No. 22-918

IN THE

Supreme Court of the United States

LOS ANGELES COUNTY
DEPARTMENT OF PUBLIC SOCIAL SERVICES,

Petitioner,

v.

TRINA RAY AND SASHA WALKER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly applied a well-established multifactor test, which forms the basis for similar tests in other circuits and in Department of Labor rulemaking, to determine that the County of Los Angeles is an employer of Plaintiffs and others similarly situated under the Fair Labor Standards Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ... iii
INTRODUCTION ... 1
STATEMENT OF THE CASE ... 2
REASONS FOR DENYING THE WRIT ... 6
I. There is No Conflict Warranting This Court's Review ... 7
A. The FLSA uses the broadest possible definition of "employ." ... 7
B. The four Bonnette factors are sufficient—but not necessary—to establish joint employment in every circuit. ... 8
C. The circuits are not divided on the question presented ... 10
D. This case is a poor vehicle to address the FLSA joint employment standard because the outcome would be the same under any approach ... 14
II. Neither the Legislative History Nor Recent Regulatory Activity Require Abandoning Existing Joint Employer Jurisprudence ... 14
III. The Ninth Circuit's Decision Was Correct ... 19
CONCLUSION ... 23

TABLE OF AUTHORITIES

Barrentine v. Arkansas-Best Freight Sys., Inc.,
450 U.S. 728 (1981) 17

Baystate Alt. Staffing, Inc. v. Herman,
163 F.3d 668 (1st Cir. 1998).......................... 8, 10

Bonnette v. California Health & Welfare Agency, 704 F.2d 1465
(9th Cir. 1983) 1,2, 4-6, 9-12,15, 16, 19-20

Brooklyn Savings Bank v. O'Neil,
324 U.S. 697 (1945) 17

Butler v. Drive Auto. Indus. of Am., Inc.,
793 F.3d 404 (4th Cir. 2015) 10

EEOC v. Skanska USA Bldg., Inc.,
550 F. App'x 253 (6th Cir. 2013)....................... 10

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 16

Godlewska v. HDA,
916 F. Supp. 2d 246 (E.D.N.Y. 2013) *aff'd sub nom. Godlewska v. Hum. Dev. Ass'n, Inc.*,
561 F. App'x 108 (2d Cir. 2014) 13

Hall v. DIRECTV, LLC,
846 F.3d 757 (4th Cir. 2017) 8

Home Care Ass'n of Am. v. Weil,
799 F.3d 1084 (D.C. Cir. 2015) 8

In re Enter. Rent-A-Car Wage & Hour Emp. Pracs. Litig., 683 F.3d 462 (3d Cir. 2012)........................... 8, 11

Knitter v. Corvias Military Living, LLC, 758 F.3d 1214 (10th Cir. 2014)......................... 10

Krage v. Macon-Bibb Cnty., Georgia, No. 5:19-CV-321 (MTT), 2021 WL 5814274 (M.D. Ga. Dec. 7, 2021), *aff'd,* No. 22-10061, 2022 WL 16707109 (11th Cir. Nov. 4, 2022)..................................... 13

Layton v. DHL Express (USA), Inc., 686 F.3d 1172 (11th Cir. 2012)......................... 11

Misewicz v. City of Memphis, Tenn., 771 F.3d 332 (6th Cir. 2014) 17

Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr., 536 F.3d 640 (7th Cir. 2008)............................. 12

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) 7,8,9

New York v. Scalia, 490 F. Supp. 3d 748 (S.D.N.Y. 2020).......... 15, 22

Orozco v. Plackis, 757 F.3d 445 (5th Cir. 2014)............................. 10

Plaso v. IJKG, LLC, 553 F. App’x 199 (3d Cir. 2014) 10

Ray et al. v. Los Angeles County Department of Public Social Services,
939 F.3d 1062 (9th Cir. 2019) 3

Ray et al. v. Los Angeles County Department of Public Social Services,
140 S.Ct. 1124 (Feb. 24, 2020) 3

Rhea v. W. Tennessee Violent Crime & Drug Task Force,
No. 217CV02267JPMCGC, 2018 WL 7272062 (W.D. Tenn. Dec. 12, 2018) 13

Rutherford Food Corp. v. McComb,
331 U.S. 722 (1947) 7, 9, 20

Salinas v. Commercial Interiors, Inc.,
848 F.3d 125 (4th Cir. 2017) 11,12

Salazar v. McDonald's Corp.,
944 F.3d 1024 (9th Cir. 2019) 21

Spears v. Choctaw Cnty. Comm'n,
No. CIV A 07-0275-CG-M, 2009 WL 2365188 (S.D. Ala. July 30, 2009) 13

Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123,
321 U.S. 590 (1944) 8

United States v. Rosenwasser,
323 U.S. 360 (1945) 7

Walling v. Portland Terminal Co.,
330 U.S. 148 (1947) 7

Whitaker v. Milwaukee Cnty., Wisc.,
772 F.3d 802 (7th Cir. 2014) 10

Zheng v. Liberty Apparel Co.,
355 F.3d 61 (2d Cir. 2003)............................ 9, 11

STATE CASES

Martinez v. Combs,
49 Cal. 4th 35 (2010) 21

Skidgel v. California Unemployment Ins. Appeals Bd.,
24 Cal. App. 5th 574 (2018),
as modified on denial of reh'g
(July 16, 2018), *aff'd,* 12 Cal. 5th 1 (2021)....... 18

FEDERAL STATUTES

29 U.S.C. § 203(d) 7, 17, 19, 21

29 U.S.C. § 203(e)(2) 17

29 U.S.C. § 203(e)(4)(A) 17

29 U.S.C. § 203(g) 7, 20

29 U.S.C. § 203(r)(2) 17

29 U.S.C. § 203(x) 17

29 U.S.C. § 207(o) 16

29 U.S.C. § 207(p) 16

FEDERAL REGISTER

Joint Employer Status Under the
Fair Labor Standards Act
85 Fed. Reg. 2820 (Jan. 16, 2020)..................... 14

Rescission of Joint Employer status Under the Fair Labor Standards Act Rule,
86 Fed. Reg. 40939 (July 20, 2021)....... 15, 18, 22

INTRODUCTION

This case presents no novel or unsettled legal issues. Since the Ninth Circuit's 1983 decision in *Bonnette v. California Health & Welfare Agency*, the law has been clear that California and its counties are employers of providers (like Plaintiffs) in the In Home Supportive Services ("IHSS") program, for purposes of the Fair Labor Standards Act ("FLSA"). 704 F.2d 1465 (9th Cir. 1983).

In *Bonnette*, the Ninth Circuit held that IHSS providers were jointly employed by the recipients of in home supportive care, the state of California, and its counties. The *Bonnette* court listed four factors relevant to its joint employment analysis: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." 704 F.2d at 1470. After applying those four factors, the court concluded that the state and county defendants were joint employers under the FLSA because the facts of the case demonstrated that they "exercised considerable control over the nature and structure of the employment relationship." *Id.*

The Ninth Circuit's *Bonnette* decision serves as the foundation for many circuits' multi-factor tests for determining FLSA joint employment, and although circuit decisions emphasize different factors depending on the factual circumstances, those differences reflect the fact-intensive nature of the analysis, not a disagreement amongst the circuits over governing legal principles.

The Petition makes no argument that the result here would have been different under any other circuit's analysis. Instead, the Petition seeks a new rule, unique to County employment, that exclusive control over payroll is dispositive of the joint employment inquiry. No circuit has announced such a rule despite decades of jurisprudence in this area.

Moreover, the Petition misstates recent Department of Labor ("DOL") rulemaking activity. DOL has not distanced itself from *Bonnette*. Instead, it has determined that previous joint employment rulemaking erred by deviating from *Bonnette*. Congress has also signaled its clear intent to apply the FLSA to all joint employers, including municipal employers like the County.

The FLSA's definitions of "employer" and "employ" are amongst the broadest in the law. The Ninth Circuit's decision was well in line with those statutory definitions because *Bonnette*'s four factors align with narrower, common law definitions of employer, such that any entity falling within *Bonnette* indisputably qualifies as an FLSA employer. And because other circuits expand *Bonnette* to cover a greater universe of employers, the Ninth Circuit's decision would have been the same in other circuits. There is no reason for this Court to accept review.

STATEMENT OF THE CASE

1. Plaintiffs Trina Ray and Sacha Walker worked as home care providers in the IHSS program, which allows income-qualifying elderly or disabled county residents to receive supportive care in their homes. Plaintiffs and other providers work long hours—up to 283 hours per month—for near minimum wage pay.

For years prior to 2015, DOL regulations did not require overtime pay for certain home care employees like Plaintiffs.

That changed in 2015, when DOL implemented new regulations removing certain overtime exemptions. After unsuccessful Administrative Procedure Act challenges to these regulations, the state of California and its counties failed to implement overtime pay in the IHSS program for months, and never paid retroactive backpay to providers. Plaintiffs filed suit almost six years ago seeking unpaid overtime pay that was indisputably owed to them and other IHSS Providers.

