No. 22-918

In The

Supreme Court of the United States

COUNTY OF LOS ANGELES DEPARTMENT OF PUBLIC SOCIAL SERVICES,

Petitioner,

v.

TRINA RAY AND SASHA WALKER,

Respondents.

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

BRIEF OF AMICI CURIAE, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is composed of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's 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 United States Supreme Court, as well as state and federal appellate courts.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties received more than ten days' notice of IMLA's intent in filing this brief and all have consented to its filing.

determined that this case is a matter affecting all counties.

IMLA and CSAC submit this amicus brief because of important ramifications of the Ninth Circuit Court of Appeals' application of the joint-employer doctrine in Fair Labor Standards Act ("FLSA") cases. Below, the circuit court held petitioner Los Angeles County Department of Public Social Services ("County") liable for violating FLSA's overtime provisions even though the County had no authority to pay the putative collective members. The Ninth Circuit so held because the County possessed some responsibilities under the in-home supportive services ("IHSS") program, even if not the responsibility for payment.

Amici write to detail how the Ninth Circuit's application of the joint-employer doctrine is part of a broader and longstanding split in how circuit courts have applied the doctrine in FLSA cases. These courts have greatly divided over the factors applicable in determining when a joint-employer relationship is established. This split in authority has long created uncertainty for all employers, but for local government employers, the split implicates unique concerns.

Because Amici's memberships advise cities, counties, and local governments, the organizations are uniquely positioned to describe the practical implications associated with this continuing split in authority. Amici's members can attest that the relationship between California and the County is

a common one nationwide. States and local governments often collaborate to provide public services to their residents. Amici believe this case presents the opportunity to consider whether and to what extent these governmental realities should bear on the interpretation of a doctrine that developed in response to historic efforts to evade FLSA wage-and-hour requirements.

The case would also allow the Court to consider the extent to which principles of federalism should guide joint-employer agency cases. As Amici's members know well, when states and local governments cooperate to provide public services, they make deliberate policy choices about how best to allocate scarce resources and apportion responsibilities. Amici believe this case would allow the Court to address whether these federalism concerns should factor into joint-liability cases.

SUMMARY OF ARGUMENT

California provides public assistance to blind, disabled, and elderly individuals through its IHSS program. *See* Cal. Welf. & Inst. Code § 12300 *et seq*. Under this program, the State pays service providers while recipients hire and schedule them. Counties screen the service recipients' initial needs, train the providers, and collectively bargain salaries and benefits. Although California provides most funding for the IHSS program, counties

contribute their own shares of program funding. *Id*. § 12306(a).

The FLSA (29 U.S.C. § 201 *et seq*.) establishes minimum wages and workweek hour requirements for covered employees. The FLSA was amended in 1974 to cover domestic services workers but a 1975 regulation broadly exempted in-home "companionship" services. In 2013, the definition of "companionship" was amended and IHSS workers became subject to FLSA requirements. *Application of the Fair Labor Standards Act to Domestic Service*, 78 Fed. Reg. 60,454 (Oct. 1, 2013) (to be codified at 29 C.F.R. § 552). This change effectively required that California's IHSS providers receive overtime pay for working more than 40 hours in a workweek. *Id.*

Interpreting the FLSA's definitions,[2] the circuit courts of appeal have formulated several tests to determine when employers are in joint relationships under the FLSA. When those relationships are established, the putative joint employers are liable for any wage-and-hour violations plaintiffs establish.

Below, the Ninth Circuit found the County was a joint employer because of its responsibilities

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[2] Under the FLSA, an "employer" is any person—including a public agency—"acting directly or indirectly in the interest of any an employer in relation to an employee[.]" 29 U.S.C. § 203(d). An employer "employs" an employee when it "suffer[s] or permit[s] [the employee] to work." *Id*. § 203(g).

under and partial funding of the IHSS program. The court so held even though it acknowledged the County does not hire or schedule IHSS workers and is not responsible for provider payments. Cal. Welf. & Inst. Code § 12317(b). The court reaffirmed a four-part test it had decided in a similar case several years earlier, *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).

The Ninth Circuit's *Bonnette* test is one of many formulations circuit courts have fashioned in applying the joint-employer doctrine. The circuit courts have deeply split on the standards they have articulated and, for decades, employers nationwide have lacked a common understanding of the doctrine's requirements. *See* Carl H. Petkoff, *Joint Employment Under the FLSA: The Fourth Circuit's Decision to Be Different*, 70 S.C. L. Rev. 1125, 1126 (2019).

