No. 23-217

IN THE

Supreme Court of the United States

E.M.D. SALES, INC., *et al.*,

Petitioners,

v.

FAUSTINO SANCHEZ CARRERA, *et al.*,

Respondent.

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

BRIEF OF *AMICI CURIAE* THE LOCAL GOVERNMENT LEGAL CENTER, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The Local Government Legal Center ("LGLC") is a coalition of national local government organizations formed in 2023 to educate local governments regarding the Supreme Court and its impact on local governments and local officials and to advocate for local government positions at the Supreme Court in appropriate cases. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC, and the Government Finance Officers Association is an associate member of the LGLC.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC"), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where more than 218 million Americans live.

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1. Pursuant to Rule 37.6, *amici* confirm that no counsel for a party authored this brief in whole or in part, and no person, other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The International Municipal Lawyers Association ("IMLA") is a non-profit organization of more than 2,500 members dedicated to advancing the interests and education of local government lawyers. It is the only national organization devoted exclusively to local government law. For nearly 90 years, IMLA has been an educator and advocate for its members, which include cities, towns, villages, townships, counties, water and sewer authorities, transit authorities, attorneys focused on local government law, and others. Its mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state appellate courts.

Local governments are collectively among the largest employers in the country. *Amici* have a significant interest in the burdens imposed upon local governments by Fair Labor Standards Act ("FLSA") litigation. *Amici* respectfully submit this brief to highlight Petitioner's argument that there is no support in the text, purpose, and history of the FLSA to find that employers bear a heightened burden of persuasion to prove one of the FLSA's numerous exemptions. Moreover, the potential financial consequences of these cases are serious and far-reaching for local governments and their citizens. If the Court adopts the burden of proof urged by Respondent, local governmental entities across the country will bear a heavy burden that could result in cuts to services and personnel disruptions for local citizens.

SUMMARY OF THE ARGUMENT

The FLSA is a broad-reaching statutory scheme that affects both private employers and local governments. The plain language of the statute contains no indication that Congress intended that employers bear a heightened burden to prove the application of an exemption. Such a reading is also contrary to this Court's construction of other portions of the FLSA.

Instead, the statute should be read in light of Congress's intent: to balance the rights of workers who require protection with the needs of public sector employers who require predictability. That balance includes the application of liquidated damages in the case of an employer's failure to adhere to the requirements, but also equally important, 34 exemptions to the FLSA's minimum wage and overtime requirements. Local governments seek to comply with the FLSA, often relying upon the statute's exemptions to clarify their obligations. A heightened litigation standard for proving that an exemption applies unnecessarily raises the stakes of those compliance efforts, tipping the scale towards chaos. It also increases uncertainty in litigation, imposing higher costs on local governments—financial burdens then passed on to the taxpayer.

ARGUMENT

I. Both the Plain Text of the FLSA and *Encino Motorcars* Support a Standard Civil Burden of Proof for Employers to Prove an Exemption.

Today, the FLSA covers most of the United States workforce, from large corporations to local governments and small businesses—"a massive reach of over 140 million workers." Michael Maslanka, Esq., *U.S. Supreme Court to Decide Key Exemption Issue*, 5 No. 7 Mountain W. Empl't. L. Letter 10, 10 (2024). In fact, FLSA cases accounted for 45% of all new labor and employment law cases in 2022. *Id.* Worker outlook has improved significantly since the FLSA was enacted. State and local governments have enacted additional wage-and-hour standards, and unemployment rates (even at their modern peak) are still far lower than they were at that time of the statute's creation in the late 1930's. Paul DeCamp, Esq., *The FLSA's Next 75: The Wish List, and the Reality*, 19 No. 2 Pub. Empl'r's Guide to FLSA Emp. Classification Newsletter 11, 11 (2013).[2] Nevertheless, the FLSA remains a powerful tool for employees.

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2. The increase in FLSA-related litigation appears to be part of a larger trend of employment class action litigation. For fiscal year 2023 alone, the Equal Employment Opportunity Commission filed 25 lawsuits on behalf of alleged victims of systemic discrimination—*almost double the number of systemic suits filed in each of the past three fiscal years and the largest number of systemic filings since 2018. See 2023 Annual Performance Review*, U.S. Equal Employment Opportunity Commission (Feb. 23, 2024), https://www.eeoc.gov/2023-annual-performance-report (last visited Aug. 15, 2024).

