No. _____

In The
Supreme Court of the United States

CLEVELAND COUNTY, NORTH CAROLINA A/K/A CLEVELAND COUNTY EMERGENCY MEDICAL SERVICES,

Petitioner,

v.

SARA B. CONNER, individually and on behalf of all others similarly situated,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act allows an employee, who has been paid at least the required minimum wage and overtime pay at a rate that is at least one and one-half times her regular rate, to sue her employer for and recover unpaid straight-time wages earned in weeks when she worked overtime.

2. Whether *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), allows courts to independently evaluate an agency's nonbinding interpretation of a statute.

RELATED PROCEEDINGS

The proceedings directly related to this petition under this Court's Rule 14.1(b)(iii) are:

- *Conner v. Cleveland Cnty.*, No. 19-2012 (4th Cir. Jan. 5, 2022) (reversing district court's judgment granting Petitioner's motion to dismiss); and

- *Conner v. Cleveland Cnty.*, No. 18-CV-2 (W.D.N.C. Aug. 21, 2019) (dismissing Respondent's complaint for failure to state a claim upon which relief can be granted).

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PETITION FOR A WRIT OF CERTIORARI

This case presents an acknowledged and entrenched circuit split over the scope of the Fair Labor Standards Act (FLSA, or the Act). 29 U.S.C. § 207. Below, the Fourth Circuit, acknowledging that split, determined that the FLSA allows an employee "to recover wages for uncompensated hours worked that fall between the minimum wage and the overtime provisions of the FLSA, otherwise known as gap time," in weeks that the employee works overtime. App. 13a (cleaned up). The Ninth Circuit has reached the same conclusion. See *Donovan v. Crisostomo*, 689 F.2d 869, 876 (9th Cir. 1982). By contrast, the Second Circuit has rejected this reading of the Act as inconsistent with the FLSA's text and structure. See *Lundy v. Catholic Health Sys. of Long Island*, 711 F.3d 106, 117 (2d Cir. 2013).

In addition to the FLSA-specific issue, this case presents an important question of federal law that divides the courts of appeals—how the courts should apply non-binding agency interpretations under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The Second, Fourth, and Ninth Circuits all approached the question of whether to recognize overtime-gap-time claims in light of an enforcement guideline issued by the Administrator of the Department of Labor's Wage and Hour Division, 29 C.F.R. § 778.315. Guidelines like § 778.315 are not issued after notice and comment and, as a result, are not entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). They are instead entitled only to "respect" under *Skidmore*. See *Christensen v. Harris Cnty.*, 529

U.S. 576, 587 (2000). The courts of appeals disagree on what "respect" means. As scholars have noted—and recent case law confirms—the courts of appeals' decisions largely fall into two camps. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1251–59 (2007). Some appellate courts presume that they must accept the agency's interpretation if it is longstanding and consistent with past practice. By contrast, other courts of appeals evaluate an agency's interpretation based solely on the force of its reasoning.

The Fourth Circuit reached the wrong conclusion on both issues. The text and structure of the FLSA do not support the Administrator's reading of the Act, 29 C.F.R. § 778.315. To the contrary, the Act allows an employee to sue her employer only if it has failed to pay her at least the minimum wage and overtime at one and one-half times her regular hourly rate. Even if the Act were ambiguous, the Fourth Circuit was still wrong to defer to § 778.315 under *Skidmore*. The court failed to independently analyze the Administrator's interpretation and to evaluate the force of its reasoning. Had the court properly applied *Skidmore*, it would have rejected this administrative guidance.

Review is warranted because both Questions Presented are exceptionally important. The split over the interpretation of the FLSA raises serious concerns for employers. In both the Fourth and Ninth Circuits, employers are now liable for double damages and the employee's attorneys' fees if they fail—even innocently—to pay an employee's contract rate. This

problem will only grow more prevalent. The Labor Department has recently expanded the universe of overtime-pay-eligible employees by increasing the salary required for an employee to qualify for the executive, administrative, or professional (EAP) exemption to § 207's overtime mandate. 29 U.S.C. § 213(a)(1). With more than one million employees newly eligible for overtime pay, it is time to clarify the overtime-gap-time issue.

