 F.4th at 44 ("[C]ourts should not be confined to narrow legalistic definitions and must instead consider all the relevant evidence . . .."); *Hale*, 993 F.2d at 1393 ("[C]ourts are to consider the totality of the circumstances of the relationship .... While these factors 'provide a useful framework for analysis ..., they are not etched in stone and will not be blindly applied.'"); *Vanskike*, 974 F.2d at 808 ("[S]tatus as an 'employee' for purposes of the FLSA depends on the totality of the circumstances rather than any technical label."); *Watson*, 909 F.2d at 1554 ("[T]o determine the true 'economic reality'" of the situation, courts "look to the substantive realities of the relationship, not to mere forms or labels."); *Carter*, 735 F.2d at 14 ("A full inquiry into the true economic reality is necessary."). The circuit decisions addressing the FLSA claims of incarcerated workers thus are undertaking the same analysis: conducting fact-intensive and fact-specific inquiries into

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FLSA); *Hale v. Arizona*, 993 F.2d 1287, 1389 (9th Cir. 1993) (en banc) (holding that the en court "d[id] not believe that prisoners are categorically excluded from the FLSA"); *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) (holding that the panel did "not question the conclusions of *Carter*, *Watson*, and *Hale* that prisoners are not categorically excluded from the FLSA's coverage simply because they are prisoners"); *Watson v. Graves*, 909 F.2d 1549, 1554 (5th Cir. 1990) ("agree[ing] with the *Carter* court that status as an inmate does not foreclose inquiry into FLSA coverage").

the question of whether a plaintiff is an employee under the FLSA using the well-worn "economic reality" test.

Petitioner does not dispute that the Fourth Circuit in this case similarly examined the totality of the circumstances in conducting the fact-specific "economic realities" analysis adopted by this Court. On the specific facts in the summary judgment record in this case, it held that the Petitioner had failed to establish it was entitled to summary judgment. In applying the test, the Fourth Circuit pointed to various facts specific to this case, including:

- "Scott and his fellow workers were not working inside the detention facility or for a 'prison-operated industry,'" and that "the recycling center [did not] exist to serve 'the prison itself.'" Pet. App. 14a, 11a (quoting *Harker*).
- The recycling center was in direct competition with private third parties like Waste Management and could operate the recycling center at a cheaper cost due to low-wage prison labor. Pet. App. 19a.
- The recycling center "sorted recycling for two other counties and was trying to secure business from four more," Pet. App. 19, and used prison labor to "decrease costs" of hiring temporary workers, who they would have had to pay minimum wage. Pet. App. 20a.
- That Respondent did not work at the place he was detained or for a business run by the prison but rather worked for a separate enterprise run by DPW, which in the light most favorable to

> Respondents, "exercised the kind of control typical to an employment relationship." Pet. App. 15a.

The Fourth Circuit's decision here thus turns on the unique set of facts where incarcerated workers are working alongside and replacing non-incarcerated labor for economic benefit to the putative employer, and the putative employer's product is sold in interstate commerce in a highly competitive and profitable industry with private competitors. Petitioner has failed to identify any circuit precedent holding that workers in analogous circumstances must be exempted from the coverage of the FLSA. Stripped to its essence, the Petition is merely seeking fact-bound error correction.

B. Petitioner's Contention that the Fourth Circuit's Decision Is in Tension with Other Decisions Is Meritless.

While Petitioner concedes that there is no circuit split in this case, Petitioner nevertheless suggests that the Fourth Circuit's decision warrants fact-bound error correction because it is an "unprecedented and unwarranted extension of the FLSA." Pet. 4. Petitioner's own cases demonstrate that this is wrong.

1. Petitioner relies on multiple cases holding, based on the specific facts of those cases, that specific instances of inmate labor were not covered by the FLSA. Pet. 17-19. Those cases are easily distinguishable from this case on their facts.