However, the FLSA has its limits, including statutory exemptions from otherwise mandatory wage and hour requirements. 29 U.S.C. § 213(a). For instance, the statute's minimum wage and overtime protections do not apply to certain classes of employees including, among others, those employed in bona fide executive, administrative, or professional capacities, those employed in agriculture, and those employed as border patrol agents. *See* 29 U.S.C. §§ 213(a)(1)–(19). Other groups of employees are not subject to the FLSA's maximum hour requirements. *See* 29 U.S.C. §§ 213(b)(1)–(30). In both scenarios, an employer invoking an exemption bears the burden of demonstrating that the employees fall within such categories. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974).

In the ordinary civil case, a litigant carries its burden of persuasion by a preponderance of the evidence. At least six Circuit Courts of Appeals agree that this familiar standard likewise applies to employers invoking FLSA exemptions. *See, e.g.*, *Adams v. All Coast, LLC*, 15 F. 4th 365, 368 (5th Cir. 2021); *Lederman v. Frontier Fire Protection, Inc.*, 685 F. 3d 1151, 1158 (10th Cir. 2012); *Baden-Winterwood v. Life Time Fitness, Inc.*, 566 F. 3d 618, 626 (6th Cir. 2009); *Yi v. Sterling Collision Ctrs.*, 480 F. 3d 505, 507–08 (7th Cir. 2007); *Dybach v. State of Fla. Dep't of Corrections*, 942 F. 2d 1562, 1566 n.5 (11th Cir. 1991); *Smith v. Porter*, 143 F. 2d 292, 294 (8th Cir. 1944). This consensus makes sense, since Congress expressed no indication in the statute that it wanted courts to treat exemptions more strictly than other elements and defenses.[3]

3. Only the Fourth Circuit disagrees, requiring employers to prove entitlement to an exemption by the more stringent "clear

As a practical matter, the proper burden often makes all the difference. *See Lederman*, 685 F. 3d at 1159 (noting that the "instructions outlining the appropriate burden of proof are almost always crucial to the outcome"). As discussed below, an elevated burden would have a particularly disastrous effect on local governments whose budgets do not have the size or flexibility to adapt if they are faced with an increase in FLSA litigation. Even when such cases against local governments settle, litigation costs and settlement payments require hard budget decisions for local governments, resulting in service cuts for taxpayers.

By ensuring that the proper burden of proof is applied in FLSA litigation, this Court can appropriately limit the already sweeping effects of the statute to ensure a level playing field for cities, towns, and counties who are endeavoring to comply with a sometimes unclear statutory scheme.

A. Respondent's "Clear and Convincing" Standard is Unsupported by the Statute.

The FLSA was originally created to improve the lives of blue-collar workers during the Great Depression. At that time, only a small number of states had meaningful wage-and-hour protections for workers, and a soaring unemployment rate of 19% gave employers leverage to exploit that gap. *See* DeCamp, *supra*, at 11; *see also Jewell Ridge Coal Corp. v. Local No. 6167, United Mine*

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and convincing" evidence standard. *See Carrera v. EMD Sales, Inc.*, 75 F. 4th 345 (4th Cir. 2023) (relying upon that Circuit's "longstanding" precedent).

Workers of Am., 325 U.S. 161, 168 (1945) (the FLSA was "aimed primarily at overworked and underpaid workers"); Brian Walter, *Frequent FLSA Liability Risks in Public Agencies*, League of Cal. Cities, 3 (May 5, 2022), https://www.calcities.org/docs/default-source/city-attorneys/frequent-flsa-liability-risks-in-public-agencies---paper.pdf?sfvrsn=b94fa5d6_3. To accomplish its goal of protecting the overworked and underpaid, Congress set the minimum wages employers must pay their employees, *see* 29 U.S.C. § 206, regulated overtime hours, *see* 29 U.S.C. § 207, and established a host of other requirements for employers. *See generally* 29 U.S.C. §§ 211–12 (instructing employers on recording-keeping, notice requirements, and restricting child labor).

The FLSA covers most employers. As long as an entity meets the broad definition of "employer" under the statute, it must follow the statutory requirements. The FLSA binds large corporations with deep pockets just as it binds small local governments trying to provide services to its citizens on a limited budget. The former treat occasional FLSA litigation as a cost of doing business, while a suit against a local government can be financially devastating for the entity and the taxpayers who fund it.