Unlike many unpaid overtime cases, there was no dispute below about whether this group of employees was exempt from the overtime provisions of the FLSA, or whether the plaintiffs were employees as opposed to independent contractors. Instead, the key legal issue was whether Petitioner the County of Los Angeles (the "County") could be held liable for the failure to pay overtime to Plaintiffs and their peers.

The County first sought to cloak itself in the state's sovereign immunity, arguing that it acted as an arm of the state in administering the IHSS Program. The district court denied the County's motion to dismiss on those grounds, App. 106, and the County appealed. The Ninth Circuit affirmed the district court's decision. App. 83. The Ninth Circuit denied the County's petition for rehearing, 939 F.3d 1062 (9th Cir. 2019), and this Court denied the County's petition for a writ of certiorari, 140 S.Ct. 1124 (Feb 24, 2020).

The case then returned to the district court, which granted summary judgment in the County's

favor, holding that the County was not an employer under the FLSA, despite *Bonnette*. App. 57. Plaintiffs appealed, and the Ninth Circuit reversed. App. 17.

2. In the Ninth Circuit decision the County challenges here, a unanimous panel concluded that the County employed Plaintiffs under the FLSA. App. 17. That decision contains a thorough factual analysis supporting the Court's application of the *Bonnette* factors to reach that conclusion.

Involvement in the IHSS program begins at the county level. "County residents seeking IHSS services apply through the County. County social workers review applications and conduct in-home visits to assess recipients' needs. Social workers determine the services recipients are entitled to receive, the time allotted for each service, and the total number of hours a provider may work for the recipient each month." App. 5. "Prospective providers must attend an in-person orientation in a County field office . . . ." *Id.*

Once a Provider begins working in the IHSS program, "[t]he County . . . exercise[s] considerable economic and structural control over the employment relationship in a variety of ways." App. 11–12. For example, "the County contributes a substantial amount of funding to the IHSS program." App. 12. In "fiscal year 2014-2015, the County paid its share of IHSS program costs using $118 million from its general fund and $237 million in realignment revenue [received from the state]." App. 12–13.

Additionally, the County "has the authority, either by itself or through a separate entity, to negotiate for wages covering the providers." App. 13. "Between 2012 and 2016, the County requested pay

increases for providers and the State approved those increases." App. 14. "The County also chooses the method of payment" from three options provided for under state law. *Id.*[1]

"[T]he County also . . . 'exercise[s] considerable control over the nature and structure of the employment relationship[.]'" App. 15 (citing *Bonnette*, 704 F.2d at 1470). Specifically, "a County social worker performs an initial in-home assessment of the recipient's needs and applies state guidelines to determine how many service hours the recipient is eligible to receive. The social worker reviews a list of twenty-five types of services that IHSS providers can give and assigns a 'functional rate index' number of 1 to 5 for each of the services for which the recipient qualifies." *Id.* at 15–16. "The social worker then authorizes the number of hours allocated to each task, based on state guidelines prescribing a range of hours for each task at each functional ranking. The social worker may deviate from the prescribed range if the worker justifies the deviation." *Id.* at 16.

The County must approve variations from those established hours. Specifically, "if a recipient needs a provider to work overtime hours beyond the authorized amount, the recipient must request County approval, except in narrow circumstances." App. 16. "County social workers [also] inspect the home to make sure recipients are receiving the care they need." *Id.* Lastly, "the County maintains some employment

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[1] Counties may "hire chore workers directly, contract with agencies or individuals for such services, or make direct payment to the recipients for the 'purchase' of chore worker services." App. 14 (citing *Bonnette*, 704 F.2d at 1467).

records, including the forms a provider signs when applying for employment, a copy of the provider's ID, and a copy of the provider's Social Security card." *Id.* at 17.

Petitioner argued below that structural changes in the IHSS program since *Bonnette* should lead to a different result today. The most significant post-*Bonnette* development was that payroll has been consolidated statewide. App. 11. However, the Ninth Circuit concluded: "[g]iven that the County makes a significant financial contribution to provider wages, *Bonnette's* finding that providers 'were paid by the [counties and State]' remains accurate, even though the State is now responsible for cutting the checks. [Citation omitted.] If anything, the County's share of funding for provider wages is greater than it was at the time of *Bonnette*." App. 13.

