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

REPLY BRIEF FOR THE PETITIONER

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Respondents characterize the Fourth Circuit's decision below as a "case-specific" interlocutory decision applying the same "economic realities" test as its sister circuits. Brief in Opposition ("Opp.") 1-2. However, the economic realities test applied by the Fourth Circuit notably deviates from its sister circuits, and the determinative facts addressed by the Fourth Circuit are shared by inmate work details across the Nation. Further,

Respondents' labeling of the posture of this case as interlocutory has no impact on whether this case presents an appropriate vehicle to address the question of inmate coverage under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. Baltimore County, Maryland ("Baltimore County") therefore requests that the Court grant the Petition for Writ of Certiorari ("Petition").

A. The Fourth Circuit's Decision Conflicts With Other Circuits.

Respondents assert that this case does not implicate a circuit split because the Fourth Circuit, like all other circuits, judged the "economic realities" of inmate labor based on the "totality of the circumstances." Opp. 14. However, the circuits have certainly disagreed about what factors to consider when judging the economic realities of inmate labor.

Review on a writ of certiorari is warranted when "a United states court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). A circuit split under Rule 10(a) exists when circuits use different standards to evaluate the same question of federal law. *See Starbucks Corp. v. McKinney*, 602 U.S. 339, 344-45 (2024) ("grant[ing] certiorari to resolve the Circuit split about what standard governs . . . requests for preliminary injunctions under § 10(j)" of the National Labor Relations Act because some courts used the traditional "four-part test for preliminary injunctions" while the Sixth Circuit applied a two-part test); s*ee also O'Connor-Ratcliff v. Garnier*, 601 U.S. 205, 207-08 (2024) (explaining that this Court granted certiorari in the

instant case as well as another one, *Lindke v. Freed*, 601 U.S. 187 (2024), "to resolve a Circuit split about how to identify state action in the context of public officials using social media," as the Ninth Circuit applied a three-part test while the Sixth Circuit applied a two-prong test).

Here, as discussed in detail by the district court below, the circuits undoubtedly use different standards to determine whether inmate labor is subject to the FLSA. Pet.App.42a-54a.

In early decisions involving work for private, outside businesses, the Second and Fifth Circuits applied a joint employer test derived from the Ninth Circuit's decision in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). This test was focused on whether the putative employer exercised control over typical prerogatives of an employer—like hiring, firing and setting work schedules—to support an employment relationship. *See Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984); *Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir. 1990).

However, the *Bonnette* joint employment test was largely abandoned after the Seventh Circuit's decision in *Vanskike v. Peters*, which observed that *Bonnette* "presuppose[s] a free labor situation" and is ill-suited to the custodial context. 974 F.2d 806, 809 (7th Cir. 1992). *Vanskike* instead analyzed three factors—(1) "whether the relationship between the workers and their putative employer had the hallmarks of 'a true employer-employee relationship;'" (2) "whether the purposes of the Fair Labor Standards Act call for its application;" and (3) "whether the putative employer had 'a rehabilitative, rather

than pecuniary, interest in' [the incarcerated workers'] labor"—and was subsequently adopted by several circuits, including the Fourth. Pet.App.13a. (quoting *Harker v. State Use Industries*, 990 F.2d 131, 133-34 (4th Cir. 1993)); *see, e.g.*, *Danneskjold v. Hausrath*, 82 F.3d 37 (2d Cir. 1996); *Reimonenq v. Foti*, 72 F.3d 472 (5th Cir. 1996); *Abdullah v. Myers*, 52 F.3d 324 (6th Cir. 1995); *Gamble v. Minnesota State-Operated Servs.*, 32 F.4th 666 (8th Cir. 2022); *Hale v. State of Ariz.*, 993 F.2d 1387 (9th Cir. 1993); *Villarreal v. Woodham*, 113 F.3d 202 (11th Cir. 1997).

Until recently, only the D.C. Circuit stood apart, using its own two-factor test providing that inmates "may be able to state a claim under the FLSA for compensation at the minimum wage" if (1) "their work was performed without legal compulsion and [(2)] any compensation received for their work was set and paid by a non-prison source." *Henthorn v. Dep't of Navy*, 29 F.3d 682, 686-87 (D.C. Cir. 1994).