This is why setting the proper burden for proving a FLSA exemption is so important. On the one hand, the "preponderance-of-the-evidence standard involves a straightforward weighing of the evidence to determine which side has the better argument." *Leflar v. Target Corp.*, 57 F. 4th 600, 604 (8th Cir. 2023). It is the standard burden of proof in civil litigation. *See Yi*, 480 F. 3d at 507. In contrast, the clear-and-convincing evidence standard is much more onerous. It requires an employer to provide

proof that "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established[.]" *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 285 n.11 (1990).

There is no need to guess at the correct standard. Either the statute provides for an alternative standard, or the default "preponderance" standard applies. Thus, absent a specific statutory "basis" for adopting a "clear and convincing evidence" burden of proof, the applicable standard is preponderance of the evidence. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 94 (2016) (preponderance of the evidence appropriate standard where "the statute at issue supplied no basis for imposing a higher standard"); *see also Herman & McLean v. Huddleston*, 459 U.S. 375, 390 (1983) (heightened clear-and-convincing evidence standard should not be applied in civil cases where, like the Fourth Circuit here, a court simply "expresses a preference for one side's interests"); *Yi*, 480 F. 3d at 507 (the burden of proof in federal civil cases between private litigators, which includes the majority of cases brought under the FLSA, is "proof by a preponderance of the evidence . . . unless 'particularly important individual interests or rights are at stake'") (quoting *Grogan v. Garner*, 498 U.S. 279, 286 (1991)).

Here, the statute does not mention burdens. Indeed, "[t]he exemption from the FLSA's overtime provision . . . curtails no greater individual interest or right than the right to a discharge in bankruptcy, at issue in *Grogan*[.]" *Yi*, 480 F. 3d at 507. In *Grogan*, this Court "rejected a requirement that a creditor prove by clear and convincing evidence his entitlement to an exception to the debtor's right to a discharge." *Id.* at 308.

In reaching a contrary rule, the Fourth Circuit did not trace the heightened standard to the FLSA, nor did it find *Grogan*-like important interests. Instead, the Court came to its rule by historical accident. The Fourth Circuit appears to have first endorsed the standard in *Shockley v. City of Newport News*, 997 F. 2d 18, 21 (4th Cir. 1993), which in turn relied upon another Fourth Circuit case, *Clark v. J.M. Benson Company*, 789 F. 2d 282, 286 (4th Cir. 1986)). However, the court in *Clark* never used the word "convincing" in describing the applicable burden. Instead, it quoted Tenth Circuit precedent that employers must demonstrate the FLSA exemptions by "clear and *affirmative* evidence." *Clark*, 789 F. 2d at 286 (quoting *Donovan v. United Video, Inc.*, 725 F. 2d 577, 581 (10th Cir. 1984) (emphasis added)). Even the Tenth Circuit has since renounced any reading of its precedents to suggest that exemptions are subject to a heightened standard. *See Lederman*, 685 F. 3d at 1158 (noting the Fourth Circuit has "mistakenly viewed 'clear and affirmative evidence' as a heightened evidentiary standard[,]" and the applicable standard is the preponderance of the evidence); *see also Yi*, 480 F. 3d at 507 ("clear and affirmative evidence" language was "merely a clumsy invocation of the [now-rejected] principle of statutory interpretation that exemptions from a statute that create remedies should be construed narrowly"). This Court should decline to adopt the "clear and convincing" evidence standard and hold that that an employer's burden in proving an FLSA exemption is by a preponderance of the evidence.

B. The Exemptions Are an Integral Part of the FLSA And Should Be Proven Under the Same Preponderance Standard as any Other FLSA Element.

While the FLSA imposes significant requirements on employers, which local governments strive to meet, Congress similarly provided 34 FLSA exemptions to those requirements. In *Encino Motorcars, LLC v. Navarro*, this Court held that the exemptions should be given nothing other than "a fair reading." 584 U.S. 79, 89 (2018). This is because "the FLSA gives no textual indication that it should be construed narrowly[,]" and "[t]he narrow construction principle relie[d] on the flawed premise that the FLSA pursues its remedial purpose at all costs." *Encino Motorcars*, 584 U.S. at 88–89 (collecting cases) (internal citations, quotation marks, and alterations omitted). "[E]xemptions, [therefore,] are as much a part of the FLSA's purpose as the overtime-pay requirement." *Id.* at 89.

The exemptions to the FLSA exist to provide clarity for employers and support a balanced application of the statute's requirements. Because each exemption is fact-specific, courts must determine whether an exemption applies on a case-by-case basis, considering the unique circumstances at issue. Accordingly, many FLSA exemption cases are considered to be extremely "close," with the scope of the interpretation of the exemptions and applicable burden of proof often being outcome-determinative. *See, e.g.*, *Lederman*, 685 F. 3d at 1159.