After a thorough review of the record, the Ninth Circuit held: "In light of the economic and structural control the County exercises over the employment relationship, we conclude that *Bonnette*'s holding that counties are joint employers of IHSS providers applies to the County." App. 17.

Petitioner sought en banc review, which was denied without any judge requesting a vote. Dkt. No. 47.

REASONS FOR DENYING THE WRIT

This case is not worthy of this Court's review. The case presents no circuit split; in fact, the result would have been the same under any circuit's joint employment test. Moreover, the result is well in line with recent DOL regulatory activity and the text and legislative history of the FLSA. Because the FLSA has

long applied to municipal employers—and has applied to Petitioner for the very program at issue in this case in the forty years since *Bonnette*—the Ninth Circuit's decision was a clear application of the status quo under the most employer-friendly circuit-level joint employment analysis. In seeking review, the County requests a fact-specific rule applicable to municipal employers that has not been articulated by any circuit court, has no basis in statutory text, and would be unworkable if applied to other employers. The Court should deny the petition.

I. There is No Conflict Warranting This Court's Review

The outcome of this case would be the same under any of the multi-factor tests used to determine FLSA joint employment.

A. The FLSA uses the broadest possible definition of "employ."

The FLSA broadly defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d), and "employ" as "to suffer or permit to work," 29 U.S.C. § 203(g). As early as 1945, this Court explained that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). The FLSA's broad definitions extend the Act's coverage beyond the scope of the common law to protect "many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947)); *see also Nationwide Mut. Ins. Co. v. Darden*,

503 U.S. 318, 326 (1992) (observing that the FLSA's "striking breadth . . . stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."). The FLSA uses expansive definitions because it serves "remedial purposes." *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084, 1093 (D.C. Cir. 2015). Thus, this Court has directed that the FLSA "must not be interpreted or applied in a narrow, grudging manner." *Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 597 (1944). Under the joint employment doctrine, workers can simultaneously be employed by more than one entity, and all such entities are jointly and severally liable for FLSA violations.

B. The four *Bonnette* factors are sufficient—but not necessary—to establish joint employment in every circuit.

Each circuit applies a multifactor, totality-of-the-circumstances test to determine whether an entity is a joint employer. Different circuits emphasize different factors, but all of them acknowledge that "it is the totality of the circumstances, and not any one factor" that determines employer status. *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 676 (1st Cir. 1998); *see also Hall v. DIRECTV, LLC*, 846 F.3d 757, 770 (4th Cir. 2017) ("[T]he absence of a single factor—or even a majority of factors—is not determinative of whether joint employment does or does not exist." (internal citation omitted)). The factors are "not exhaustive." *In re Enter. Rent-A-Car Wage & Hour Emp. Pracs. Litig.*, 683 F.3d 462, 469–70 (3d Cir. 2012). Rather, they are meant to "provide a useful framework for analysis in this case, but they are not

etched in stone and will not be blindly applied." *Bonnette*, 704 F.2d at 1470. A court is generally "free to consider any other factors it deems relevant." *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71–72 (2d Cir. 2003).

Bonnette, the first circuit case to address the issue, identifies four non-exhaustive factors: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." 704 F.2d at 1470. *Bonnette* applied those factors because they had been applied by other courts and were "relevant to [the] particular situation." *Id.* The court cautioned, however, that the factors "are not etched in stone and will not be blindly applied. The ultimate determination must be based 'upon the circumstances of the whole activity.'" *Id.* (quoting *Rutherford,* 331 U.S. at 730).

That an entity which satisfies most or all of the four factors identified in *Bonnette* is an employer under the FLSA is unremarkable because the factors reflect considerations for employment determinations under common-law agency principles, which are more restrictive than the broad definition of employ used in the FLSA. *See Darden*, 503 U.S. at 323–24 (explaining the overarching concern under agency principles is "the hiring party's right to control the manner and means" of the work and identifying the ability to hire, control over the hours of work, method of payment, provision of employment benefits, and tax treatment as among the relevant factors to consider). In fact, several circuits have articulated the relevant factors

for determining joint employment under the common-law "control" test as being virtually identical to the four factors discussed in *Bonnette*. *See, e.g.*, *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 411 (4th Cir. 2015); *Knitter v. Corvias Military Living, LLC*, 758 F.3d 1214, 1226 (10th Cir. 2014); *Plaso v. IJKG, LLC*, 553 F. App'x 199, 204–05 (3d Cir. 2014); *EEOC v. Skanska USA Bldg., Inc.*, 550 F. App'x 253, 256 (6th Cir. 2013); *cf. Whitaker v. Milwaukee Cnty., Wisc.*, 772 F.3d 802, 810 (7th Cir. 2014) (providing similar but not identical factors). In other words, a finding that an entity satisfies most or all of the four factors discussed in *Bonnette* will always be sufficient to establish an employment relationship under the broader standard applicable to the FLSA, but satisfying those factors is not necessary where other relevant factors establish an employment relationship under the FLSA.