Moreover, the lower courts' inconsistent application of *Skidmore* will create problems in the future. The Attorney General recently lifted a ban on the use of informal guidance in enforcement proceedings. Going forward, the lower courts are likely to face recurring questions about the proper application of *Skidmore*. What's more, agencies have increasingly insisted that courts defer to their litigation positions. See *E.I. Du Pont de Nemours & Co. v. Smiley*, 138 S. Ct. 2563, 2563 (2018) (Gorsuch, J., respecting the denial of certiorari). As the lower courts encounter agencies demanding deference, clarification of *Skidmore* will provide a bulwark against agency overreach.

The Questions Presented pose serious and costly problems for millions of employers, both public and private, and this case provides the ideal vehicle for resolving them. Both issues were fully briefed below, and both were essential components of the court's decision. If this Court reverses the Fourth Circuit's judgment, that decision will be case-dispositive.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 22 F.4th 412 and reproduced at App. 1a–34a. The district court's order is unreported and is reproduced at App. 37a–45a.

JURISDICTION

The Fourth Circuit rendered its decision and judgment on January 5, 2022. App. 1a. On March 31, 2022, the Chief Justice extended the time to petition for a writ of certiorari through June 3, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

29 U.S.C. § 207 provides in pertinent part:

> (a)(1): Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

> * * *
>
> (e): "Regular rate" defined
>
> As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to . . . the employee[.]

App. 64a, 68a.

29 C.F.R. § 778.315 provides:

> In determining the number of hours for which overtime compensation is due, all hours worked (see § 778.223) by an employee for an employer in a particular workweek must be counted. Overtime compensation, at a rate not less than one and one-half times the regular rate of pay, must be paid for each hour worked in the workweek in excess of the applicable maximum hours standard. This extra compensation for the excess hours of overtime work under the Act cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid.

App. 63a.

STATEMENT OF THE CASE

I. The Fair Labor Standards Act

In 1938, Congress enacted the FLSA to combat "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers[.]" 29 U.S.C. § 202. The "central aim of the Act was to achieve, in those industries within its scope, certain minimum labor standards." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Put differently, the FLSA provides covered employees with "a fair day's pay for a fair day's work" and protects them "from the evils of overwork as well as underpay." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (cleaned up).

The FLSA contains four primary protections, establishing a minimum wage, mandating overtime pay, requiring recordkeeping, and prohibiting child labor. See 29 U.S.C. §§ 206–07, 211–12; see also Dep't of Lab., *Handy Reference Guide to the Fair Lab. Standards Act* at 1 (2016 ed.). These protections supplement the rights and remedies provided by state law but are not meant to impose "continuing detailed federal supervision" of labor practices. *Mitchell*, 361 U.S. at 292.

To enforce the Act, Congress authorized the Labor Secretary to promulgate regulations implementing its provisions. See, e.g., 29 U.S.C. §§ 207(k)(1), 213(a)(1). Congress also created the Wage and Hour Division of the Department of Labor and authorized the Division's Administrator to bring

suit "to restrain violations of" the Act. 29 U.S.C. § 211; see also § 204. To that end, the Administrator has promulgated several "[a]dvisory interpretations" that "indicate the construction of the law which will guide the Administrator in the performance of his administrative duties[.]" 29 C.F.R. § 775.1. These enforcement guidelines are entitled to "respect" under *Skidmore*. See *Christensen*, 529 U.S. at 587.

II. The Gap-Time Problem

Gap time "refers to time that is not [directly] covered by the [FLSA's] overtime provisions because it does not exceed the overtime limit, and to time that is not covered by the [FLSA's] minimum wage provisions because . . . the employees are still being paid a minimum wage when their salaries are averaged across their actual time worked." App. 13a. "There are two types of gap time—pure gap time and overtime gap time." App. 14a. "In pure gap time claims, the employee seeks to recover for unpaid straight time in a week in which they worked no overtime." App. 14a. By contrast, in overtime-gap-time claims, "the employee seeks to recover unpaid straight time for a week in which they *did* work overtime." App. 14a. Courts uniformly reject "pure" gap-time claims, but "they are divided on whether an employee can bring an overtime gap time claim for unpaid straight time worked in an overtime week." App. 14a.

