TENDERED

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2010-SC-00322-TG

MADISON COUNTY FISCAL COURT; CITY OF CYNTHIANA; CITY OF DANVILLE; CITY OF FLORENCE; CITY OF GEORGETOWN; CITY OF GLASGOW; CITY OF NICHOLASVILLE; CITY OF PARIS; CITY OF RICHMOND; CITY OF SOMERSET; AND CITY OF WINCHESTER — APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT; NO. 09-CI-01940
HON. THOMAS D. WINGATE, JUDGE

KENTUCKY LABOR CABINET, J.R. GRAY, in his official capacity as Secretary of the Kentucky Labor Cabinet; MICHAEL L. DIXON, in his official capacity as Commissioner of the Department of Workplace Standards of the Kentucky Labor Cabinet; MARJORIE ARNOLD, in her official capacity as Program Manager (Eastern), Wage and Hours of the Kentucky Labor Cabinet; JERALD ADKINS, in his official capacity as Program Manager (Western), Wage and Hours of the Kentucky Labor Cabinet; and UNNAMED COMPLAINANTS, individually — APPELLEES

AMICUS CURIAE BRIEF ON BEHALF OF CITY OF ASHLAND, KENTUCKY; CITY OF HAZARD, KENTUCKY; AND CITY OF PADUCAH, KENTUCKY

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The Cities of Ashland, Hazard, and Paducah jointly tender this amicus curiae brief because they are confronting similar overtime disputes with their firefighters or the Labor Cabinet involving the same state training incentive funds. Set forth below are the background and procedural history of each city's overtime controversy. The brief then addresses the following arguments: (1) the prior, longstanding overtime methodology used by local governments to calculate overtime on the incentive funds was valid; (2) the overtime methodology in *Labor Cabinet v. Hasken*, 265 S.W.3d 215 (Ky. App. 2007) should be confined to that action because the record, the issues, and the posture of that case on review were limited; and (3) the immunity and jurisdictional arguments by Appellants are consistent with law and efficiently resolve the overtime dispute.

BACKGROUND AND PROCEDURAL HISTORIES

(1) The City of Ashland

The City of Ashland has operated under a collective bargaining agreement ("CBA") with Local 706 of the International Association of Firefighters, pursuant to KRS Chapter 345, since 1977. In 1980, the parties agreed to insert the following provision into the CBA that remains to date: "It is understood that the 1980 Legislature adopted a Professional Firefighters Foundation Program Fund to provide salary supplements to those amounts paid by the City. The City shall continue to apply for participation in such funds on behalf of the firefighters and the City agrees to take all appropriate steps to seek said increases or supplemental pay for members of the bargaining unit." (Article IX, § 2 of the CBA adopted by Ashland City Ord. No. 80-2008).

From 1980 forward, the City has participated in the state incentive fund program and has followed the method for calculating overtime on the supplement, both scheduled

and unscheduled, as set forth by the state in a Labor Cabinet document addressed to Bob Burch of the state Fire Commission, dated July 14, 2000. (*See* Court's Record on Appeal ("ROA") pp. 784-86). In fact, when Ashland was audited by the Labor Cabinet in 2005 regarding back overtime wages for clothing and commissary allowances and longevity pay provided to firefighters under the CBA, the Labor Cabinet found Ashland to be in compliance with overtime requirements on the incentive supplement. The Labor Cabinet's "Tentative Findings of Fact" specifically stated: "Payroll records reveal that Ashland has properly paid overtime on the Firefighters Foundation Program Fund; however, Ashland has failed to compensate employees at a rate of one and one-half (1 ½) the hourly rate for hours worked over forty (40) in a workweek on the clothing allowance, commissary allowance and longevity increment in violation of KRS 337.285." (04/5/05 Tentative Findings of Fact).

Most recently, however, the Labor Cabinet has performed another audit of Ashland, purportedly following the decision in *Hasken*, resulting in a demand on the city on October 19, 2010. The audit demands Ashland to pay an unbudgeted sum of $338,613.87 in back overtime wages allegedly due on the state incentive supplement to 59 active and retired firefighters. In addition, if the City pays such back overtime wages, the City and its taxpayers will incur another obligation in excess of $112,000 payable to the state retirement system on behalf of the firefighters. To date, the City of Ashland has not received a final notice or "Tentative Findings of Fact" as a result of this latest audit.