Nowhere are the exemptions more important than in FLSA cases against local governments. For instance,

the full and partial exemptions applying to qualifying firefighters are often a point of litigation in local governments' FLSA litigation. *See, e.g.*, *Mickelson v. City of Encinitas*, No. 22-cv-0487, 2023 WL 2415160, at *5 (S.D. Cal. Mar. 7, 2023) (order granting joint motion for approval of FLSA settlement involving overtime pay for Battalion Chiefs of the Encinitas Fire Department); *Peake v. City of Coronado*, No. 21-cv-00820, 2021 WL 6113340, at *7 (S.D. Cal. Dec. 27, 2021) (order granting plaintiff's motion for approval of FLSA settlement agreement involving overtime pay for employees of the City of Coronado's Fire Department). Local governments face similar issues in suits involving police officers. *See, e.g.*, *Jacobs v. City of Philadelphia*, No. CV19-4615, 2024 WL 3202549, at *8 (E.D. Pa. June 26, 2024) (enforcing $60,000.00 settlement agreement between city of Philadelphia and police officer regarding several claims, one of them overtime pay); *Pappas v. City of Newark*, No. 23-CV-6010, 2024 WL 2093472 (S.D.N.Y. May 9, 2024) (pending FLSA case concerning police K-9 officers and allegations of overtime pay); *see also* Walter, *supra*, at 5–11 (further discussing the unique issues facing local governments as they attempt to navigate FLSA compliance).

Congress has long understood the implications of the FLSA on local governments and the importance of these exemptions to public sector employers. For instance, when Congress passed the Fair Labor Standards Amendments of 1974, which extended the coverage of the FLSA to public sector employees, the amendments also specified exemptions for firefighters, police officers, and correctional officers. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, (codified as amended at 29 U.S.C. §§ 207, 216). The FLSA was again amended

in 1985. *See* Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat 787. This amendment came following the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which Congress viewed as limiting local governments' ability to use compensatory time off for overtime work and imposing costly obligations on local governments already "experiencing financial hardship." 131 Cong. Rec. H9916–18, 9917 (daily ed. Nov. 7, 1985) (statement of Rep. Robert McEwen). These amendments reflected Congress's continuing focus on protecting the rights of public sector employees but also balancing potential dramatic economic consequences for local governments. Congress did so by codifying the ability of local governments to offer compensatory time off in lieu of overtime pay. *See* § 2, 99 Stat. 787. This was described as "a compromise on an issue that could have caused severe hardship to many State and local governments and their employees." 131 Cong. Rec. at 9918 (statement of Rep. Harold Ford). This legislation demonstrates the balanced commitment by Congress to protect the rights of employees while still mindfully considering financial burdens on local governments and taxpayers.

Congress's awareness of the significance of the FLSA exemptions for local governments has continued. For instance, in 1999, Congress amended Section 203 of the FLSA by clarifying the exemption's coverage for firefighters—particularly EMS who worked closely with the fire department. *See* Fair Labor Standards Act Amendment, Pub. L. 106-151, § 1, 113 Stat 1731 (adding subsection "y" to 29 U.S.C. § 203). Due to courts' narrow interpretation of the meaning of what employees fell within the scope of fire protection activities at the time,

EMS personnel had often been found to fall outside of the overtime wage exemption otherwise applicable for firefighters. 145 Cong. Rec. H11499–02, H11500 (statement of Rep. John Boehner) (speaking on bill concerning H.R. 1693 to amend the FLSA of 1938 to clarify the definition of employees engaged in fire protection activities). Unsurprisingly, this narrow reading of the exemption "resulted in State and local governments being liable for millions of dollars in back pay, attorneys fees and court costs." *Id.* The sponsor of the amendment clarifying EMS personnel to fall within the exemption, Representative Robert Erlich, noted the exposure for local governments by giving one example of Anne Arundel, Maryland, where "taxpayers [were] liable for $3.5 million under a recent FLSA case." *Id.* In closing, he highlighted the importance of clarifying the exemption, remarking that "[t]he potential consequences of these cases are serious and far-reaching and could ultimately result in a dramatic increase in the local costs of fire protection to taxpayers nationwide." *Id.* These statements made in support of this amendment highlight Congress's continued emphasis on the FLSA exemptions in order to avoid fiscal burdens on local governments.