To understand the overtime-gap-time concept, consider two hypotheticals about an employee who works 45 hours—a 40-hour week plus five overtime hours—in a given workweek. In the first example, her

employer promises $400 for 40 hours of work, or $10 per hour. Her employer complies with the agreement, so she is paid $475: $400 in straight time pay, plus $75 in overtime pay. In this case, the $75 represents five hours' pay at one and one-half times the employee's $10 hourly rate.

In the second example, the agreement is the same, but the employee is paid only $8 per hour, less than the contract rate. As a result, she is paid $380 for 45 hours of work: $320 in straight time pay, plus $60 in overtime pay. In this case, the $60 represents five hours' pay at one and one-half times the employee's $8 hourly rate. In this scenario, the employer has breached the employment agreement. But payment of $380—$320 in straight time pay, plus $60 in overtime—satisfies the FLSA. Under the Act, the required amount of overtime pay depends on the employee's regular rate—what she was *actually paid* on a per-hour basis. See *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460–61 (1948); see also 29 U.S.C. § 207(e). In this example, the employee's regular rate is $8. Thus, under the Act, the employee is owed only $60 for five hours' overtime work. Without an overtime-gap-time claim, the employee would have a remedy in the form of a state-law breach of contract claim but would not have a claim under the FLSA.

Overtime-gap-time claims often arise out of good-faith disagreements about the terms of the employment contract. These disagreements can easily arise, for example, between municipalities and police officers, who do not adhere to a strict 40-hour-per-week overtime threshold. Section 207(k) allows law enforcement officers to work "tours" of up to 28 days.

If an officer works a 28-day tour, he is entitled to overtime pay only if he works more than 171 hours during that period. See generally 29 U.S.C. § 207(k); 29 C.F.R. § 553.230. An officer who works a 28-day tour, and who usually works fewer than 171 hours, may object to his paycheck if, in a given tour, he works overtime. He may think that his base salary covers only his typical schedule of fewer than 171 hours and that he is entitled to more pay at his regular rate for every hour worked that exceeds his typical schedule, until he reaches the 171-hour overtime threshold. His employer will likely disagree. From the employer's perspective, the officer's base salary covers not the officer's typical schedule, but every hour worked up to the 171-hour overtime threshold. The disagreement over the officer's employment contract may yield an FLSA claim for overtime-gap time.

To combat overtime-gap-time claims, the Administrator of the Department of Labor's Wage and Hour Division issued 29 C.F.R. § 778.315, a non-binding administrative interpretation of the FLSA. This interpretation reflects the Administrator's view that an employee must be paid all the straight-time wages that she is due under her employment agreement—meaning all the wages that she has been promised for non-overtime hours—before the employer can claim to have paid *any* overtime wages. According to the Administrator, even if an employee's overtime rate satisfies § 207 of the Act, that compliance is irrelevant; when an employee has not been paid her promised straight-time wages, any "overtime" pay received is really straight-time pay by another name—at least until her employer satisfies its contractual obligations. As a result, an employer

that mischaracterizes straight-time pay as overtime pay can never satisfy § 207(a)(1)'s overtime mandate. Even if the employee's overtime pay is 150% of her regular rate, the employer will always come up short.

III. Background

A. County Emergency Medical Services (EMS) personnel work 24-hour on/48-hour off shifts. Because these employees do not qualify for the FLSA's modified overtime threshold for law enforcement and firefighters, 29 U.S.C. § 207(k), they become overtime-eligible after 40 hours of work, § 207(a)(1). Under the County's 24-hour on/48-hour off schedule, each EMS employee works at least eight overtime hours every week.

The County pays its EMS employees twice per month. Until January 2018, employees' salary ranges were set by ordinance, but employees did not receive straight-time pay equal to 1/24th of their individual salary. To determine each employee's hourly rate, the County divided the promised salary by the number of hours—straight *and* overtime—they would work in a given year (2,928), not by the number of straight-time hours (2,080 hours). The County paid each employee that hourly rate for each straight-time hour worked in a workweek.

B. Respondent is a County EMS employee who worked the 24-hour on/48-hour off schedule. She sued the County in the Western District of North Carolina, asserting a claim under the FLSA and seeking to recover her underpaid straight-time wages—the

difference between Respondent's salary and the amount she was paid.