For public agencies, this lack of clarity creates unique practical concerns. Like California, states throughout the nation regularly use their local governments in providing public services. Experience shows that public programs are often best provided through cooperative relationships in which states and local governments serve in their most effective capacities. States typically handle broad, programmatic functions while local governments interface with program recipients. These arrangements are structured for reasons of organizational convenience and administrative efficiency. Those efficiency considerations are very different from those that inform the joint-employer doctrine, which the Department of Labor (DOL)

formulated partly from statutory text originally directed toward the eradication of child labor. *See* Marc Peralta, *Identifying Joint Employment is as Easy as ABC*, 45 Seton Hall Legis. J. 261, 273 (2021).

Because state-local collaborations like the IHSS program are common throughout the nation, this case would allow the Court to not only resolve a longstanding split in authority but would provide for consideration of local governments' unique concerns in joint-employer cases. Programs like California's represent deliberate policy choices about how best to provide public services. Accepting certiorari would also enable the Court to consider whether and to what extent principles of federalism should inform the application of the joint-employer doctrine when states and local governments collaborate, as California and the County have done here.

ARGUMENT

I. CIRCUIT COURTS HAVE DEEPLY DIVIDED OVER THE STANDARDS FOR JOINT-EMPLOYER LIABILITY.

This case presents an opportunity to address a longstanding split in authority in the circuit courts. The split poses unique concerns for public agencies, as will later be discussed. But for both private and public employers, the search for a clear, uniform answer to when joint-employer

liability applies has long been elusive. This case would allow the Court to provide the certainty that has so long been lacking.

Congress enacted the FLSA at the height of the Great Depression to prevent employers from paying their employees too little while working them too much. *See*, *e.g.*, 29 U.S.C. § 202(a); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012).

The joint-employer doctrine developed as courts wrestled with the ambiguous text of some of the FLSA's definitions. The act uses the terms "employer" and "employ" in regulating workweeks longer than 40 hours. It requires the excess hours be paid at a rate of one and one-half times the rate of regular pay. 29 U.S.C. § 207(a)(1).

The FLSA defines "employ" as "to suffer or permit to work." *Id.* § 203(g). And it defines "employer" to include "any person acting directly or indirectly in the interest of an employer[.]" *Id.* § 203(d). Courts have recognized that these definitions contemplate that employees can have more than one employer who is jointly responsible for wage and hour obligations. The joint-employer doctrine has developed as a result.

The FLSA itself does not mention joint employment but the principle has deep roots. The "suffer or permit" language comes from early labor laws targeting dodgy employers who tasked middlemen with illegally hiring and supervising would-be employees like children. *See Rutherford*

Food Corp. v. McComb, 331 U.S. 722, 728 & n.7 (1948); *Antenor v. D & S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996). The rationale was that an employer's chance to know about illegal work and prevent it was enough to impose liability. *See Salinas v. Commercial Interiors, Inc.,* 848 F.3d 125, 133 (4th Cir. 2017).

This Court recognized that concept not long after the FLSA's enactment. In *Rutherford Food Corp. v. McComb*, the Court held that meat boners could be employed both by a subcontractor who directly employed them and by slaughterhouse operators who controlled their daily work. 331 U.S. at 724-25, 730. The Court emphasized an "economic realities" standard and directed courts to consider the "circumstances of the whole activity" when assessing employment relationships. *See id.* at 730.

The DOL's first regulations implementing the FLSA also recognized joint employment. *E.g.*, *Joint Employment Relationship Under Fair Labor Standards Act of 1938*, 23 Fed. Reg. 5905 (Aug. 5, 1958) (formerly codified at 29 C.F.R. § 791.2); *Salinas*, 848 F.3d at 133. The DOL declared in 1958 that nothing barred an employee from having multiple employment relationships. 23 Fed. Reg. at 5906. The regulations carried out the DOL's longstanding scrutiny—going back to 1939—of dual employment designed to skirt overtime requirements by minimally "separating" employers. *See Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule*, 86 Fed. Reg. 40,939 (July 30, 2021).

The thrust of the regulations was that joint employment exists when "all the facts" of a case indicated that employment by one employer is "not completely dissociated" from employment by another. 23 Fed. Reg. at 5906. The DOL explained that it would consider joint employment to exist in situations such as when (1) employers arrange to share employees' services; (2) one employer acts directly or indirectly in the interest of other employers; or (3) the employers share control of an employee. *Id.*; *see* 86 Fed. Reg. at 40,939-40.

Over the nearly three-quarters of a century that followed, the DOL confirmed its interpretation in guidance documents like opinion letters. 86 Fed. Reg. at 40,940. But in the interim, there has been persistent conflict among the circuit courts over which factors should apply when testing for joint employment. *See*, *e.g.*, *Salinas*, 848 F.3d at 135–38; *Hall v. DIRECTV, LLC*, 846 F.3d 757, 766 (4th Cir. 2017) ("[C]ourts have long struggled to articulate a coherent test for distinguishing separate employment from joint employment.")