C. The circuits are not divided on the question presented.

Circuit courts addressing joint employment since *Bonnette* have looked to the Ninth Circuit's four factors for guidance. In *Baystate Alternative Staffing*, for example, the First Circuit held that the *Bonnette* factors "provide a useful framework" to determine whether a staffing agency jointly employed workers with the client companies for whom the agency provided labor. 163 F.3d at 675. Likewise, the Fifth Circuit used the *Bonnette* factors in *Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir. 2014), to determine whether an employee of a franchisee was jointly employed by the franchisor.

Other circuits analyze joint employment using factors beyond the four set forth in *Bonnette*. For example, the Third Circuit, while emphasizing that its

factors do not constitute an exhaustive list, crafted "the *Enterprise* test" for joint employment by adding additional considerations to the factors set forth in *Bonnette*. *In re Enter. Rent-A-Car Wage & Hour Emp. Pracs. Litig.*, 683 F.3d at 469–70. In *Zheng*, the Second Circuit held that the district court erred by relying exclusively on the four *Bonnette* factors to assess joint employment, explaining that those four factors can be *sufficient* to establish employer status but a positive finding on those factors is not *necessary* to establish joint employment. 355 F.3d at 69. Rather, the Second Circuit noted additional factors pertinent to the joint employment inquiry, many of which address labor contractors. *Id.* at 72–75. The Eleventh Circuit uses an eight-factor test that largely overlaps with the *Bonnette* and *Zheng* factors. *See Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1176–77 (11th Cir. 2012).

The Fourth Circuit uses a different approach to articulate its totality-of-the-circumstances standard for FLSA joint employment, but it generally overlaps with the frameworks utilized by other circuits. In *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017), the court held that a general contractor jointly employed the plaintiffs, drywall installers who were directly employed by a subcontractor. The court explained that, for purposes of the FLSA, "joint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker's employment and (2) the two entities' combined influence over the essential terms and conditions of the worker's employment

render the worker an employee as opposed to an independent contractor." *Id.* at 129–30.

The Fourth Circuit's decision in *Salinas* synthesizes existing case law regarding both the joint employment doctrine and the issue of whether a worker is an independent contractor, and it provides a two-step framework to address both issues. Under the first step, courts determine whether two entities should be treated as joint employers. Under the second step, courts determine whether the workers are employees or independent contractors. As to whether two entities constitute joint employers, the Fourth Circuit considers six factors that largely encompass the four *Bonnette* factors, but are more expansive and focus on whether the putative joint employers share or codetermine the terms and conditions of a worker's employment.[2]

Thus, while other circuits reviewing FLSA joint employment post-*Bonnette* have built on *Bonnette*'s multi-factor test to add nuance to the factual analysis, these cases articulate more employee-friendly tests that allow for a finding of employer status in a multitude of factual scenarios.[3]

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[2] Petitioner cites a Seventh Circuit case arising under the Family Medical Leave Act in support of an alleged circuit split. *See Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr.*, 536 F.3d 640, 642 (7th Cir. 2008). But a case arising under a different statute is no basis for this Court to accept review.

[3] Amici Curie agree on this point, acknowledging that every circuit other than the Fourth applies *Bonnette* or something more expansive, and that the Fourth Circuit criticizes *Bonnette* as too narrowly focused on control over employees. Br. for Amici Curie, at 10–11.

Far from creating a circuit split, these decisions reinforce the fact-based nature of the joint employment inquiry and are aimed at providing guidance to district courts analyzing the unique circumstances of each case. As but one example, a district court in New York reviewed a state Medicaid program to determine whether New York City was a joint employer. *See Godlewska v. HDA*, 916 F. Supp. 2d 246 (E.D.N.Y. 2013), *aff'd sub nom. Godlewska v. Hum. Dev. Ass'n, Inc.*, 561 F. App'x 108 (2d Cir. 2014). Under the unique facts of that case, which (unlike here) involved a private company that performed many employer functions, the district court concluded that the *Bonnette* factors did not weigh in favor of employer liability for the city. *Id.* at 251–62. That result is no basis for this Court's review, as Petitioner claims, but instead confirms that unique facts produce different results even under the same test.[4]