The County filed a motion for judgment on the pleadings, and the district court dismissed Respondent's complaint. See App. 37a. The district court concluded that the County had not violated the FLSA because the County calculated Respondent's premium overtime rate in accordance with 29 U.S.C. § 207(a) and because, even if underpaid, her hourly rate was substantially higher than the required minimum wage, § 206.

C. Respondent appealed to the Fourth Circuit. In an opinion by Judge Wynn, the court reversed, concluding that Respondent had stated a plausible claim under § 207(a). To start, the court observed that the FLSA is "silen[t]" about whether it requires employers to pay all bargained-for straight-time wages, so the court could look to the Administrator's interpretations for "guidance." App. 15a.

Reviewing § 778.315 for "the validity of its reasoning, [as well as] its consistency with earlier and later pronouncements," the court concluded that the Administrator's interpretation is entitled to "considerable deference" under *Skidmore*. App. 16a. It focused its analysis on the FLSA's remedial purpose and the Administrator's long-standing position, rather than on the statutory text.

The court reasoned that § 778.315, along with related interpretations—such as 29 C.F.R. §§ 778.310, 778.317, and 778.322, which impose, for

example, limits on an employer's ability to make lump-sum payments for overtime work, § 778.310—were "piece[s] in" the FLSA's "remedial" "armor" designed to provide "for the general well-being of workers." App. 19a. The Fourth Circuit did not evaluate each interpretation's strength and consistency with the FLSA's text. Instead, it grouped them together and concluded that they generally fit with the FLSA's remedial purpose.

That court also concluded that § 778.315 is entitled to respect under *Skidmore* because it is long-standing. App. 16a–17a. Without assessing the strength of the Administrator's reasoning, the Fourth Circuit declared that the guideline "makes sense" because it furthers "the policy objective of the FLSA overtime provision by ensuring employers do not mitigate or skirt the financial pressures of working their employees above the forty-hour threshold." App. 17a.

Finally, the court recognized that "many courts acknowledge[d]" overtime-gap-time claims, App. 24a (citing *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236 (3d Cir. 2014)), or had recognized the validity of those claims, see App. 17a (citing *Donovan v. Crisostomo*, 689 F.2d 869 (9th Cir. 1982)). It contrasted these cases with *Lundy v. Catholic Health System of Long Island*, 711 F.3d 106 (2d Cir. 2013), summarily rejecting the Second Circuit's text-based conclusion: "We respectfully disagree with the Second Circuit's decision in *Lundy*." App. 24a.

REASONS FOR GRANTING THE PETITION

This Court should grant the County's petition and review the Fourth Circuit's judgment. The Questions Presented involve two issues of exceptional importance. This case is also an ideal vehicle for resolving them.

I. The Questions Presented raise important issues about the scope of the FLSA and the proper application of *Skidmore*.

A. The decision below deepens a circuit split over the scope of the FLSA. As the Fourth Circuit recognized, courts are "divided on whether an employee can bring an overtime gap time claim for unpaid straight time worked in an overtime week." App. 14a. The Second Circuit has rejected the notion that the FLSA allows employees to seek unpaid straight-time wages for weeks in which they work overtime. The Fourth and Ninth Circuits, by contrast, have concluded that such a claim is viable.

1. The Second Circuit has determined that overtime-gap-time claims conflict with the FLSA's text. In *Lundy v. Catholic Health System of Long Island*, 711 F.3d 106 (2d Cir. 2013), the plaintiffs asserted an overtime-gap-time claim, alleging that, in weeks when they worked overtime, their employer failed to compensate them for compensable meal breaks and other off-duty work. *Id.* at 111. The Second Circuit rejected the claim. The panel, which included Justice O'Connor, unanimously concluded that the "FLSA does not provide for" overtime-gap-time claims. *Id.* at 116. The court reasoned that "the text

of [the] FLSA requires only payment of minimum wages and overtime wages," meaning the Act "simply [did] not consider or afford a recovery for gap-time hours." *Ibid.* The FLSA merely "supplements the hourly employment arrangement with features that may not be guaranteed by state laws, without creating a federal remedy for all wage disputes." *Id.* Thus, underpaid straight-time wages become a problem only when an employee's hourly rate falls below the minimum wage threshold required by § 206. *Id.* at 115–17; see also *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 494 (2d Cir. 1960).