Because of this longstanding conflict, the DOL became concerned over the lack of uniformity. *Joint Employer Status Under the Fair Labor Standards Act*, 84 Fed. Reg. 14,043, 14,046-47 (Apr. 9, 2019). It proposed to make a rule formalizing the factors from the Ninth Circuit's 1983 *Bonnette* opinion. *Id.* at 14048. The four *Bonnette* factors ask whether a supposed employer (1) could hire and fire employees, (2) controlled

employees' work and employment conditions, (3) determined rates of pay, and (4) maintained employment records. *Bonnette*, 704 F.32d at 1470.

The DOL rescinded this rule after California and sixteen other states plus the District of Columbia sued. *See New York v. Scalia*, 490 F. Supp. 3d 748, 757, 765 (S.D.N.Y. 2020); 86 Fed. Reg. at 40,942-3. It determined that the Rule strayed from the FLSA's text and purpose. 86 Fed. Reg. at 40,942-43. No guidance from the DOL has replaced the rule. *See id*. at 40,954.

With no regulation in place, courts are left with a mishmash of tests that pervade the joint-employment question. *See, e.g.*, *Salinas*, 848 F.3d at 135. Alongside the Ninth Circuit, the First, Third, and Fifth Circuits apply some version of the *Bonnette* test. *See Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468-70 (3d Cir. 2012); *Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir. 2014); *Ray v. L.A. Cty. Dep't of Soc. Servs.*, 52 F.4th 843, 847-48 (9th Cir. 2022). The *Bonnette* test looks to "economic realities" by probing a supposed employer's control and authority over an employee. *See, e.g.*, *Orozco*, 757 F.3d at 448; *Ray*, 52 F.4th at 848.

Other courts criticize the *Bonnette* factors for their narrow focus on traditional agency concepts like direct control. The Second Circuit decided that *Bonnette* factors cannot be squared with the FLSA's "suffer or permit" language

because the FLSA extends far beyond typical agency, as this Court itself has stated. *See Zheng v. Liberty Apparel Co, Inc.*, 355 F.3d 61, 69 (2d Cir. 2003) (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992)). The Second Circuit applies a non-exclusive six-factor test accounting for "functional" control of employees. *See id.* at 71-76.

The Eleventh Circuit applies an even more expansive eight-factor test. *E.g.*, *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1176-78 (11th Cir. 2012). The court's test includes the *Bonnette* considerations (e.g., direct control) but focuses also on employees' economic dependence on alleged employers. *See id.*

The Fourth Circuit applies a different six-factor test altogether. *E.g.*, *Salinas*, 848 F.3d at 141-42. The court is critical of *Bonnette* and the other tests, concluding that they wrongly focus on economic dependence and control of employees. *Id.* at 137. Instead, the court gauges the relationship and balance of power between employers. *Id.* at 137, 141-42. The scope of that relationship, in the court's view, is the threshold inquiry that must when determining whether employers are "not completely dissociated." *Id.* at 141-42.

None of the circuit tests has achieved anything close to a consensus. *E.g.*, *id.* at 135. And the circuit split has real consequences. The uncertainty over what test to apply continues to present practical obstacles for courts. Businesses or government agencies could be subject to liability in

one circuit but not in another for the same actions. The DOL itself expressed this fear when it adopted its uniform rule. 84 Fed. Reg. at 14047.

Because of the wide divergence in the circuit tests, a clear understanding of the joint-employer doctrine has remained elusive. Private and public entities alike lack a clear, uniform understanding of the standards by which they may be subject to joint-employer liability. Application of joint liability is inconsistent throughout the circuits as a result. All entities would greatly benefit from this Court's adoption of a common standard.

II. THE SPLIT IN AUTHORITY OVER JOINT-EMPLOYER LIABILITY UNIQUELY AFFECTS LOCAL GOVERNMENTS.

The split in how the circuits have applied the joint-employer doctrine has significant practical implications for local agencies. In particular, the Ninth Circuit's application of its branch of this split made the County liable for overtime violations for which it had no control. The Ninth Circuit affirmed this liability because the County had *some* responsibilities under California's IHSS program—even though it was not responsible for paying program providers.

Unlike the classical situations that informed the historical development of the joint-employer doctrine, the relationship between California and the County is hardly the type for which the doctrine seems intended. The agencies

did not, for instance, use middlemen, engage in any deceptive practice, or employ any artifice to evade the act's wage-and-hour requirements. Their relationship, rather, is a typical example of how states and local governments collaborate to provide public services.

Cooperation among the federal, state, and local governments is the modern norm. Indeed, "[i]t is difficult to find any governmental activity that does not involve all three of the classic so-called levels of government." 1 E. McQuillin, Law of Municipal Corporations, § 3A:3 (3d ed. 2010).