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[4] Petitioner cites other factually-distinct district court FLSA cases. *See*, *e.g.*, *Rhea v. W. Tennessee Violent Crime & Drug Task Force*, No. 217CV02267JPMCGC, 2018 WL 7272062 (W.D. Tenn. Dec. 12, 2018) (plaintiff who worked in drug task force established by District Attorneys General was not a county employee, where multi-factor joint employment test was not met); *Krage v. Macon-Bibb Cnty., Georgia*, No. 5:19-CV-321 (MTT), 2021 WL 5814274 (M.D. Ga. Dec. 7, 2021), *aff'd,* No. 22-10061, 2022 WL 16707109 (11th Cir. Nov. 4, 2022) (sheriff's deputies were not county employees, where sheriff was an elected constitutional officer and acted as an arm of the state); *Spears v. Choctaw Cnty. Comm'n*, No. CIV A 07-0275-CG-M, 2009 WL 2365188 (S.D. Ala. July 30, 2009) (same conclusion as to sheriff's deputy).

D. This case is a poor vehicle to address the FLSA joint employment standard because the outcome would be the same under any approach.

Even if variations in how the circuits articulate their multifactor totality-of-the-circumstances standards for determining FLSA joint employment constituted a circuit split (and it does not), this case would not warrant review because the outcome would be the same under any approach. The *Bonnette* factors are not, and were not intended to be, the sole considerations for joint employment under the FLSA. Because the County is a joint employer based solely on an analysis of the four *Bonnette* factors, which comprise the most restrictive test, the outcome would necessarily be the same even if additional factors were considered. The Court need not accept review to craft a county-specific joint employment rule out of whole cloth for the specific nuances of this case.

II. Neither the Legislative History Nor Recent Regulatory Activity Require Abandoning Existing Joint Employer Jurisprudence

1. The Petition's argument that recent DOL activity undermines *Bonnette* misstates the regulatory record. Far from undermining *Bonnette*, DOL's 2021 regulatory activity confirms *Bonnette*'s ongoing vitality.

At issue is a Rule titled "Joint Employer Status Under the Fair Labor Standards Act," published in January 2020. 85 Fed. Reg. 2820 (Jan. 16, 2020). That rule revised 62 year-old joint employer regulations.

See "Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule," 86 Fed. Reg. 40939, 40941 (July 30, 2021). Seventeen states and the District of Columbia sued challenging the Rule, and in September 2020 a district court vacated the portion of the Rule at issue here[5] as contrary to law and arbitrary and capricious. *New York v. Scalia*, 490 F. Supp. 3d 748, 774, 792 (S.D.N.Y. 2020).

In a Final Rule issued July 30, 2021 after notice and comment, DOL officially rescinded the 2020 Joint Employer final rule. 86 Fed. Reg. at 40943. One of DOL's primary reasons for rescinding the Rule was that its "four-factor analysis deviated from the analysis in *Bonnette* in several ways." *Id.* at 40941. First, the Rule required that the putative employer actually engage in hiring and firing, as opposed to merely having the power to hire and fire. *Id.* Second, the Rule required that a putative employer supervise and control schedules and conditions of employment "to a substantial degree"—a qualifier that does not appear in *Bonnette*. *Id.* Third, the Rule provided that maintaining employment records alone will not lead to a finding of employer status, a provision that was not in *Bonnette*. *Id.* And fourth, the Rule provided that additional considerations are only relevant if they show the putative employer exercises "significant control over the terms and conditions of the employee's work." *Id.* at 40942. This requirement conflicts with

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[5] The Final Rule addressed both "horizontal" and "vertical" joint employment. This case involves vertical joint employment, where more than one employer acts with respect to the same work performed by an employee. *See New York v. Scalia*, 490 F. Supp. 3d 748, 761 (S.D.N.Y. 2020).

Bonnette's teaching that its four factors "'provide a useful framework for analysis in this case,' but 'are not etched in stone and will not be blindly applied,' and that '[t]he ultimate determination must be based upon the circumstances of the whole activity.'" *Id.* at 40942 (quoting *Bonnette*, 704 F.2d at 1470).

DOL ultimately concluded that "the Rule's requirement for the actual exercise of control" was "especially problematic," since that standard had not been adopted by any court. *Id.* at 40947. By rescinding the Rule the DOL therefore reaffirmed *Bonnette's* flexible, totality of the circumstances approach. It did not suggest, as the Petition argues, that *Bonnette* is contrary to law.