2. The Ninth Circuit, by contrast, has determined that the FLSA allows overtime-gap-time claims. In *Donovan v. Crisostomo*, the court allowed the Labor Secretary to use the FLSA to "seek restitution for kickbacks from straight time wages as overtime compensation" in weeks when affected employees worked overtime. 689 F.2d at 876.[1]

The Crisostomos argued that the Secretary's reading of the statute would "expand the scope of the FLSA to include claims Congress regarded as contract disputes to be regulated by state law." *Ibid.* They reasoned that, even if they had underpaid their employees' contract wages, the employees' wages nevertheless complied with 29 U.S.C. §§ 206 and 207(a) because they were paid an hourly wage in excess of the minimum wage and their overtime rate was one and one-half times their regular hourly wage. *Ibid.* Rejecting that argument, the court concluded

[1] The Crisostomos routinely took a $0.38 "kickback" from each of their employees' hourly wage. *Id.* at 872.

that, to hold otherwise, "would allow employers to frustrate the [FLSA's] policy[.]" *Ibid.*; see also *id.* at n.13.

3. Here, the Fourth Circuit joined the Ninth Circuit in holding that the FLSA allows employees to sue for underpaid contract wages in weeks when they work overtime. The court acknowledged that the "FLSA does not include language about overtime gap time." App. 14a. Still, it said the statute's silence did not "end [the court's] inquiry." App. 14a.

Like the Ninth Circuit, the Fourth Circuit concluded that to hold otherwise would frustrate the Act's purpose. In that court's view, "allowing any amount other than the full amount of straight-time wages to count as compliance would frustrate the purposes of the FLSA just as surely as would nonpayment for specified hours." App. 23a. It continued, "If we did not mandate that *all* straight wages should be paid, we might encourage employers to simply shift wages to the 'overtime' bucket and reduce the wages for straight time promised by the employment agreement[.]" App. 23a. The Fourth Circuit acknowledged that its decision conflicted with the Second Circuit's in *Lundy* and said it "respectfully disagree[d]" with that court's conclusion. App. 24a.

B. Certiorari is also warranted to clarify the proper application of *Skidmore*. In *Skidmore v. Swift*, this Court held that lower courts may give an agency's non-binding interpretation of a statute—for example, one issued without following notice-and-comment rulemaking procedures—"respect" if it has the "power to persuade." *Skidmore*, 323 U.S. at 140.

1. Scholars have identified two primary methods that courts of appeals use when applying *Skidmore*. Hickman & Krueger, *supra* at 1251–52, 1270–71. The first is the "independent judgment" model. Under this model, a court reviewing an agency's non-binding interpretation using independent judgment considers "the merits of the agency's interpretation" when determining whether it is entitled to deference. *Id.* at 1251. The second is the more deferential sliding scale approach. Courts applying this model "consider whether to give weight to the agency's point of view, even if not required to give such weight." *Ibid.*

These two models demonstrate competing understandings of *Skidmore*. On the one hand, courts applying their own judgment ask whether the agency's interpretation makes sense, putting the agency on equal footing with any other litigant. On the other hand, courts applying the sliding scale approach are predisposed to defer to agency decisions. While these courts may ultimately reject the agency's position, they will not do so based only on their independent evaluation of the position's merits.

In the five years following *United States v. Mead Corp.*, 533 U.S. 218 (2001), the deference or sliding scale model predominated, accounting for nearly three out of every four *Skidmore*-based decisions. Kristin E. Hickman & Richard J. Pierce, *Admin. L. Treatise*, § 3.7; Hickman & Krueger, *supra* at 1270–71.

Despite the prevalence of deferential analysis during that period, a substantial minority of courts

independently evaluated the merits of the agencies' positions, choosing not to defer under *Skidmore* unless an agency's position was, in the reviewing court's opinion, sound. Hickman & Krueger, *supra* at 1270–71. In these cases, which made up about 20% of the 106 *Skidmore* cases, the courts did not analyze any of the factors identified in *Skidmore*. *Id.* at 1267–68. Instead, they construed the ambiguous statutes in the first instance, considering the agency's conclusion only to say that it was, or was not, in line with the courts' own. *Id.* at 1268–69 (citing *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003)).