(2) The City of Hazard

The City of Hazard has been involved in a legal action with its firefighters since 1998 arising out of a decades old payroll dispute regarding how to interpret a former

section of the Hazard Code of Ordinances which purported to "equalize" the non-exempt members of the police and fire departments. *See John Dishman Fitzpatrick, III, et al. v. City of Hazard*, No. 98-CI-0393 (Perry Circuit Court). As a result of the publicity of the overtime dispute between the City of Louisville and its firefighters, the Hazard firefighter-plaintiffs, in or about 2000, amended their Complaint to add a separate count against Hazard for allegedly excluding the state incentive supplement and longevity pay as factors in calculating overtime liability. The action was held in abeyance for much of the time period while appellate courts considered the *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354 (Ky. 2005) case, and later the *Hasken* case.

After this Court denied discretionary review of the Court of Appeals' decision in *Hasken*, the parties resubmitted their issues to the Perry Circuit Court on cross motions for summary judgment, and the trial court, on February 8, 2010, rendered interlocutory Findings of Fact, Conclusions of Law, and Partial Summary Judgment construing Hazard's ordinance and the proper methodology for calculating overtime based on the trial court's interpretation of that ordinance. *Fitzpatrick, et al.*, No. 98-CI-0393 (Perry Circuit Court, Partial Summary Judgment rendered 2/8/10). The Perry Circuit Court ruled in Hazard's favor in regard to interpreting the payroll ordinance, but it followed what it believed the *Hasken* decision to require in regard to Hazard's failure to include the incentive supplement and longevity pay in the calculation of scheduled and unscheduled overtime for firefighters. The trial court distinguished *Hasken*, in part, choosing to apply a divisor of 2,912 hours to calculate overtime rather than the divisor of 2,080 hours used in *Hasken*. The trial court made this distinction because of *Hasken's* reliance on the Sixth Circuit Court of Appeals decision in *Sharpe v. Cureton*, 319 F.3d

259 (6th Cir. 2003), which allowed use of a 2,912 hour divisor when firefighters are compensated on a salary rather than an hourly basis.

This Perry Circuit Court action remains pending and awaits entry of final judgment on individualized determinations of each firefighter's damages, with possible offsets or recoupment for overpayments of wages, and a determination of whether Hazard enjoys governmental immunity or qualified official immunity, the same immunity issues before this Court in this appeal. Depending on possible offsets and recoupment, the City of Hazard and its taxpayers face a potential unbudgeted obligation potentially exceeding $125,000 in back overtime wages inclusive of interest. This exposure does not include additional pension contributions payable by the city (which have not yet been determined or estimated but will be significant) should Hazard be required to pay any back overtime wages. Furthermore, the city's exposure could increase if the Perry Circuit Court's interlocutory ruling distinguishing *Hasken* based on the Sixth Circuit's decision in *Sharpe* is appealed by the firefighters and overturned on review.

(3) The City of Paducah

The City of Paducah is currently embroiled in a legal action with 70 current and retired firefighters for overtime allegedly due on the state incentive supplement distributed to firefighters. The action is pending in McCracken Circuit Court and was originally filed on January 26, 2006. *See Barry Carter et al. v. City of Paducah*, No. 06-CI-00072 (McCracken Circuit Court). Collectively, the Paducah firefighter-plaintiffs seek over $5 million in damages plus pre-judgment interest and attorney fees. The Paducah firefighter-plaintiffs seek 15 years' worth of alleged overtime (resulting in their multi-million dollar claims) because they assert a 15-year period of limitations under the

CBA instead of the 5-year limitations ordinarily applicable to statutory claims brought under KRS Chapter 337.

Since the 1970's, Paducah has recognized Local 168, International Association of Fire Fighters, as the exclusive bargaining representative for firefighters. Paducah has participated in the state incentive Fund program since its inception in the early 1980's. For more than 25 years, Paducah distributed the incentive supplement to firefighters in strict compliance with the statutory, regulatory, and contractual regime established by the state under KRS 95A.200 *et seq*. Until 2006, when the Paducah action was initiated, no firefighter-plaintiff had claimed to be entitled to overtime on state training incentive funds. Likewise, no firefighter-plaintiff or bargaining representative for Local 168 had pursued a grievance that the city failed to properly factor the state incentive supplement into firefighters' base wage rates for purposes of calculating overtime.