Based upon the massive uptick in employment lawsuits in recent years, correctly interpreting the 34 FLSA exemptions is more important than ever. Maslanka, *supra*, at 10. Employers—particularly local governments—need a clear understanding of these exemptions so they can properly budget their expenses and pay employees. The adoption of the Fourth Circuit's "rogue" standard advocated by Respondent would cause many of "the exemptions so often relied upon by so many employers [,including local governments, to] vanish." *Id.*; *see also*

DeCamp, *supra*, at 12; *see also, e.g., Yuen v. U.S. Asia Comm. Dev. Corp.*, 974 F. Supp. 515, 527 n.15 (E.D. Va. 1997) (while the "record evidence presents a close case[,] the higher burden of proof on an employer seeking to classify an employee as exempt under the FLSA *tips the balance* in favor of a denial of summary judgment") (emphasis added). That cannot be the result intended by Congress, particularly in light of the above legislative history and the applicable burdens of proof under similar employment law statutes. *See, e.g.*, *Houck v. Vir. Polytechnic Inst. & State Univ.*, 10 F. 3d 204, 207 (4th Cir. 1993) (Fourth Circuit case holding employer's burden in Equal Pay Act cases is *preponderance of the evidence*) (emphasis added); *Ritter v. Mount St. Mary's Coll.*, 814 F. 2d 986, 993 (4th Cir. 1987) (same). Nor are the devastating costs such suits impose on both local governments and family-owned businesses, such as Petitioner EMD, the desired outcome.

Because Congress's intent has always been to balance local governments' exposure and liability for violations of the FLSA with protections for their employees, there is no reason to think that Congress also intended to place a heightened burden on public sector employers to prove an exemption. This Court should examine Congress's consideration, and emphasis, on these exemptions—especially for local governments—to determine that the preponderance of the evidence is the appropriate burden of proof.

II. Defensive FLSA Litigation Is Costly for Local Governments and Taxpayers Bear Those Expenses.

As Congress has routinely acknowledged, the impact of the FLSA on local governments cannot be understated, and the Court's decision in this case will have wide-ranging effects. The FLSA requirements are particularly nuanced—and burdensome—for local governments. While local governments strive to comply with the FLSA's requirements, they need clarity to do so. Differing burdens create uncertainty, which makes management and budgeting difficult, likely resulting in higher burdens on taxpayers. Likewise, firefighters and police officers—often employed by local governments—are subject to different overtime criteria and rules than traditional employees. *As VA Workers Face Mandatory Overtime, Keep In Mind FLSA Rules For the Public Sector*, 334 FLSA Handbook for States, Loc. Gov't & Sch. Newls. 4, 3 (2013); *see also Mickelson*, 2023 WL 2415160, at *5; *Peake*, 2021 WL 6113340, at *7; *Jacobs*, 2024 WL 3202549, at *8; *Pappas*, 2024 WL 2093472 (all discussing unique issues facing local governments in context of suits by firefighters and police officers); *see also* Walter, *supra*, at 5–11. Each of these nuances makes a local government's compliance with the FLSA challenging. *See* FLSA Handbook for States, *supra*, at 4. These difficulties bear out in compliance data. In fact, "[h]istorically, the U.S. Department of Labor estimates that more than" 70% of the employers with whom it comes into contact are (often inadvertently) out of compliance with the FLSA. DeCamp, *supra*, at 11.

Although the FLSA was created as a remedial statute to combat the devastating effects of the Great Depression,

it has "evolved into a serious trap" for employers and a "gold mine" for plaintiffs' attorneys handling class and collective actions. DeCamp, *supra*, at 11. That is due to the FLSA's statutory structure, which allows liquidated damages to double the recovery for prevailing plaintiffs, plus reasonable costs and attorneys' fees. *See* 29 U.S.C. § 216(b). These liquidated damages awards place prevailing plaintiffs "in far better position[s] than if the employer had been implementing correct practices in the first place." DeCamp, *supra*, at 12. *Accord. Cunningham v. Suds Pizza, Inc.*, 290 F. Supp. 3d 214, 229–30 (W.D.N.Y. 2017) ($1.7 million settlement of class and collective action was fair and reasonable).