C. The debate between deference and independent judgment continues in the courts of appeals. Even within the last five years, the lower courts have still struggled with the proper application of *Skidmore* deference following *Christensen* and *Mead Corp.*

During that time, many courts of appeals have continued to apply the deference model. For instance, the Fourth, App. 15a–20a; Sixth, *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 908 (6th Cir. 2021) (en banc); Seventh, *U.S. ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649, 662 (7th Cir. 2022); and Ninth Circuits, *Larson v. Saul*, 967 F.3d 914, 925 (9th Cir. 2020), have foregone independent evaluation of an agency's interpretation of an ambiguous statute and have instead analyzed the agency interpretation only in the context of the factors identified in *Skidmore*. In *Larson v. Saul*, the Ninth Circuit concluded that, despite its weak reasoning, the Social Security Commissioner's interpretation of the uniformed-service exception to the Social Security Act was

entitled to deference because the "provision concerns an interstitial administrative matter, one in which the agency's expertise could have an important role to play." 967 F.3d at 926 (cleaned up). So, too, in the Sixth Circuit, where, in *Gun Owners of America*, the court concluded that the Bureau of Alcohol, Tobacco, Firearms, and Explosive's rule banning bump stocks was entitled to *Skidmore* deference. The court explained that ATF had "abundant experience in determining which devices constitute machineguns." *Gun Owners of Am., Inc.*, 19 F.4th at 908.

By contrast, other courts of appeals continue to defer under *Skidmore* only after independently concluding that deference is appropriate. Over the last five years, for example, the Second, *Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 105–06 (2d Cir. 2019); Fifth, *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 327 n.9, 328 (5th Cir. 2018); Tenth, *N. N.M. Stockman's Ass'n v. U.S. Fish & Wildlife Serv.*, 30 F.4th 1210, 1226–27 (10th Cir. 2022); Eleventh, *Rafferty v. Denny's, Inc.*, 13 F.4th 1166, 1185 (11th Cir. 2021); and Federal Circuits, *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1354 (Fed. Cir. 2020), have continued to use their independent judgment. In each of these circuits, the courts evaluate the consistency of the agency's interpretation with the text of the controlling statute. So, for example, in the Federal Circuit, the court rejected the Director of the Patent and Trademark Office's non-binding interpretation of 35 U.S.C. § 315(c) because it was "inconsistent with the plain language of the statute and therefore unpersuasive." *Facebook, Inc.*, 973 F.3d at 1354. Likewise, the Second Circuit adopted the Federal

Trade Commission's interpretation of the Fair Credit Reporting Act, concluding that it was "helpful and, *as it tracks the language of the statute, persuasive*." *Kidd*, 925 F.3d at 106 (emphasis added).

II. The decision below is wrong.

A. The Fourth Circuit's decision contradicts the FLSA's text and context.

1. Overtime-gap-time claims have no basis in the statutory text. The FLSA's text does not allow overtime-gap-time claims. The Act requires that employers pay overtime only "at a rate not less than one and one-half times [an employee's] regular rate[.]" 29 U.S.C. § 207(a)(1).

An employee's regular rate, the starting point for any overtime calculation, is not set by her employment contract. The FLSA defines the regular rate as an actual fact; it stems from what the employee *has been paid* on a per-hour basis. 29 U.S.C. § 207(e) (defining the "regular rate" to "include all remuneration for employment *paid to . . . the employee*" (emphasis added)); accord *Bay Ridge Operating Co.*, 334 U.S. at 460–61. To satisfy § 207, an employer needs to pay at least one and one-half times that amount, not one and one-half times the employee's promised, contractual wages. § 207(a)(1). When a statute's text is unambiguous and the statutory scheme is coherent, courts enforce the statute as written, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The Fourth Circuit should have done so here.

2. The FLSA's structure also counsels against overtime-gap-time claims in two ways. First, the decision below contradicts § 215. Congress imposed liability only on employers who "violate . . . the *provisions of . . . section 207*," not on those who fail to pay an employee her contract wages. 29 U.S.C. § 215(a)(2) (emphasis added). Even if an employer fails to pay an employee her contractual wages, it has not necessarily violated § 207; the employer still may have paid the employee 150% of her regular rate.