To be sure, some circuits—including the Fourth Circuit—exclude *in-prison labor of service to the prison* from the FLSA's definition of "employee." *See* Pet. App.

28a (citing *Harker*, 900 F.2d at 135). But those cases are irrelevant. This case does not involve in-prison labor of service to the prison. Indeed, the Fourth Circuit took pains to distinguish the unique facts here from the circumstances of work done inside of a prison where the output from such work limits its effect on commerce. Pet. App. 18a-21a.

At a minimum, the cases upon which Petitioner relies are distinguishable because they involve work directly for prison operations or programming, usually inside the prison. These cases involve, for example, incarcerated individuals tutoring only other incarcerated individuals within the same prison, or incarcerated individuals working as a janitor or cook for the prison. *See, e.g.*, *Danneskjold v. Hausrath*, 82 F.3d 37, 39 (2d Cir. 1996); *Vanskike v. Peters*, 974 F.2d 806, 806 (7th Cir. 1992). *See also Villareal v. Woodham*, 113 F.3d 202, 207 (11th Cir. 1997) ("services for the benefit of the correctional facility and other pretrial detainees and convicted prisoners"); *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) (distinguishing cases where inmates were working for other entities other than their prison as free labor).[3]

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[3] Petitioner's remaining cases are distinguishable for other reasons. In *Hale v. Arizona*, the Ninth Circuit applied the "economic realities" test and held that "[w]hile we do not believe that prisoners are categorically excluded from the FLSA, we hold that the inmates in this case, who worked for programs structured by the prison *pursuant to the state's requirement that prisoners work at hard labor*, are not 'employees' of the state within the meaning of the FLSA." *Hale*. 993 F.2d at 1394 (emphasis added). This case does not involve incarcerees sentenced or even mandated to perform work.

2. Nor do Petitioner's cases support a broader proposition that work *outside* of the prison for a government entity *other* than the prison categorically is exempted from FLSA coverage. The cases that Petitioner cites explicitly find that whether a putative employer is public or private is not determinative or do not consider this as a relevant factor. For example, the D.C. Circuit explained in *Henthorn v. Dep't of Navy* that "[n]either the inside/outside nor the public/private distinction alone provides an adequate answer to which prisoner work situations should be covered by the FLSA. 29 F.3d 682, 685–86 (D.C. Cir. 1994). And Petitioner's cases make clear that the courts conduct a fact-specific totality of the circumstances analysis, examining the "economic realities," when faced with a claim that a government entity is an employer of incarcerated workers working outside the prison. *See Burrell*, 60 F.4th at 44; *Watson*, 909 at 1556 (recognizing that "[t]his court still must apply the economic realities test to each individual or entity alleged to be an employer," including to the sheriff and warden in this case); *Carter*, 735 at 15 (holding that there were genuine issues of material fact as to whether an incarcerated

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And while the D.C. Circuit still applies the "economic realities" test, it held in *Henthorn v. Dep't of Navy* that "federal prisoner plaintiffs seeking relief under the FLSA must allege that their work was performed without legal compulsion and that any compensation received for their work was set and paid by a non-prison source." 29 F.3d 682, 687 (D.C. Cir. 1994). Neither of these factors are at issue here. *See* Pet. App. 62a (highlighting that "DOC supervisors acknowledge that they did not force individuals to work"); Pet. App. 34a (noting that the MRF paid the incarcerated workers $20 for their work detail).

individual tutoring for community college courses was an employee of the community college).

The Fourth Circuit's analysis in this case thus aligned with this conclusion when it stated that "the Act's coverage does not turn on the formal legal label affixed to the putative employer." Pet. App. 23a; *see also Watson*, 909 F.2d at 1554 ("We must also look to the substantive realities of the relationship, not to mere forms or labels ...."). By cherry-picking certain facts and treating them as determinative, Petitioner has misstated the law.