The City of Paducah followed the express directives of the state Fire Commission with respect to the payment of overtime on state incentive funds with the full acquiescence of each firefighter-plaintiff and the Local 168, but they now claim Paducah was obligated to calculate and pay more overtime on the incentive supplement. The CBA does not explicitly mention the state training incentive funds, but Paducah's firefighter-plaintiffs now seek overtime based on their belief that the *Hasken* decision requires overtime to be paid differently than instructed by the Fire Commission's directives. The unfunded and unbudgeted overtime liability alleged by the firefighter-plaintiffs, if successful, will financially devastate Paducah and its taxpayers and will undoubtedly impair the City's ability to provide essential services, including fire protection in the future.

ARGUMENTS

(1) The prior, longstanding overtime methodology used by local governments to calculate overtime on the incentive funds was valid.

When an employee works in excess of 40 hours per week, state law requires overtime "at a rate of not less than one and one-half (1-1/2) times the hourly wage rate." KRS 337.285(1). It is well documented that firefighters regularly work "scheduled overtime" because of their 24-hour on-duty, 48-hour off-duty work schedule. This work schedule causes a three week cycle of two consecutive 48-hour weeks and one 72-hour week. Therefore, firefighters work, on average, 56 hours per week ((48 + 48 + 72) / 3) or 2,912 hours per year (56 x 52 weeks per year), equaling 16 scheduled overtime hours weekly (56 – 40) and 832 annually (16 x 52 weeks per year).

Overtime is computed based on the employee's regular hourly rate of pay. 803 KAR 1:060 § 6. In most cases, the regular hourly rate of pay depends on the "employment contract between the employer and employee." *Sharpe*, 319 F.3d at 270; *see also 149 Madison Ave. Corp. v. Asselta,* 331 U.S. 199, 204 (1947). The incentive supplement, however, is not determined by the employer and employee, but is governed by the state and is fixed by statute. Appellants' brief already demonstrates the comprehensive state regulation over the incentive funds. Moreover, both local governments and firefighters are bound by the state statutory and regulatory provisions, per KRS 95A.200 *et seq.*, and 739 KAR 2:020, that govern the incentive supplement. Therefore, in deriving the regular hourly rate of pay and calculating overtime liability on the incentive funds, KRS 95A.200 *et seq.* must frame the analysis.

The General Assembly charged the state Fire Commission in KRS 95A.240 with administering the incentive supplement established by KRS 95A.250, and Appellants'

brief details how this state agency implemented it. The Fire Commission construed the incentive supplement to be inclusive of "base pay" plus "scheduled overtime." As a result of the Commission's interpretation, the supplement was presumed to include an overtime premium for scheduled overtime hours. The overtime premium subsumed within the supplement directly shaped the overtime instructions devised by the Labor Cabinet, approved by the Fire Commission, and distributed as "proper" instructions for local governments to follow statewide.

The supplement's compensation structure, which included an overtime premium, was valid. Federal courts have found compensation arrangements covering both base pay and overtime to be in compliance with the Fair Labor Standards Act ("FLSA"). *See Adams v. Dep't of Juvenile Justice*, 143 F.3d 61, 67 (2d Cir. 1998)("[I]f the annual salary was properly intended by the parties to account for both a regular rate and an overtime rate, the contemplated arrangement is in compliance with the FLSA."); *see also Fulmer v. City of St. Albans*, 125 F. App'x 459, 461 (4th Cir. 2005)(same)(copy attached). This Court specifically looks to federal cases interpreting the FLSA when no Kentucky cases are on point. *City of Louisville v. Fire Serv. Managers Ass'n ex rel. Kaelin*, 212 S.W.3d 89, 95 (Ky. 2006). Here, state statutory and regulatory authorities are silent whether compensation may be structured to include overtime premiums and Kentucky courts have not considered the issue. Therefore, *Adams* and *Fulmer* provide the most direct guidance.