To this end, in developing public programs, states (often with assistance from federal funding) routinely use local governments, as the closest and most direct level of government, to distribute program benefits to or interface with program recipients. That collaboration allows the partnering agencies to achieve efficiencies and economies of scale in delivering public services.

At the state level, officials and regulators often focus on developing program goals and policies, enacting implementing regulations, and securing program funding. At the local level, cities and counties—working from locales nearest program recipients—are usually considered the most suitable agencies through which program beneficiaries may receive services.

State and local governments collaborate like this in a host of areas, like education, health care, housing, public safety, transportation, and, as in

this case, social services. State and local governments spent $3.5 trillion on direct general governmental expenditures in 2020. Urban Inst., State and Local Backgrounders: State and Local Expenditures, https://urbn.is/3UObzvg. Of this amount, local governments spent $1.8 trillion, which was slightly higher than the $1.7 trillion states spent. *Id*. The larger amount attributable to local expenditures is because local governments often administer state-transferred funds. In 2020, the amount transferred from state to local governments was $581 billion. *Id*.

Against this backdrop, California's IHSS program is a typical example of how states and local governments collaborate to provide public services. The State, wielding federal and state funds, has determined that in-home supportive services are an important service that its blind, disabled, and elderly citizens should receive. But in a state as large and populous as California, providing such services from government offices in Sacramento would surely be unachievable. In developing the IHSS program, the State thus used the services of its 58 counties to handle the direct interactions with program providers and recipients. The State directed counties to train IHSS providers, negotiate those providers' salaries and benefits, and oversee the initial screenings of program recipient needs. But other program obligations, including the obligation to pay program providers, are California's responsibility.

California and the County's relationship is one example of the types of collaborations common

between state and local agencies nationwide. Counties, in particular, are often utilized as the public interfaces for many types of social-service and public-assistance programs. In addition to the types of services at issue here, they may administer programs for food and nutrition, housing, employment assistance, and child- and adult-protective services.

It is also common for local agencies to collaborate with state agencies in providing fire prevention, emergency medical, and dispatch services. Equally, local police departments or sheriffs' offices regularly provide various forms of assistance to state law-enforcement agencies. In public-safety matters, state and local agencies often collaborate in state areas where there are unique needs—such as wildfire or special hazard areas—or areas of overlapping jurisdictions—such as state capitals or state parks.

Local agencies also regularly provide services to state agencies that oversee large public works and infrastructure projects. Local transportation agencies, for instance, may provide a number of services to assist state agencies in highway construction and maintenance projects.

Because state-local collaborations are common throughout the nation, it is reasonable to question whether the Ninth Circuit properly applied the joint-employer doctrine below. The circuit courts have widely differed in interpreting the doctrine's standards, leading to inconsistent liability determinations. But beyond this split in

authority lies the deeper issue of which, if any, of these courts' iterations of the doctrine are appropriately applied when two layers of government cooperate to provide public services.

The joint-employer doctrine developed to prevent business from evading wage-and-hour requirements through ostensibly separate—but practically connected—entities. As noted, the doctrine developed partly from the historic effort to combat the Great Depression-era employment practice of child labor. Given the doctrine's origin, it is reasonable to assume the power to make or control payments should be a key attribute for determining when putative employers are jointly liable.

Such an interpretation hews closest to statutory language. The joint-employer doctrine is based largely on the FLSA's definition of "employ," which means "to suffer or permit to work." 29 U.S.C. § 203(g). It is fair to question whether the County could truly have "suffer[ed] or permit[ed] to work" the IHSS providers who California was responsible for paying. And because the IHSS program is structured like public-service models utilized throughout the nation, it is equally fair to question whether local governments should be held liable when they similarly collaborate to provide public services but are not responsible for paying worker wages.

This case accordingly presents an opportunity to resolve not only a longstanding split in authority, but one that has significant practical

concerns for how states and local governments provide public services. This case would allow this Court to consider the application of the joint-employer doctrine to the myriad and common arrangements in which states and local governments collaborate to provide public services. Granting certiorari would enable the Court to determine whether the doctrine's goals are intended to reach the type of state and local collaborations involved here.

At the same time, the case would also allow the Court to consider the extent to which principles of federalism should weigh in the determination of joint-employer cases. Here, California has developed a carefully crafted scheme by which it provides IHSS to its blind, elderly, and disabled residents. California has used the respective efficiencies of state and local governments to delineate the responsibilities of the State and counties in that program. Like so many other state and local relationships throughout the nation, California's structuring of its IHSS program reflects the policy choices of its elected officials and regulators for how best to provide social services.

In sum, granting certiorari would allow the Court to consider under what circumstances state and local governments may subject themselves to joint-employer liability when they collaborate to provide public services. Because of the unique practical and federalism concerns this issue presents, the Court has ample reason to accept certiorari and resolve the split in authority that has long existed in joint-employer cases.

CONCLUSION

For the above reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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