3. Petitioner suggests that the panel's decision is in tension with the Third Circuit's recent decision in *Burrell*. *See* Pet. at 16a-17a. But the Fourth Circuit in this case expressly rejected this argument—and explained that its holding *avoided* creating a circuit split with *Burrell*. *See* Pet. App. 23a-24a ("But we try to avoid creating circuit splits, and the County identifies no persuasive way to distinguish *Burrell*."). In *Burrell*, the Third Circuit considered the FLSA claims of civil detainees who sorted trash at a recycling center owned by the Municipal Authority, which then outsourced most of the center's operation to a private corporation. *Burrell*, 60 F.4th at 44. The Third Circuit held that the incarcerated individuals had "state[d] a claim" that "*the County*, *its Municipal Authority*, and the Corporation [we]re their joint employers." *Id.* at 43 (emphasis added).

In coming to this conclusion, the Third Circuit explained "that FLSA coverage is a highly factual inquiry that requires consideration of the circumstances of the whole activity …. rather than any one particular

factor" and "the FLSA employer/employee determinations must be made in light of the 'economic reality' of the parties' relationship." *Id.* at 43. The court did not find one factor dispositive but weighed numerous circumstances, including the economic benefit for the incarcerated individuals' work, and the voluntariness and control of the incarcerated individuals' work. *Id.* at 45-47. The court also considered the fact that incarcerated individuals "did the facility's integral and necessary grunt work of hand-sorting garbage in lieu of the Corporation employing hourly-paid workers." *Id.* at 46. The work "benefited Defendants by reducing the need for paid employees and artificially reducing their labor costs." *Id.* at 46. As the Third Circuit explained, "[t]his is true as to the County, which had custody of plaintiffs and provided their labor, and its Municipal Authority, which owned the facility out of which the Recycling Center ran and shared the profits that resulted from its operation." *Id.*

The Petition nevertheless attempts to distinguish *Burrell*, stating that the Third Circuit "emphasized that 'the [private operator] got an unfair advantage in the form of nearly free labor' that was not available to its competitors." Pet. 17, *citing Burrell*, 60 F.4th at 47-48. But Petitioner tellingly omits the second half of that sentence:

> And as to the competition in commerce, the Corporation here surely competed with other local and regional recycling facilitates who had to hire employees; the Corporation, on the other hand, got an unfair advantage in the form of nearly free labor funneled from *its business*

> *partner, the County—who stood to profit from the Corporation's success.*

Burrell, 60 F.4th at 47 (emphasis added); *see also id.* at 45-46 (explaining that the County and Authority also received an "economic benefit").

Thus, the Fourth Circuit's decision is in-line with the Third Circuit in finding potential FLSA coverage against a government entity. *See, e.g.*, *Burrell*, 60 F.4th at 48. This Court recently denied certiorari in *Burrell*. *Burrell*, 60 F.4th at 48, *cert. denied sub nom. Lackawanna Recycling Ctr., Inc. v. Burrell*, 143 S. Ct. 2662, 216 L. Ed. 2d 1239 (2023); *see also Harker v. State Use Indus.*, 990 F.2d 131, 135 (4th Cir. 1993), *cert. denied* 510 U.S. 886 (1993) (setting forth the legal factors that the Fourth Circuit followed in this case).

4. Petitioner thus is left with a baseless factual argument that Respondents in fact were working "exclusively for their custodian" and that their work therefore should be categorically exempted from FLSA coverage. *See, e.g.*, Pet. 17, 19. But Petitioner identifies no case, including *this* case, that holds that working for a "non-correctional agency of an inmate's governmental custodian," *see* Pet. 19, is dispositive over the economic realities test. Again, the only cases Petitioner cites for this proposition address the distinguishable fact pattern of work conducted for the direct benefit of the prison's operations and programming, typically inside the prison. *See* Pet. 17-19; *see also* p. 14 *supra*.

II. This Case Is a Poor Vehicle for Certiorari Review.

The procedural posture and unique facts underlying the petition also make this case a poor vehicle to address the question presented.