In *Adams* and *Fulmer*, the principal issue was whether the parties had intended the compensation to include an overtime premium. Intent cannot be an issue respecting the incentive supplement. When the Fire Commission interpreted and implemented the incentive supplement, the state agency interpreted the General Assembly's statutory

intent to be that the supplement applies on top of all compensation "regularly" received by firefighters for straight-time and scheduled overtime hours. Local governments and firefighters accordingly had the same intent and expectations because state law bound them to follow the provisions of KRS 95A.200 *et seq.*, the rules, regulations, and instructions of the Fire Commission, as well as contracts between local governments and the state. *Compare* KRS 95A.240(1) *with* 739 KAR 2:020 §§ 2, 3 & 4 (statutes and regulations that govern both firefighters and participating local governments under the state training incentive funds program); *see also* KRS 95A.010(1)("This chapter shall apply to the personnel of all fire departments in the state whether paid or unpaid, or both."). Indeed, local governments continued and annually renewed their participation in the incentive program based on their understandings of how the program was implemented and operated over the years.

Finally, the pre-*Hasken* overtime instructions properly calculated overtime liability in light of the overtime premium subsumed within the incentive supplement. When compensation includes an overtime premium, the overtime premium must be: (1) excluded from the regular hourly rate of pay; and (2) credited against overtime compensation. *See* 803 KAR 1:060 § 8(5); *see also* 29 U.S.C. § 207(e)(5)(this provision is the FLSA equivalent to 803 KAR 1:060 § 8(5)). The pre-*Hasken* overtime methodology fulfilled both of these requirements. First, the instructions directed local governments to divide the annual supplement amount by a 3,328 annual "divisor," which is the sum of 2,080 (the number of straight-time hours per year) plus 1,248 (the average number of 832 scheduled overtime hours per year multiplied by 1.5). The formula multiplied the number of scheduled overtime hours by 1.5 to account for the overtime

premium embedded in the incentive supplement thereby preventing the premium from inflating the regular hourly rate of pay. Thus, the formula effectively excluded the overtime premium from the regular hourly rate of pay, as required by 803 KAR 1:060 § 8(5). Local governments had to pay ***un***scheduled overtime at one and one-half times the hourly rate derived from the formula. Second, local governments were not directed to pay additional scheduled overtime because the overtime premium included within the incentive was creditable under 803 KAR 1:060 § 8(5). The credit accordingly offset the scheduled overtime liability of local governments.

After 2000, when the incentive supplement was fixed at $3,100 annually, the pre-*Hasken* overtime methodology applied in the following manner. The $3,100 supplement is divided by the 3,328 divisor to produce a regular hourly rate of pay of $.9315 ($3,100 / 3,328). This hourly rate properly apportions the $3,100 supplement across all straight-time and scheduled overtime compensation, including the overtime premium: $1937.52 is apportioned to base pay for straight-time hours ($.9315 x 2,080); $775.01 is apportioned to base pay for scheduled overtime hours ($.9315 x 832); and $387.50 is apportioned to overtime premium for scheduled overtime hours (one-half of $.9135 x 832). The incentive supplement accordingly increases the unscheduled overtime liability of local governments by an hourly overtime rate of $1.3973 ($.9315 x 1.5). Pursuant to 803 KAR 1:060 § 8(5), the overtime premium included within the incentive is creditable and offsets the overtime liability of local governments for the 832 scheduled overtime hours.[1]

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[1] In addition to the 3,328 annual-based divisor, the Labor Cabinet devised alternative weekly-based overtime divisors and formulas. The weekly divisor formulas used the same methodology: the number of straight-time hours plus one and one-half the number of scheduled overtime hours. Thus, the divisor was 52 in 48-hour workweeks (40 + (8 x 1.5) = 40 + 12 = 52) and 88 in 72-hour workweeks (40 + (32 x 1.5) = 40 + 48 = 88). Of

In *Fulmer*, the Fourth Circuit upheld this ***same*** overtime methodology and the 3,328 annual divisor for computing the hourly rate of pay for firefighters under the FLSA. *Id.* at 460. The *Fulmer* Court explained that a smaller divisor would impermissibly inflate the hourly rate and would allow an overtime premium on top of overtime premium. *Id.* at 461-62. Employees are not entitled to such "double overtime." *See, e.g., Adams*, 143 F.3d at 67. In this case, the overtime methodology devised by the Labor Cabinet and approved by the Fire Commission is directly on point with *Fulmer* and federal case law applying FLSA statutory and regulatory provisions similar to KRS 337.285 and 803 KAR 1:060. Thus, when the context behind the incentive supplement in KRS 95A.200 *et seq.* is considered along with federal guidance, the pre-*Hasken* overtime methodology should be validated.