2. The Petition also misstates Congress' response to *Garcia v. San Antonio Metro Transit Authority*. In amending the FLSA after *Garcia*, Congress affirmed its intent to apply joint employment principles to cities and counties in the same manner as they apply to private employers.

In *Garcia*, this Court held that Congress did not exceed its commerce clause power by affording municipal employees the protections of the FLSA. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985). Congress responded by amending the FLSA that same year to allow public agencies to provide compensatory time off in lieu of overtime pay (29 U.S.C. § 207(o)); to permit fire fighters and law enforcement offers to accept special detail work from a separate employer without the requirement that the municipal employer pay overtime (29 U.S.C. § 207(p)); and to allow for municipalities to accept volunteer services without pay (29 U.S.C. § 203(e)(4)(A)). These changes "reflect a desire to apply the FLSA to state

and local government employers while at the same time making some of its requirements less burdensome given their unique situation." *Misewicz v. City of Memphis, Tenn.*, 771 F.3d 332, 338 (6th Cir. 2014).

By amending the Act without excluding public agencies from the definition of employer, Congress reaffirmed the clear, statutory intent to hold states and municipalities to the FLSA's other requirements. *See*, *e.g.*, 29 U.S.C. § 203(d) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency"); 29 U.S.C. § 203(e)(2) (expansive definition of "individual employed by a public agency"); 29 U.S.C. §§ 203(r)(2), (s)(1) (defining "enterprise" to include the activities of a public agency); 29 U.S.C. § 203(x) (defining "public agency").

3. Once considered an employer under the FLSA, states and municipalities have no right to legislate out of coverage—just as private employers have no right to contract around their obligations. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." (quoting *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945)).) Thus, California's desire to avoid FLSA obligations within the IHSS program is entitled to no weight in the employer analysis. A state attempting to legislate around the FLSA by disclaiming responsibility is no different than the employer who uses "intermediaries to shield themselves from liability"—the very bad actors that joint employment

principles are meant to capture. *See* 86 Fed. Reg. 40945.

This case differs significantly from *Skidgel v. California Unemployment Ins. Appeals Bd.*, cited by Petitioner, because *Skidgel* involved California's policy decisions regarding application of the *state* unemployment insurance code to the IHSS program. 12 Cal. 5th 1, 8 (2021). Because the state legislature created and implemented the unemployment insurance program, it is free to delimit the program's contours. There is nothing untoward about the state legislature writing IHSS Providers out of the unemployment insurance code. But as the court of appeal recognized in *Skidgel*, "[t]he FLSA . . . define[s] 'employ' and 'employer' more expansively than the Unemployment Insurance Code or the common law. . . . [T]he Legislature could not change these definitions in the IHSS context for purposes of applying *federal* wage and hour laws." *Skidgel v. California Unemployment Ins. Appeals Bd.*, 24 Cal. App. 5th 574, 591, n. 19 (2018), *as modified on denial of reh'g* (July 16, 2018), *aff'd,* 12 Cal. 5th 1 (2021).

4. Given the long-standing *Bonnette* decision and the legislative and regulatory history, this case does not mark a sea change in the law, nor does it present undue surprise to Petitioner or other municipal employers. Instead, the Ninth Circuit affirmed forty year-old precedent addressing the *exact same* legal question in the *exact same program*, based on a case that has been cited repeatedly by circuit courts and the DOL.

III. The Ninth Circuit's Decision Was Correct.

In the decision below, The Ninth Circuit engaged in a thorough review of the factual record, focusing on the "economic and structural control the County exercises over the employment relationship" to correctly determine that the County met the broad statutory definition of "employer." App. 17. The court did not treat any one fact or factor as determinative, consistent with the broad statutory text and the totality-of-the-circumstances approach applied by every circuit court. The Petition cites no circuit case or regulatory guidance that would have led to a different result.

The Petition asks this Court to reject *Bonnette* and create a new test for joint employment under the FLSA. This marks a sudden shift in strategy by the County. In its petition for en banc review, the County did not ask the Ninth Circuit to reconsider *Bonnette*, but instead argued that the panel misapplied *Bonnette* to this case. Not only that, the County stated that "[n]umerous other jurisdictions have adopted *Bonnette*'s framework as the doctrinal foundation for determining whether a party is a joint employer." Dkt. No. 45 at 12.