1. This Court's review of the petitioner's interlocutory appeal would be premature, given the Fourth Circuit's remand for further proceedings in the case below. The Fourth Circuit stressed the limited nature of its holding:

> We do not hold every incarcerated person who works outside the four walls of their prison is covered by the Act, nor do we hold that every incarcerated person doing a job outside the prison walls that could be done by a free worker at a higher wage is covered. We do not even hold that Scott and those he represents are covered by the Act.

Pet. App. 28a. Instead, the Fourth Circuit emphasized it would be "better to follow our usual practice of allowing the district court to conduct the required analysis in the first instance" to answer those questions, whether through additional summary judgment proceedings or a trial. *Id.* at 27a.

Members of this Court have often emphasized that interlocutory appeals present poor vehicles for a case's immediate resolution. *See, e.g.*, *Wilson v. Hawaii*, 220 L. Ed. 2d 266, 266 (2024) (Thomas, J., statement respecting denial of certiorari) (noting that "the interlocutory posture of the petition weighs against" the Court's review); *Wrotten v. New York*, 560 U.S. 959, 960 (2010) (Sotomayor, J., statement respecting denial of

certiorari) ("In light of the procedural difficulties that arise from the interlocutory posture, I agree with the Court's decision to deny the petition for certiorari.").

Such procedural difficulties are manifestly present here. As the Fourth Circuit held in its opinion below, remanding back to the district court was "especially appropriate here given the inherently fact-intensive nature of the relevant inquiry." Pet. App. 27a. Concurrent with this petition's briefing schedule, those proceedings continue in the district court, and as a result there are undecided questions of fact, liability, and damages in this case. These questions could at a minimum be relevant to Petitioner's question presented of whether "inmates working in furtherance of public works projects for the government charged with their custody and care may qualify as 'employees' under the FLSA." Pet. i.

Moreover, this case's ongoing proceedings may well render the question presented here moot or irrelevant—and thus render any opinion of this Court purely academic, rather than outcome determinative. Such a result would run "contrary to Article III's strict prohibition on issuing advisory opinions." *Haaland v. Brackeen*, 599 U.S. 255, 294 (2023) (internal quotations omitted). If Respondents prevail on the merits at trial—with its accompanying well-developed factual record—Petitioner can seek review at that time.

2. The unique facts in this case render the petition a poor vehicle for review of the legal question. The County operated an offsite recycling center using both detained and non-detained workers because it is more cost-effective than outsourcing the same services to Waste

Management. Pet. App. 19a. The risk of spurring unfair competition with private businesses is especially acute in this context, as additionally evidenced by DPW's plan to eliminate non-inmate minimum wage jobs and fully staff the center with inmate workers and the County's attempt to secure contracts for recyclable sorting from four more counties. Pet. App. 18a-19a. Baltimore County's scheme is therefore unrepresentative of most public works details—such as road crews, litter removal, and of course "prison house-work," such as work in a prison kitchen, commissary or laundry facility—which typically lack for-profit competitors to whom services would otherwise be outsourced. *See* Pet. 30, Pet. App. 5a ("The bales are then sold at auction to 'commercial purchasers.'") Indeed, unlike a public works project such as paving a road, building a library, or renovating a school, the County conceded that it "hoped the recycling center could turn a profit," and the recycling center in fact generated tens of millions of dollars of revenue for the County. Pet. App. 59a. In short, viewed in the light most favorable to the Respondents at this summary judgment stage, this case involves a government operating a business. The Fourth Circuit's decision does not jeopardize incarcerated workers involved in work details, so long as those work details are not disguised work release programs, performed for some entity other than the jailer, involving the operation of an enterprise operating in interstate commerce. Because the legal issue here arose in an atypical context, the Court should wait for a more paradigmatic case before weighing in.

III. The Court of Appeals' Decision Is Correct.

Review is also unwarranted because the decision below was correct. The text of the FLSA states that "any individual employed by an employer" is entitled to the minimum wage and overtime pay protections provided by the FLSA. 29 U.S.C. § 203(e)(1).