Yet, in 2023, the Third Circuit revived the *Bonnette* joint employment analysis in a case involving inmate work at a recycling facility owned by a local government, *but operated by a private corporation*. *Burrell v. Staff*, 60 F.4th 25, 45 (3d Cir. 2023). *Burrell* applied a four-factor test similar to *Bonnette* to determine whether the county government *and* private corporation were joint employers for FLSA purposes: "does the alleged employer have: (1) authority to hire and fire employees; (2) authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (3) day-to-day supervision, including employee discipline; and (4) control of employee records, including payroll, insurance, taxes, and the like." *Id.* at 43-

44 (quoting *In re Enter. Rent-A-Car Wage & Hour Emp. Pracs. Litig.*, 683 F.3d 462, 469 (3d Cir. 2012)).

Thus, as demonstrated above, even prior to the Fourth Circuit's decision, the circuits were using three different tests to answer the same question of whether inmates were subject to the FLSA.

The Fourth Circuit's decision generated even further confusion. While the Fourth Circuit purported to apply the three-factor test from *Vanskike*, it in fact imported principles from the *Bonnette* joint employment analysis by differentiating between control exercised by Baltimore County's Department of Public Works ("DPW") and Department of Corrections ("DOC"). Specifically, in addressing the first *Vanskike* factor of the nature of the working relationship, the Fourth Circuit agreed that Respondents, like the inmates in *Vanskike*, did not deal at arm's length with Baltimore County. Pet.App.14a. However, the Fourth Circuit determined that this factor did not cleanly favor Baltimore County because Baltimore County's DPW—as distinguished from the DOC—had exercised control over prerogatives like assigning Respondents their workstations and keeping attendance records. Pet.App.15a. The Fourth Circuit's reasoning is squarely at odds with *Vanskike*, which observed that the joint employment principles from *Bonnette* apply only where "prisoners performed work for private, outside employers." 974 F.2d at 808.

The Fourth Circuit further determined that the DPW's status as a government agency and performance of a government function was irrelevant to the FLSA's application, and instead analyzed the DPW as akin to

a private, work release employer like McDonald's. Pet. App.18a, 26a. However, this reasoning is also at odds with *Vanskike*, which opined that "[a] governmental advantage from the use of prisoner labor is not the same as a similar low-wage advantage on the part of a private entity." 974 F.2d at 811. Even further, the Fourth Circuit's treatment of the DPW as a private, outside employer is contrary to longstanding guidance from the Wage and Hour Division of the U.S. Department of Labor ("DOL"), which would not apply the FLSA to *both* "work for the prison *or another element of the State government (such as a State university)*[.]"[1]

These discrepancies—along with the longstanding variance in tests used to analyze inmate labor—illustrate a difference of opinion on the appropriate standard for application of the FLSA to inmate workers. As such, while this "Court has never addressed the issue of whether inmates are to be included within the coverage of the FLSA[,]" it should do so now to bring clarity to this important issue of federal law. *McMaster v. State of Minn.*, 30 F.3d 976, 978 (8th Cir. 1994).

B. The Determinative Facts Addressed by the Fourth Circuit are Shared by Inmate Work Details Across the Nation.

The nationwide impact of the Fourth Circuit's decision further implicates "an important question of federal law that . . . *should be*[] settled by this Court." Sup. Ct. R. 10(c) (emphasis added). While Respondents characterize

1. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (July 10, 1975), https://vlibrary.info/op_ltrs/1975-07-10_FLSA.pdf (emphasis and alteration added).

the Fourth Circuit's decision as "fact-bound" and "specific to this case[,]" many of the determinative facts addressed by the Fourth Circuit are shared by inmate work details across the Nation. Opp. 15-16.