Second, overtime-gap-time claims are in tension with the FLSA's minimum-wage provision. The Act guarantees a minimum wage, not a minimum agreed-upon wage, and the Administrator's interpretation is at odds with Congress' choice to limit § 206. Congress could have expanded that provision to guarantee *either* $7.25 per hour (the statutory rate) *or* a negotiated contract rate. It did not. Congress presumably made a conscious policy choice. See, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002) (observing that if Congress intended to create broad liability, "it could have done so clearly and explicitly."). The Administrator's interpretation disregards that congressional judgment.

3. Judicial deference is appropriate "only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). Because the FLSA's text and context are clear, the Fourth Circuit should have rejected Respondent's overtime-gap-time claim. Further, because the FLSA's text and context are

clear, the Fourth Circuit had no reason to ever consider the *Skidmore* question.

4. Even if *Skidmore* deference were warranted, the Fourth Circuit failed to evaluate § 778.315 independently. If it had done so, the court would have rejected the Administrator's interpretation. Section 778.315 fails to track, or even refer to, any part of the FLSA. Instead, it announces a general policy statement untethered from the statute's text. The Administrator's failure to identify any word or phrase that § 778.315 interprets renders it unpersuasive. Cf. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (interpreting the word "because" to determine whether a Title VII retaliation claim requires a showing of "but-for" causation); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008) (considering the definition of "charge" under the Age Discrimination in Employment Act); *Gonzales v. Oregon*, 546 U.S. 243 (considering the Attorney General's interpretation of "currently accepted medical use"); *Mead Corp.*, 533 U.S. 218 (considering whether a three-ring day planner was a bound "diar[y]" subject to a tariff).

In addition, and contrary to the Fourth Circuit's reasoning, the Administrator's interpretation does not advance the FLSA's policy. The FLSA's principal purpose is "to protect all covered workers from substandard wages and oppressive working hours." *Barrentine*, 450 U.S. at 739. The overtime provision accomplishes this goal by "inducing employers to shorten hours because of the pressure of extra cost" associated with requiring specific employees to work more than 40 hours in a

given workweek. *Bay Ridge Operating Co.*, 334 U.S. at 460. Section 778.315 does not further this goal. Regardless of whether an employee is paid at her contract rate or something lower, if an employer pays the employee overtime at a rate that is at least one and one-half times her regular rate of pay, the employer still faces the "pressure of extra cost" associated with requiring an employee to work overtime.

III. The Questions Presented are exceptionally important.

The FLSA question addresses an entrenched circuit split concerning the proper application of the Act's overtime mandate, a matter of substantial practical import to employers and employees throughout the country. Further, this case provides the Court with the opportunity to clarify another nationally important issue: the proper method for applying *Skidmore* deference.

A. The FLSA question is important to employers, both public and private, who now doubt the Act's scope, and whose approach to the issue will have significant effect on many of their employees.

1. Businesses in the Fourth and Ninth Circuits have little choice but to comply with § 778.315 if their employees can plausibly assert they have a contract promising straight-time pay at a fixed rate. This conservative approach is a practical necessity; otherwise, employers leave themselves open to potential liability under the FLSA, which

could include liquidated damages, attorneys' fees, and the threat of a collective action.

Private employers operating both within and without the Fourth Circuit or Ninth Circuit face a particularly difficult choice. Consider the case of First Student Management, LLC. First Student has been sued for violation of 29 C.F.R. § 778.315 in district courts across the country, including in the First, *Gould v. First Student Mgmt., LLC*, 2017 WL 3731025 (D.N.H. Aug. 29, 2017); Third, *Rosario v. First Student Mgmt., LLC*, 2016 WL 4367019 (E.D. Pa. Aug. 16, 2016); Sixth, *Murphy v. First Student Mgmt., LLC*, 2017 WL 346977 (N.D. Ohio Jan. 24, 2017); Seventh, *Spencer v. First Student Mgmt., LLC*, 2016 WL 693252 (N.D. Ill. Feb. 22, 2016), and Eleventh Circuits, *Jackson v. First Student Mgmt., LLC*, 2017 WL 10874175 (M.D. Fla. Apr. 20, 2017). The circuit split creates acute uncertainty for businesses like these.