Since its earliest cases interpreting the scope of the FLSA, this Court has recognized that the Act is broadly "aimed at protecting commerce from injury … by eliminating sub-standard working conditions." *Overstreet v. North Shore Corp.*, 318 U.S. 125, 131 (1943); *see Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427, 429 (1955) (emphasizing that the FLSA "has been given a liberal construction," the scope of which is "determined by practical considerations not by technical conceptions"). As this Court has recognized, one of the purposes of the FLSA was to "eliminate the competitive advantage enjoyed by goods produced under substandard conditions," as that "competition is injurious to the commerce." *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 37 (1987) (internal quotation marks omitted) (citing *United States v. Darby*, 312 U.S. 100, 115 (1941)). Given that "broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency," this Court has likewise "construed the Act liberally to apply to the furthest reaches consistent with congressional discretion." *Tony and Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 296 (1985) (internal citations omitted).

In light of this broad construction, this Court has established the economic realities test to decide whether a given worker is a covered employee under the FLSA. *Id.* at 301 (citing *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961)). The economic realities test is fact-intensive, considering the totality of the economic circumstances of a given employment relationship rather than arbitrary designations of either the workers or the putative employer. *See Goldberg*, 366 U.S. at 32-33 (rejecting that members of a cooperative cannot also be employees of that cooperative simply because of the organizational structure of the enterprise); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) ("Where the work done…follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the Protection of the Act."). Furthermore, in applying the economic realities test of employment, this Court acknowledges that groups of workers not explicitly exempted from the FLSA's protection should not impliedly be read as not being covered employees. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 517 (1950) (holding that Congress's "specificity in stating exemptions strengthens the implication that employees not thus exempted…remain within the Act").

The Fourth Circuit carefully and faithfully applied this Court's economic realities test to the specific facts of the work detail program for which Scott worked. As the panel decision explained, the court first asked "whether the relationship between the workers and their putative employer had the hallmarks of 'a true employer-employee relationship.'" Pet. App. at 13a (quoting *Harker*, 990 F.2d at 133). Second, it determined

"whether the purposes of the [FLSA] call for its application." Pet. App. 13a. Namely, since the FLSA protects even those workers not seeking coverage, the Fourth Circuit weighs the economic implications of cheaper prison labor to screen for unfair competition. *Id.* at 18a. Third, it decided "whether the putative employer had 'a rehabilitative, rather than pecuniary interest in'" the workers' labor. *Id.* at 13a (quoting *Harker*, 990 F.2d at 133). The Fourth Circuit did not err in finding that, given the totality of the circumstances, there were at minimum genuine disputes of material fact.

Employer-employee relationship. During the work detail, DPW staff, not officers of DOC, "assigned the incarcerated workers' workstations, set the work schedule, provided safety and work equipment, and kept attendance records." Pet. App. 15a. While true that Scott did not bargain with DOC or the recycling center directly, as the district court noted, "[t]he more voluntary nature of the work perhaps resulted in a greater degree of bargaining power than usually enjoyed by inmates in work programs." Pet. App. 63a. And the Fourth Circuit, construing the facts in the light most favorable to Respondents, found that "the evidence suggests that the recycling center exercised the kind of control typical to an employment relationship." Pet. App. 15a. The Fourth Circuit did not err in concluding that there were at least genuine disputes as to whether the relationship between Respondents and their putative employer is close enough to the typical employer and employee that they are covered by the FLSA.

Unfair competition and the effect on commerce. One of the purposes of the FLSA is the prevention of the introduction of unfair competition into the stream of commerce. 29 U.S.C. § 202(a)(3). Unfair competition as a result of substandard working conditions "is injurious to the commerce," and the FLSA is designed to "make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of [such] goods." *Darby*, 312 U.S. at 115. As the Fourth Circuit correctly found, it is this kind of injurious unfair competition that the County was engaged in through the work detail program at the recycling center, disadvantaging both third-party enterprises and free workers. Pet. App. 18a-20a.