Respondents first argue that there is a unique risk of unfair competition in this case because the work performed by Respondents at the recycling center "replac[ed] non-incarcerated labor" and allowed Baltimore County to "operate the recycling center at a cheaper cost [than private recycling centers] due to low-wage prison labor." Opp. 23-24. However, the fact that Baltimore County avoided the need to hire "non-incarcerated labor" and operated at a cheaper cost than private businesses is hardly unique: "[f]or every prisoner who is assigned to sweep a floor or wash dishes for little or no pay, there is presumably someone in the outside world who could be hired to do the job." *Vanskike*, 974 F.2d at 811 (emphasis removed). Indeed, the numerous other inmate work details described in Baltimore County's Petition—landscaping public grounds, habitat restoration, litter and debris removal, and combatting wildfires—avoid the need to hire free workers and operate at a cheaper cost than private businesses that do the same work. Pet. 30. Each of these real-world inmate work details are subject to the same edict of "unfair competition" made by the Fourth Circuit below.

Respondents further attempt to distinguish other work details on the grounds that Baltimore County generated revenue from the recycling center. Opp. 24. However, the Fourth Circuit did not find an unfair competitive advantage by Baltimore County on that basis. Pet.App.17a-21a. In any event, the mere fact of revenue generation

from the recycling center work detail is hardly unique to Baltimore County. Inmates of the federal government have worked without a minimum wage for decades to process recyclables sold by Federal Prison Industries, known by its trade name "UNICOR."[2] UNICOR's net recycling sales in 2022 alone were $30,642,000.[3]

Respondents also emphasize that inmates "were not working inside the detention facility" but for an "enterprise run by DPW[.]" Opp. 15. However, Respondents do not dispute that, as set forth in the Petition, almost half of the country's public prisons assign inmates to public works programs outside the prison, on projects managed by non-correctional arms of the government. *See* Pet. 29-33. One such public works detail has received significant press coverage since Baltimore County filed its Petition. The California Department of Corrections and Rehabilitation ("CDCR"), "in cooperation with the California Department of Forestry and Fire Protection ("CAL FIRE") and the Los Angeles County Fire Department ("LAC FIRE")" jointly operate conservation camps, where inmates assist in responding to emergencies like the recent wildfires in Los Angeles, California.[4] Like Respondents here, inmates

2. U.S. Dep't of Justice, A Rev. of Fed. Prison Indus.' Elec.-Waste Recycling Program ix, 26 (October 2012), https://oig.justice.gov/reports/BOP/o1010.pdf.

3. UNICOR, FY 2022 Ann. Sales Rep. 7, 9 (2022), https://www.unicor.gov/publications/reports/FY22AnnualSalesReport.pdf.

4. *Conservation (Fire) Camps Program*, California Dep't of Corr. and Rehab., https://www.cdcr.ca.gov/facility-locator/conservation-camps/faq-conservation-fire-camp-program/ (last visited Mar. 10, 2025); *2025 Southern California Wildfires*, U.S.

in California's conservation camps are trained, instructed and paid by a non-correctional agency, work outside of the prison in jobs that would otherwise be filled by free workers, and further the non-rehabilitative aims of CAL FIRE and LAC FIRE (fire suppression).[5]

The Fourth Circuit's reasoning regarding application of the FLSA would apply with equal force to inmates completing important fire suppression work, contrary to Respondents' contention that the Fourth Circuit's holding is limited to the facts of this case. This is but one example illustrating that this case raises an important and timely question of federal law regarding the application of the FLSA to inmates working for the exclusive benefit of the government charged with their custody and care.

C. This Case Presents an Ideal Vehicle for This Court's Review.

Respondents' arguments regarding the "interlocutory" posture of this case ignore the Court's jurisdictional authority, and attempt to distract the Court from the legal issue presented here: whether there is an employment relationship between inmates and the governments charged with their custody and care.

No rule, statute, or other consideration prevents this Court from exercising its jurisdiction to review the Fourth Circuit's erroneous and detrimentally impactful reversal of the district court's order granting summary

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Env't Prot. Agency, https://www.epa.gov/california-wildfires (last visited Mar. 10, 2025).