(2) The overtime methodology in *Hasken* should be confined to that action because the record, the issues, and the posture of that case on review were limited.

The prior overtime methodology and the 3,328 annual divisor were introduced during the administrative process in *Hasken*. However, as reported by Appellants' brief, the Hearing Officer rejected the 3,328 annual divisor because the Labor Cabinet and the City of Louisville provided no legal basis for it. In fact, the historical context behind the incentive supplement in KRS 95A.200 *et seq.* was not part of the administrative record. As a result of the deferential standard on review from administrative actions, subsequent reviewing courts had no grounds to reverse the Hearing Officer's determination or to reinstate the 3,328 divisor.

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course, to convert the fixed incentive amount into an hourly rate using the weekly-based divisors, the $3,100 annual supplement had to be divided by 52 weeks per year.

Based on 803 KAR 1:060 § 6, the Labor Cabinet also advocated using a divisor equal to the number of scheduled working hours per year, which is 2,912 hours for firefighters. The Hearing Officer, however, rejected the 2,912 divisor, too. In interpreting and applying Section 6, the Hearing Officer determined that the divisor turns on intent, not the mathematical number of scheduled hours. Relying on the terms of the CBA between Louisville and its firefighters (which actually pertained to other elements of pay at issue besides the incentive supplement because the supplement was not addressed in Louisville's CBA), the Hearing Officer found that firefighters were intended to be compensated on a 40-hour workweek basis, or 2,080 hours annually. The Hearing Officer accordingly applied the 2,080 divisor to all elements of pay in dispute, including the incentive supplement, notwithstanding the CBA's silence as to it.

Both the Jefferson Circuit Court and the Court of Appeals upheld the Hearing Officer's determinations. *Hasken*, 265 S.W.3d at 221-22. The Court of Appeals considered only two divisors, either 2,912 or 2,080, with its ruling turning on Section 6 of 803 KAR 1:060 and the CBA. The Court of Appeals agreed with the Hearing Officer that Section 6 required the divisor to be based on intent, and the Court also analyzed intent through the lens of Louisville's CBA with its firefighters. Therefore, based on how the case was presented and framed on review, the Court of Appeals sustained the 2,080 divisor for all of the elements of pay, including the incentive supplement. *Id.*

The firestorm of overtime litigation ignited by *Hasken* should be contained. In *Hasken*, the record, the issues, and the posture of the case on review were limited. The 3,328 divisor for the incentive funds was argued by the Labor Cabinet and Louisville, but it was rejected because they provided no legal basis. The ruling by the Hearing Officer is

understandable because the rationale for the overtime methodology previously followed by firefighters and local governments regarding the incentive supplement is found in KRS 95A.200 *et seq.* The General Assembly charged the Fire Commission with administering the state incentive funds pursuant to KRS Chapter 95A, and the Commission construed the supplement to be inclusive of scheduled overtime. Thus, the incentive supplement was defined by the state to include an overtime premium, but without the context of KRS 95A.200 *et seq.*, the record was too slim for the Hearing Officer or reviewing courts to understand or uphold the 3,328 divisor.

The failure to show the incentive supplement's context proved more costly when the Labor Cabinet and Louisville lost the intent argument. The Labor Cabinet and Louisville both had argued that Section 6 of 803 KAR 1:060 required a divisor based on the number of regularly scheduled working hours. However, the Hearing Officer and the reviewing courts ruled that the divisor under Section 6 turned on intent, and the CBA (and the parties' intent therein) was the only "evidence" of intent in the record. Moreover, the incentive supplement was lumped together with other elements of pay expressly provided for in the CBA, even though the CBA was silent as to the supplement itself. If a complete history of the incentive program had been made a part of the record, the evidence may have explained the omission respecting the incentive funds or at least counterbalanced the CBA.