Defending against these suits is expensive. "The cost of defending a wage and hour class or collective action often hits six figures and can top seven figures for a particularly vigorous dispute. This is money that the employer pays out whether it wins, loses[,] or (as is almost always the case) settles the litigation." DeCamp, *supra*, at 12. Plaintiffs' attorneys themselves have obtained significant portions of such settlements—and jury verdicts—especially recently. *See, e.g.*, *LaFleur v. Dollar Tree Stores, Inc.*, 189 F. Supp. 3d 588, 602 (E.D. Va. 2016) (approving class action settlement fund in the gross amount of $600,000.00 and awarding plaintiffs' counsel $1 million in attorneys' fees, costs, and expenses); *Beckman v. Keybank, NA*, 293 F.R.D. 467, 483 (S.D.N.Y. 2013) (awarding class counsel 33% in attorneys' fees, or $1,617,000.00, from a common settlement fund and an additional $38,928.00 in litigation fees); *Valerio v. Total Taxi Repair & Body Shop, LLC*, 82 F. Supp. 3d 723, 750 (N.D. Ill. 2015) (awarding plaintiffs' counsel $86,112.00 in attorneys' fees despite a significant reduction of the

lodestar); *Rudy v. City of Lowell*, 883 F. Supp. 2d 324, 328 (D. Mass. 2012) (awarding plaintiffs' counsel $47,101.00 in attorneys' fees and costs against a small city, also despite meaningful reduction of the lodestar); *see also* DeCamp, *supra*, at 12 ("A statute that started out primarily as a poverty relief measure has come to benefit mainly the lawyers who handle these issues, rather than the workers Congress meant to help.").

Nowhere are the financial consequences felt more than by local governments, whose budgets are limited and whose ability to raise revenue is constrained. A heightened burden to prove an affirmative defense in FLSA litigation would impact all stages of litigation, each raising the costs for local governments and taxpayers. *See* The 2015 Hiscox Guide to Employee Lawsuits, *Employee Charge Trends Across the United States*, Hiscox, Inc., 6 (2015), https://www.hiscox.com/documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf (noting that, even back in 2015, 19% of employment charges against employers with fewer than 500 employees resulted in defense and settlement costs averaging a total of $125,000.00; the median judgment against such employers at trial had been approximately $200,000.00, in addition to defense costs; and about 25% of cases resulted in a judgment of $500,000.00 or more). If the heightened burden of proof advocated by Respondent is utilized, fewer cases will be resolved early on, likely leading to drawn-out litigation even in cases where the plaintiff is unlikely to prevail. These increasing costs also play into settlement—including a local government's analysis of whether it should, and for how much it should, settle.

While all local governments will be harmed if this Court adopts a heightened burden of proof requirement, smaller localities with fewer resources and smaller budgets will be the most severely impacted. These small local governments have less ability to absorb the costs of large FLSA lawsuits, and their citizens are more likely to feel the consequences in the form of delayed projects, service cuts, and personnel layoffs. The following examples highlight the negative effects FLSA suits already have had on small local governments and their limited resources, without a heightened burden of proof.

a. City of Mobile: Overtime Pay for K-9 Officers

In 2023, the City of Mobile, Alabama settled an FLSA suit. It arose out of overtime pay involving the City of Mobile's Police Department K-9 unit. *McKean v. City of Mobile*, No. 1:22-00289, 2023 WL 5004062, at *1 (S.D. Al. Aug. 4, 2023). There, three police officers alleged that the City of Mobile willfully violated the FLSA by failing to pay them overtime pay for three years, although the city later corrected its pay practices. *Id.* at *1, *4. The city agreed to a total settlement of $222,892.06. *Id.* at *4. Of that total, $26,109.50 included attorneys' fees and costs. *Id.* at *9.

Mobile's proposed 2023 budget included a section dedicated solely to legal costs for the city attorney's office, the total amount of which was $2,222,353.00. *See* City of Mobile, *2023 Proposed Budget*, 13 (Aug. 19, 2022), 2023-proposed-budget-081922-1220pm.pdf (cityofmobile.org). A single lawsuit involving only three officers constituted 10% of that legal budget. And, while the settlement reflected the amount that Mobile actually paid to settle the lawsuit, it did not reflect the costs and

attorneys' fees it incurred associated with its defensive litigation. Such costs were likely significant in light of current trends. *See Employee Charge Trends*, *supra*, at 6.

