

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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CLEVELAND COUNTY, NORTH CAROLINA,

*Applicant,*

v.

SARA CONNER,

*Respondent.*

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**APPLICATION FOR AN EXTENSION OF TIME TO FILE A  
PETITION FOR A WRIT OF CERTIORARI  
TO THE U.S. COURT OF APPEALS, FOURTH CIRCUIT**

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## APPLICATION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicant Cleveland County, North Carolina, requests a 60-day extension of time, up to and including June 3, 2022, within which to file a petition for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Fourth Circuit in this case.

1. The U.S. Court of Appeals for the Fourth Circuit issued its decision on January 5, 2022. *See Conner v. Cleveland Cnty.*, 22 F.4th 412 (4th Cir. 2022) (Appendix A). Unless extended, the time to file a petition for certiorari will expire on April 5, 2022. This application is being filed more than 10 days before the petition is due. *See* S. Ct. R. 13.5. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

2. In the underlying litigation, respondent Sara Conner asserts a claim against the County under the Fair Labor Standards Act, 29 U.S.C. § 207(a). She contends that her rate of pay—calculated in accordance with the County's published ordinances, written personnel policies and long-established payroll practices—failed to compensate her for all wages allegedly "earned" in a given pay period. On the County's motion to dismiss, the district court dismissed Conner's FLSA claim. Conner appealed to the Fourth Circuit. On appeal, the Fourth Circuit reversed and remanded. It concluded that Conner had stated a claim for violation of the Fair Labor Standards Act by stating "a plausible overtime gap time claim." 22 F.4th at 427.

3. The Fourth Circuit concluded that the FLSA allows employees to "recover unpaid straight time for a week in which they *did* work overtime." *Id.* at 421. The court acknowledged that "no provision of the FLSA explicitly governs employee claims to recover for unpaid gap time" and that the "FLSA does not include language about overtime gap time." 22 F.4th at 421. Even so, the court determined "that an overtime gap time claim is cognizable under the FLSA" because the "FLSA ensures [that] employees are adequately paid for all overtime hours." *Id.* at 429. According to the Fourth Circuit, "[C]ourts must ensure [that] employees are paid all of their straight time wages first under the relevant employment agreement, before overtime is counted." *Id.* at 429. To support its conclusion, the Fourth Circuit deferred to the Department of Labor's administrative *interpretation* of the FLSA, 29 C.F.R. § 778.315. That provision states that overtime compensation "cannot be said to have been paid to an employee unless all the straight time compensation due to him for the nonovertime hours under his contract . . . has been paid." *Id.* at 422.

4. The decision below deepens an existing split between the federal courts regarding deference to § 778.315. The decision below concludes that federal courts in the Fourth Circuit must allow plaintiffs to pursue so-called "overtime gap time claims" based entirely on a "general" interpretation of the FLSA by the Administrator of the Wage and Hour Division of the U.S. Department of Labor, not on the statute's text. The Fourth Circuit began its analysis "with a review of the purposes of the FLSA and the concept of 'gap time.'" *Conner*, 22 F.4th at 420. The court acknowledged that the FLSA is "silen[t] regarding overtime gap time" and, as a result, turned to the

Department of Labor's administrative interpretation to determine whether an overtime-gap-time claim was viable. *Id.* at 421. The court ultimately concluded that Conner's claim was viable, but failed to find support for that conclusion in the FLSA's text. In contrast with the Fourth Circuit's decision, the Second Circuit has concluded that § 778.315 is entitled to no deference. *Lundy v. Catholic Health Sys.*, 711 F.3d 106, 116–17 (2nd Cir. 2013). As the Second Circuit notes, the FLSA's statutory text does not obviously support § 778.315. *Id.* at 117. Likewise, § 778.315 says nothing about how its interpretation squares with the FLSA's text.

5. Cleveland County has retained Alex C. Dale and the firm of Ward and Smith, PA as counsel to file a petition for writ of certiorari. As a deliberative public body subject to public meeting notice requirements, the applicant's Board of Commissioners only recently gave final authorization to proceed with the petition.

6. In the time since the Fourth Circuit's decision was rendered, and especially since the County's authorization to proceed with the petition was given, counsel have been, and are, engaged in other matters and request additional time to prepare the petition for writ of certiorari. Counsel have been engaged in extensive briefing in the U.S. Court of Appeals for the Federal Circuit. *See Innovative Global Sys. v. Keep Truckin, Inc.*, No. 2021-2289 (CAFC); *Van Dyke v. Wake Forest Univ. Health Scis.*, 2022-1317 (CAFC). Further, counsel have been involved in numerous other appellate proceedings, including both oral argument and briefing, before the Fourth Circuit. *See Warfield v. ICON Advisers, Inc.*, 26 F.4th 666 (4th Cir. 2022); *United States v. Fields*, No. 21-4427 (4th Cir. 2021). Finally, counsel prepared for, or

participated in, oral argument before the Supreme Court of North Carolina, *Blue v. Bhiro*, No. 26A21 (N.C. 2021), trial in the Eastern District of North Carolina, *Musselwhite v. Mid-Atlantic Rest. Corp.*, No. 18-CV-89 (E.D.N.C. 2018), motions practice before the Eastern District of North Carolina in *Penn America Insurance Company v. Fancy Flea Antique Mall, Inc.*, No. 21-CV-198 (E.D.N.C. 2021), record preparation activities before the North Carolina Court of Appeals, and hearings in North Carolina state trial courts.

7. The County requests this extension to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below. Due to the circuit split on this issue, there is a reasonable prospect that this Court will grant the petition, such that it warrants this additional time for these important questions to be fully addressed in the petition. If the petition were granted, it appears that the Court would hear oral argument during the same term regardless of whether an extension is granted. No prejudice will result from the requested extension.

**Conclusion**

For those reasons, applicant Cleveland County, North Carolina, requests that this Court grant an extension of 60 days, up to and including June 3, 2022, within which to file a petition for a writ of certiorari.

Respectfully submitted,

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