Petitioner asserts that the County "never sought to undercut or undersell other sellers." Pet. 6, *citing* Pet. App. 19a, 32a. Not only is that proposition not supported by its citations, but the Fourth Circuit correctly explained that it was "unpersuasive." *Id.* at 19a. By using the cheaper labor of Scott and his fellow workers, the County "could provide recycling services more cheaply than private providers, making it more difficult for private providers to secure business they otherwise might have won." *Id.* As the Fourth Circuit emphasized, it was not that the County merely could have advantaged itself over hypothetical private competitors. Rather, "the County operated the recycling center so it would not have to go to Waste Management," which would have been a direct competitor. *Id.*

DPW's recycling center decreased its costs and increased its profitability by paying Scott and his fellow

workers $20 per day, which enabled it to operate at a particular advantage over private competitors like Waste Management, so much so that it sought to win business (secure recyclable materials) from neighboring Counties. *Id.* Indeed, the district court opinion concluded that "the recycling facility resulted in $41 million in revenue" from 2014 through 2020. *See* Pet. App. 59a. Succinctly put, the County was engaged in "competition with ordinary commercial enterprises," yet paid "substandard wages" that "undoubtedly [gave] petitioners…an advantage over their competitors." *Tony & Susan Alamo Found.*, 471 U.S. at 299. In this Court's own words, "[i]t is exactly this kind of 'unfair method of competition' that the Act was intended to prevent." *Id.* (quoting 29 U.S.C. § 202(a)(3)).

The Fourth Circuit was also correct in recognizing that the FLSA is concerned with unfair competition for "*all* workers—not just those seeking coverage in a particular case." Pet. App. 17a (citing 29 U.S.C. § 202(a)). This Court has long acknowledged that not affording a set of employees FLSA coverage "would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." *Tony and Susan Alamo Found.*, 471 U.S. at 302; *cf. Gemsco, Inc. v. Walling*, 324 U.S. 244, 252-54 (1945) (upholding an administrator's ban of industrial homework because "if the prohibition cannot be made, the floor of the entire industry" and those homeworkers would "destroy[] the right of the much larger number of factory workers to receive the minimum wage").

The record here shows that the County attempted to oust the temp employees from the recycling center to increase the percent of incarcerated workers at the center in order to decrease costs, meaning that "the use of incarcerated workers kept other workers from getting these jobs." Pet. App. 20a. This practice has thus "destroy[ed] the right of the much larger number of [recycling center] workers to receive the minimum wage." *Walling*, 324 U.S. at 252. The Fourth Circuit thus did not err in recognizing that the economic reality of the recycling center work detail program directly contravened the core purpose of the FLSA "that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions" since that competition "is injurious to the commerce." *Darby*, 312 U.S. at 115.

In sum, the Fourth Circuit's decision emphasizes the impact on private enterprises and unfair competition by the government. Petitioner's position in this case would force private industry to have to compete with a government entity that can tap a pool of free or low-wage labor, such as incarcerated persons. The Fourth Circuit's decision correctly guards against use of the labor of incarcerated workers to disadvantage and compete against private industry.

Pecuniary interest of the putative employer. As the Fourth Circuit correctly held, Petitioner's insistence on its "the County is the County is the County" approach "improperly elevates form over substance" in a way that ignores the economic realities of the working relationship in question and thus ignores every one of