For a comparison with Mobile's budget, the over $200,000.00 settlement payment (not including the city's own costs or attorneys' fees) exceeded projected costs of proposed local projects. For instance, this settlement with just three police officers was more than the city planned to expend on a needed bi-annual bridge inspection. *2023 Proposed Budget*, *supra*, at 18. This cost comparison shows that FLSA litigation not only consumes a significant portion of a local government's legal budget, but it also comes a cost to the taxpayers: their taxes will go to fund a settlement rather than pay for local projects often essential to community safety.

b. City of Redondo Beach: Firefighters and Police Officers

The city of Redondo Beach, California has been involved in consolidated FLSA litigation involving a group of 115 firefighters and law enforcement officers. *In re City of Redondo Beach FLSA Litigation*, Nos. 2:17-cv-09097, 2:18-cv-01533, 2021 WL 5493978, at *1 (C.D. Cal. Nov. 23, 2021). This specific lawsuit concerned the city's miscalculation, and underpayment, of overtime pay, and lasted four years. *Id.* at *1, *3. It ultimately resulted in a settlement, which also included $92,197.50 in attorneys' fees and $37,210.46 in costs. *Id.* at *1. As the court noted in its order granting the award of attorneys' fees and costs, this was protracted litigation over the course of several years. *Id.* The lawsuit involved extensive discovery, filings, hearings, experts, and mediation, which meant the

plaintiffs' attorneys spent a substantial amount of time on it, and the city likely even more.

Consider the effect of this litigation on the city of Redondo Beach, which had a population of 68,972 for the calendar year 2022. While the city did have a sizable budget for the 2021–2022 fiscal year, *see* City of Redondo Beach, California, *Annual Comprehensive Financial Report (Fiscal Year Ended June 30, 2022)*, https://cms2.revize.com/revize/redondobeachca/City%20of%20Redondo%20Beach%20CAFR%202022.pdf, this protracted litigation undoubtedly disrupted the city's financial plan. For instance, the city had planned to continue roadway improvements, as well as begin a potential harbor dredging project. *See id.* at ix. Budgets need to be balanced, and the costs associated with FLSA litigation will disrupt that scale, leaving taxpayers to bear the consequences.

c. City of Merced: Holiday-in-Lieu Pay

In 2020, the City of Merced, California settled two lawsuits involving FLSA claims. Both of these cases involved an error by the city in not including holiday-in-lieu pay in calculating and paying overtime. *See McKinnon, et al. v. City of Merced*, No. 1:18CV01124, 2020 WL 4813206, at *1 (E.D. Cal. Aug. 19, 2020); *Englert v. City of Merced*, No. 1:18CV01239, 2020 WL 2215749, at *1 (E.D. Ca. May 7, 2020). In *McKinnon*, the City of Merced agreed to pay a total of $250,000.00 to settle plaintiffs' claims. *McKinnon*, 2020 WL 4813206, at *3. This settlement covered damages, attorneys' fees, and costs of the litigation. *Id.* Similarly, in *Englert*, the City of Merced agreed to pay a total of $350,000.00—$236,503.85 in damages and $113,496.15 in

attorneys' fees and costs—to settle its employees' claims. *Englert*, 2020 WL 2215749, at *2.

While the total payments in both of these cases were substantial, they were not the end of the city's costs. These payments did not reflect the cost and disruption to the city to defend and litigate the cases. If the plaintiffs' attorneys asked for over $100,000.00 in attorneys' fees and costs, the city likely faced similar—if not much greater—expenses for its own attorneys' fees, costs, and associated expenditures. Both *McKinnon* and *Englert* also came at the start of COVID-19, and as the city's financial report for 2020 showed, the city had created a budget that prioritized essential services, "minimize[ed] impacts to existing staffing levels, and incorporate[ed] as many goals [and] priorities as allowed under the fiscal restraints." City of Merced, California, *Basic Financial Statements for Fiscal Year End June 30, 2020*, 17 (Mar. 19, 2021), https://www.cityofmerced.org/home/showpublisheddocument/14390/637565022354100000. These cases involving the City of Merced highlight the detrimental effects unexpected FLSA litigation has on local governments' budgets, management, and planning.

d. City of Cortland: Willful and Wanton Allegations

This is a pending case involving the city of Cortland, New York that will be directly affected by the Court's decision in this case. *Badger v. City of Cortland*, No. 5:23-cv-844, ECF No. 24 (N.D.N.Y. Dec. 1, 2023). Cortland is a town of less than 20,000 people. *See* United States Census Bureau, Cortland City, Cortland County, New York, https://data.census.gov/profile/Cortland_city,_Cortland_

County,_New_York?g=060XX00US3602318388 (last accessed August 13, 2024). This FLSA litigation involves current and former police officers and alleges willful and unlawful violations of the FLSA—meaning if so found, the plaintiffs could receive liquidated damages, in addition to compensatory damages, attorneys' fees, and costs.