Finally, the 3,328 divisor was not the focus of the *Hasken* litigation. Instead, the overtime dispute was inadequately framed under Section 6 of 803 KAR 1:060 and whether that regulatory provision required a divisor of 2,912 or 2,080; the decision by the Court of Appeals never even mentioned the separate 3,328 divisor for the incentive

funds. As a result, the overtime premium incorporated into the incentive supplement by the Fire Commission was overlooked, and thus, the question whether the premium should be excluded from the regular hourly rate of pay and also credited against overtime compensation under Section 8(5) of 803 KAR 1:060 was never considered. If the issues in *Hasken* had been framed under Section 8(5), the rationale by the federal courts in *Adams* and *Fulmer* could have been considered to sustain the longstanding pre-*Hasken* overtime methodology.

For all of these reasons, *Hasken* should not seal the fate of local governments. Rather, they must be allowed to show how the supplement was set up by the state pursuant to KRS 95A.200 *et seq.* and its implementing regulations; to expand the analysis beyond local employment contracts that may or may not specifically address the supplement due to its comprehensive state regulation; and to frame the issues under Section 8 of 803 KAR 1:060 instead of merely Section 6.

(3) The immunity and jurisdictional arguments by Appellants also are consistent with law and efficiently resolve the overtime dispute.

Although the pre-*Hasken* overtime methodology should be validated while *Hasken* and its overtime methodology should be limited, unraveling all of the fallout of *Hasken* could be challenging. The City of Hazard has already litigated the divisor issue and successfully distinguished *Hasken* because its firefighters are employed on a salary basis. As a result, an interlocutory order by the Perry Circuit Court applied a 2,912 divisor. This divergent outcome is at tension with the post-*Hasken* trend and is likely to be challenged further on appeal. Furthermore, under KRS 95A.200 *et seq.*, all firefighters received an equal amount of incentive funds from the state and all local governments received the same overtime instructions from the Fire Commission.

Hasken, however, has forced local governments, like Hazard, into having to rely on local ordinances to achieve different outcomes. To put all local governments and firefighters back in the same position under a uniformly set up and applied state incentive fund program, the immunity arguments asserted by Appellants provide the most efficient resolution.

Appellants' primary agency immunity claim is consistent with the law of Kentucky because:

> (i) state agents are entitled to sovereign or governmental immunity under this Court's jurisprudence spanning from *Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1990) to *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009) and *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790 (Ky. 2009);
>
> (ii) the General Assembly has preserved the immunity of state agents to the fullest extent of law under KRS 44.072 of the Board of Claims Act;
>
> (iii) local governments are state agents in their function and capacity of carrying out the incentive program when considering the level of state control and regulation and when applying the agency principles of *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145 (Ky. 2003) and Restatement (3d) of Agency §1.01 (2006); and
>
> (iv) overtime liability on the incentive funds is inseparable from how the incentive supplement was implemented by the state and carried out by local governments pursuant to the statutory, regulatory, and contractual regime of KRS Chapter 95A.

The Court should, therefore, sustain Appellants' immunity argument, which will also spare these Amici and other local governments across the state from varying rulings and the potential for additional, unanticipated (and unbudgeted) overtime liability stemming from the incentive funds.

Finally, granting immunity to local governments is just and equitable. Local governments are not at fault; rather, they carried out the incentive program as directed by

the state, either from the Fire Commission or the Labor Cabinet, or both. Indeed, the expectations underlying the incentive supplement were set by the state, not by local governments or firefighters, because the state created, implemented, and controlled the incentive funds. *Hasken* upsets the settled expectations long established by the state over many years. As a result, firefighters stand to gain large windfalls at the expense of taxpayers saddled with huge sums of unforeseen overtime liability during lean economic and budgetary climates. The Court should stop this inequity.

CONCLUSION

The Court needs to intervene because local governments are not at fault and because key evidence and issues were not presented in *Hasken*. The evidence shows that the prior overtime methodology should be validated, that the overtime methodology in *Hasken* should be limited to that case, and that local governments are entitled to immunity.

Respectfully submitted,

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