this Court's precedents on the issue. Pet. App. 23a (citing *Goldberg*, 366 U.S. at 33). Petitioner accuses the Fourth Circuit of "improperly highlight[ing] arbitrary distinctions and 'technical labels.'" Pet. 19. Meanwhile, Petitioner paradoxically makes such a distinction: that incarcerated workers working for a government entity should be deemed to be working for their custodian, regardless of record facts. *Id.* As discussed above, this is wrong. This Court has repeatedly disavowed rigid formalism in the context of the FLSA. *See*, *e.g.*, *Tony and Susan Alamo Found.*, 471 U.S. at 298-99 (citing 29 U.S.C. § 202(3)) (rejecting that workers for a commercial enterprise that had religious aims were categorically excluded from FLSA coverage simply because the organization was religious since "the admixture of religious motivations does not alter a business's effect on commerce"); *Goldberg*, 366 U.S. at 32 (internal citation omitted) (holding that members of a cooperative can also be employees of that cooperative because "[i]t is the cooperative that is affording them the opportunity to work, and paying them for it," and "[t]here is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship"). The Fourth Circuit did not err in remanding consideration of this factor to the district court.

Finally, Petitioner's arguments in reliance on the Ashurst-Sumners Act similarly fail. The Ashurst-Sumners Act "penalizes the knowing transportation of prison-made goods in commerce." *Vanskike*, 974 F.2d at 811 . While this case clearly implicates unfair competition concerns, Petitioner of course does not argue it is transporting prison-made goods in commerce in violation of the Ashurst-Sumners Act. As the panel

decision noted, "[o]ne other possible reason for the County's reluctance to emphasize Ashurst Sumners: if that law applied to the sort of work being done here, the County may have spent years violating it by selling bundles of recycled material produced using incarcerated labor." Pet. App. 21a n.2.

Petitioner nevertheless asserts that the Ashurst-Sumners Act does apply to this case, but only insofar as it precludes the FLSA from remedying the issues of unfair competition created by Petitioner. This too is wrong. Courts have generally acknowledged that if prison labor is done on behalf of a non-prison entity engaged in commerce, the FLSA is not precluded by the Ashurst-Sumners Act. *See Burrell*, 60 F.4th at 47–48; *see also Danneskjold*, 82 F.3d at 44; *Gamble v. Minnesota State-Operated Servs.*, 32 F.4th 666, 671 (8th Cir. 2022). Contrary to Petitioner's assertion, its cited circuit cases do not hold that "the very existence of the Ashurst-Sumners Act *precludes* application of the FLSA to service work." *See* Pet. 28; *Danneskjold*, 82 F.3d at 44 (considering Ashurst-Sumners Act argument in case involving "forced prison labor for the prison"); *McMaster v. Minnesota*, 30 F.3d 976, 977 (8th Cir. 1994) (considering Ashurst-Sumners Act argument in case involving inmate work inside the prison) *Vanskike*, 974 F.2d at 812 (same). And contrary to Petitioner's claim that the "application of the FLSA to inmate labor because of unfair competition would render the Ashurst-Sumners Act 'unnecessary,'" Pet. App. 27 (quoting *McMaster*, 30 F.3d at 980), this case provides a clear example of the FLSA remedying unfair competition in the prison labor context beyond the specific situation that the Ashurst-Sumners Act addresses.

In any event, this issue was not properly presented, argued, and preserved by the Petitioner below. Although briefly discussed before the district court, *see Scott v. Baltimore Cnty., Maryland*, No. CV SAG-21-00034, 2023 WL 3932010, at *8 (D. Md. June 9, 2023), Petitioner's only mention of the Ashurst-Sumners Act in its Fourth Circuit briefing was in a passing mention in a sentence in a footnote: "*Harker* rather rejected a similar argument in connection with the FLSA's stated purpose of avoiding unfair competition, recognizing that [C]ongress had passed legislation to specifically address this concern in the Ashurst-Sumners Act." Brief of Appellee at 46 n.12, *Scott v. Baltimore Cnty.*, 101 F.4th 336 (2024) (No. 23-1731), 2023 WL 8260999, at 46 n.12. As the Fourth Circuit observed, the "County's brief barely mentions this" issue with the County appearing "reluctan[t] to emphasize Ashurst-Sumners." Pet. App. 21a n.2. Petitioner thus did not adequately raise this issue below. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 1401, 47 L. Ed. 2d 701 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 3, 2025