Cortland, like all local governments, adopts a budget with clear objectives: avoid deficits and promote clear funding plans. *See* City of Cortland, *2024 Adopted Budget*, https://www.cortland.org/DocumentCenter/View/1392/2024-City-Budget-Adopted-20231219. This budget delineates specific monetary amounts for different services. For instance, it allocates $116,500.00 for building and grounds; $352,407.00 for code enforcement; and $82,780.00 for youth programs. *See id.* at 2, 6, 8. The pending FLSA case could, and likely will, disrupt the city's budget—certain services will suffer at the cost of the litigation. Notably, the Second Circuit has yet to rule whether the applicable burden is a preponderance of the evidence or the more onerous clear and convincing evidence standard, bringing the City of Cortland uncertainty and likely affecting its litigation strategy. If this Court adopts the Respondent's "clear and convincing" evidence standard, Cortland, and other small cities throughout the nation facing similar issues, would be put in a much worse litigation position, contrary to Congress's intent.

e. City of Clarksburg, West Virginia: A Pending FLSA Action

Clarksburg, West Virginia is a town of just over 16,000 people. United States Census Bureau, Clarksburg City, West Virginia, https://data.census.gov/profile/

Clarksburg_city,_West_Virginia?g=160XX00US5415628 (last accessed August 13, 2024). In May 2024, 44 members of Clarksburg's fire department filed a lawsuit against the city alleging violations of the FLSA. *See Walsh et al. v. City of Clarksburg*, 1:24-cv-00064, ECF No. 1 (N.D. W. Va. June 25, 2024). The plaintiffs allege that the city has underpaid the fire department by millions of dollars. *Id.* at 3. The litigation is in its early stages, and will also be directly affected by this Court's decision.

In Clarksburg's proposed budget for fiscal year 2023–2024, the town had total projected legal expenses of $196,669.00—which included only $88,500.00 for contractual services provided by outside counsel and the city attorney. City of Clarksburg, *Proposed Budget Draft*, 14, https://www.cityofclarksburgwv.com/DocumentCenter/View/2127/Budget-Revision-2-FY-2023-2024?bidId=. The budget also allocated $200,000.00 for a "rainy day fund." *Id.* at 23. Clarksburg's budget is diligently balanced and planned—like that of most local governments. Local governments are not big businesses with large profit margins. They are government entities whose purpose is to provide services to their citizens. The FLSA should provide predictability and brightline rules for all employers, but public service employees in particular. If the Court adopts the Respondent's clear and convincing standard, that will undoubtedly play into the town's litigation strategies and associated costs within the pending litigation. Because Clarksburg has only a small financial window to work within, any large settlement will throw the town's budget into chaos. And, its citizens will feel the effects.

These are real examples of the ongoing problems cities, towns, and counties face in light of the FLSA. Local governments have to make judgment calls about their employees and when exemptions apply. If the employer misjudges that an exemption applies when it does not, that employer should bear the consequences. But, where those consequences include liquidated damages, as well as costs and attorney's fees, the Court should not further tip the scales in favor of a heightened burden for employers to prove an exemption. A reasonable mistake could cost a locality a sizable amount of money if a court determines its evidence regarding an exemption does not rise to a clear and convincing standard. Settlements in the hundreds of thousands of dollars have an impact on local governments, no matter their size, and their efforts to keep a balanced budget while providing services to their communities. These lawsuits and high payouts have a direct correlation with a local government's ability to provide needed services including bridge inspections, filling potholes, police and fire protection, water and sewer services, garbage collection, and myriad other mundane but exceptionally important things that local governments provide for their communities. As a result of lawsuits like these, local governments are forced to pass the costs to taxpayers through either cuts in services or increases in taxes.

That is why the burden of proof matters in this litigation. The FLSA exemptions, especially as they relate to local governments, reflect an intentional balance between the protection of workers and fiscal burdens imposed on local governments. To establish a standard that raises the burden higher for employers, and public sector employers in particular, is not in line with Congress's intent. Such

a high burden also will have disastrous effects on local governments across the country who will certainly face higher costs associated with FLSA litigation, either due to a lower risk calculation by plaintiffs leading to higher settlements or simply a higher level of litigation expenses due to a larger number of cases being filed and taken to trial. This is not the intent of Congress—in fact, it is contrary to legislation in which local governments have been explicitly considered.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by Petitioner, this Court should reverse the judgment below.

Respectfully submitted,

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