5. *Conservation (Fire) Camps Program*, *supra* note 4.

judgment in Baltimore County's favor. This Court "clearly has authority" to "review a nonfinal order of the Court of Appeals . . . ." *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 168 n.2 (1964) (Harlan, J., dissenting); *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312 (1986) ("certiorari review of interlocutory orders of federal courts is available . . . .") (citing 28 U.S.C. § 1254(1)). This Court has regularly granted certiorari to review circuit decisions reversing summary judgment and remanding to the trial court for further proceedings. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244-47 (1986); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001); *City of Escondido, Cal. v. Emmons*, 586 U.S. 38, 41 (2019).

Respondents are misguided in their contrary reliance on *Wilson v. Hawaii*, 145 S. Ct. 18 (2024) (Thomas, J., statement regarding denial of *cert.*), and *Wrotten v. New York*, 560 U.S. 959 (2010) (Sotomayor, J., statement regarding denial of *cert.*) for the proposition that interlocutory review of the Fourth Circuit's decision should be denied. Opp. 22-23. Indeed, neither Justice Thomas nor Justice Sotomayor reasoned that certiorari should be denied in these cases merely because the decision to be reviewed anticipated further proceedings before the trial court.

In *Wilson*, the petitioner invoked the Second Amendment to seek review of a decision of the Hawaii Supreme Court, reversing dismissal of criminal firearms offenses. 145 S.Ct. at 18. Justice Thomas agreed with the decision to deny certiorari in *Wilson*, reasoning that the petitioner had not moved to dismiss a state law trespassing charge "on which his Second Amendment defense has no

bearing." *Id.* at 21. As such, the petitioner sought "review of an interlocutory order *over which [this Court] may not have jurisdiction*." *Id.* (emphasis added).

In *Wrotten*, Justice Sotomayor similarly agreed with the Court's decision to deny certiorari review of whether the Confrontation Clause of Sixth Amendment was violated by the admission of "two-way video" testimony at a criminal trial. 560 U.S. at 959. Justice Sotomayor reasoned that the petition reached the court in an "interlocutory posture[,]" after New York's highest court had remanded "for further review, including of factual questions relevant to the issue of necessity." *Id.* As such, a threshold question existed as to whether this Court had jurisdiction over a "final judgment" of a state's highest court pursuant to 28 U.S.C. *§* 1257(a), *and*, even if the threshold requirement of jurisdiction were satisfied, this Court "would not have the benefit of the state courts' full consideration." *Id.*

Here, unlike *Wilson* and *Wrotten*, this Court's jurisdiction over a dispositive question of federal law addressed by the Fourth Circuit is undisputed. Moreover, the Court is not disadvantaged from the lack of a complete factual record regarding whether an employment relationship exists. The Fourth Circuit recognized that "the de novo standard of review means we could apply those standards ourselves to decide whether to affirm the district court's grant of summary judgment[.]" Pet. App.27a. Thus, the facts are ripe for this Court to answer the legal question underpinning this entire case—whether Respondents are employees of Baltimore County. Pet. App.27a. "Where there is an important and clear-cut issue of law that is fundamental to the further conduct of

the case and that otherwise would qualify as a basis for certiorari, interlocutory status need not preclude review." *Randolph Cent. School Dist. v. Aldrich*, 506 U.S. 965 (1992) (White, J., *et al.* dissenting from denial of *cert.*) (collecting cases).

On review, this Court would have a complete record on which to determine whether Respondents—inmates working for their government custodian in furtherance of public works projects—may qualify as "employees" under the FLSA. Accordingly, the Court should reject Respondents' arguments regarding the interlocutory status of the Fourth Circuit's decision.[6]

* * * * *

6. Respondents raise without explanation the possibility that further proceedings in the district court may render Baltimore County's question presented moot. Opp. 23. This argument runs contrary to the caselaw cited immediately above, and would prevent this Court from reviewing *any* interlocutory decision. In any event, this Court—if not the district court—can stay the proceedings in the district court pending this appeal. *See*, *e.g.*, *Nken v. Holder*, 556 U.S. 418, 426 (2009) ("An appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as 'inherent,' preserved in the grant of authority to federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law[.]'") (quoting All Writs Act, 28 U.S.C. § 1651(a)).

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant the Petition.

Respectfully submitted,

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