The County was right the first time. At issue is the FLSA's definition of employer, which provides that "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . . ." 29 U.S.C. § 203(d). That definition works in concert with the statutory definitions of "employ" and "employee" to create the FLSA's broad approach to covered employment. *Bonnette* articulates four factors under which an entity easily fits within these statutory

definitions. As the Ninth Circuit cautioned and other circuits recognize, "[t]he ultimate determination must be based 'upon the circumstances of the whole activity.'" *Bonnette*, 704 F.2d at 1470 (quoting *Rutherford*, 331 U.S. at 730).

Amici Curiae are wrong in their suggestion that the state and local government collaboration at issue here is different than classic joint employment structures the statute aims to capture. *See* Br. for Amici Curie, at 12–13. Indeed, the joint employment regulations that stood for over sixty years provided there was joint employment when "one employer is acting directly or indirectly in the interest of other employers; or . . . the employers . . . share control of an employee." *See* 86 Fed. Reg. 40939–40. That is what happened here. Moreover, the policy concerns underlying the joint employment doctrine are the same in public and private employment; two entities may not act in concert to shield one or the other from the law.

The Petition requests a brand new rule, tailored to its factual circumstances and untethered from the statutory text. No court has imposed the bright line rule Petitioner proposes—that control over payroll is necessary for the FLSA to attach—and the text provides no support for such a rule. The Petition points to the "suffer or permit to work" definition of employ found in 29 U.S.C. § 203(g), but runs afoul of the statutory text by arguing that an entity must suffer or permit the specific illegality at issue to be held liable.

By defining "employ" as "to suffer or permit to work," the FLSA provides that any entity permitting or requiring work is obligated to comply with the law. Under Petitioner's proposed rule, however, an entity

could "suffer or permit" an employee "to work," but still not meet the definition of "employ" if it lacked independent control over all aspects of legal compliance. That rule runs afoul of the FLSA's definition of "employer," which includes "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. § 203(d).

Moreover, there is no support in the case law for such a rule. The Petition cites cases addressing the "suffer or permit" standard under state laws, but none hold that the ability to prevent improper compensation is necessary for employer liability to attach. *See*, *e.g.*, *Salazar v. McDonald's Corp.*, 944 F.3d 1024, 1030 (9th Cir. 2019) ("Plaintiffs' focus on responsibility for the alleged *violations* of wage-and-hour laws is misplaced, because the 'suffer or permit' definition [under state law] pertains to responsibility for *the fact of employment itself*.") (emphasis in original); *Martinez v. Combs*, 49 Cal. 4th 35, 70 (2010), *as modified* (June 9, 2010) (no liability as to putative employers who did not have "the power to prevent plaintiffs from working").

Likewise, DOL did not criticize the *Bonnette* test as contrary to the "suffer or permit" standard of Section 3(g) of the Act, as the Petition argues. Instead DOL recognized that the non-rescinded Rule's singular focus on actual control deviated from a wholistic approach to the joint employment inquiry, through which Congress meant to "include as employers entities that used intermediaries to shield

themselves from liability." 86 Fed. Reg. at 40945.[6] Indeed, the "suffer or permit" standard "was intended to expand coverage beyond employers who control the means and manner of performance to include entities who 'suffer' or 'permit' work." *Id.* at 40945.

Here, the County clearly both suffered and permitted the providers' work. *See*, *e.g.*, App. 5, 15–16 (County social workers determined the services to be provided, the time to be spent on each task, and the maximum hours to be worked, and the County approved deviations from the maximum hours). The County also had the power to negotiate Providers' wages. App. 13. Accordingly, the County could have reduced Providers hours or increased their pay, but the County did neither. Thousands of low wage workers toiled without proper pay as a result.

Petitioner's proposed rule would have far-reaching consequences. Permitting states to legislate out of the FLSA could strip millions of police officers, fire fighters, court employees, and other civil servants from federal employment protections. And if the "power to prevent unlawful work conditions" becomes a bright line delimiter of employer status, private employers could evade compliance by contractually limiting the rights and responsibilities of each entity involved in an employment relationship. The FLSA's

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[6] Both the DOL and the New York district court recognized that the Rule's singular focus on the statutory definition of "employer," while disregarding the statutory definition of "employ" and "employee," was a fatal flaw. *Scalia*, 490 F. Supp. 3d at 775; 86 Fed. Reg. at 40945. The Petition commits the same error by advocating for a bright-line test narrowly structured around the power to prevent unlawful activity and allegedly derived from the "suffer or permit" standard. Pet. 29.

broad definitions of "employer," "employee," and "employ" do not permit this result.

CONCLUSION

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

Respectfully submitted,

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