2. The FLSA question is also critical to public sector state and local governments. Because they are often severely constrained by fixed budgets, their ability to litigate overtime-gap-time claims under the FLSA is impaired. Claims arising under the approach embraced by the Fourth and Ninth Circuits often involve several potential claimants suing a state or local government. Consider *Newton v. Schwarzenegger*, 2011 WL 13261986 (N.D. Cal. Jan. 14, 2011). There, more than 11,000 correctional officers joined a gap-time suit against the State of California, alleging that the State had failed to compensate them for more than 2,000,000 hours worked. *Id.* at *1; see also Compl. *Newton*, No. C 09-

5887 (N.D. Cal. filed Dec.16, 2009) (ECF No. 1). Similar defendants include the City of New York, *Conzo v. City of N.Y.*, 667 F. Supp. 2d 279 (S.D.N.Y. 2009) (class of nearly 1,500 paramedics and EMTs); City of Philadelphia, *Carter v. City of Phila.*, 2022 WL 169868 (E.D. Pa. Jan. 19, 2002); and City of Charleston, South Carolina; *Carter v. City of Charleston*, 995 F. Supp. 620 (D.S.C. 1997).

State and local governments have limited resources; they need certainty and predictability in the law governing their employment relations. Without it, these entities must err on the side of caution, spending taxpayer money on payroll that they might instead spend in more productive ways. In addition, in the Fourth and Ninth Circuits, state and local governments *must* defer to § 778.315 or face potentially significant financial consequences.

3. Recent rulemaking shows the profound effect that increasing the number of overtime-eligible EAP employees could have on the pool of potential overtime-gap-time plaintiffs. The Department of Labor recently expanded overtime eligibility effective January 1, 2020. Compare 29 C.F.R. §§ 541.100 (executive), .200 (administrative) & .300 (professional) (2020), with § 541.100, .200, & .300 (2012); see also 84 Fed. Reg. 51230. Before 2020, the Department of Labor had set the salary level for exempt employees at $455 per week ($23,660 per year). 69 Fed. Reg. 22122, 22171. The 2020 changes increased that level by about 50%, up to $684 per week ($35,568 per year). E.g., 29 C.F.R. § 541.100 (2020).

The Department estimated that the 2020 change affected more than 3 million people. Most significantly, the Department estimated that an additional 1.2 million EAP employees—those earning more than $455, but less than $684 per week and performing EAP duties—would become eligible for overtime compensation because they would fail the required salary prong of the § 213 inquiry. 84 Fed. Reg. 51231. In addition, the Department concluded that the 2020 change would strengthen the overtime claim of more than 2 million additional employees. *Ibid.*

B. The *Skidmore* question presents an important chance to clarify application of *Skidmore* deference. Doing so will be important, given recent changes at the Department of Justice.

The Department of Justice recently expanded its attorneys' power to use informal guidance documents in enforcement litigation, such as suits brought under the False Claims Act.

Beginning in 2017, the Attorney General scaled back the Department of Justice's power to use guidance documents—publications usually entitled to *Skidmore* deference in civil lawsuits. In November 2017, the Attorney General issued a memorandum on the "prohibition of improper guidance documents." Mem. from the Off. of the Att'y Gen., *Prohibition on Improper Guidance Documents* (Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012271/download. The November 2017 memorandum suspended the Department's practice of issuing guidance documents,

"such as letters to regulated entities" that "effectively bind private parties without undergoing the [notice-and-comment] rulemaking process." *Id.* at 1. A January 2018 memorandum from the Associate Attorney General expanded the prohibition on guidance documents to the "Department['s] litigators in determining the legal relevance of other agencies' guidance documents in affirmative civil enforcement." Mem. from the Assoc. Att'y Gen., *Limiting Use of Agency Guidance Documents in Affirmative Action Civil Enforcement Cases*, 1 (Jan. 25, 2018), https://www.justice.gov/file/1028756/download. Banning the use of guidance documents in "affirmative civil enforcement" affected sweeping change, preventing the use of such documents in any lawsuit to "recover government money lost to fraud or other misconduct or to impose penalties for violations of Federal health, safety, civil rights or environmental laws." *Id.* at 1–2 n.1. In particular, the January 2018 memorandum specifically prohibited the use of guidance documents in False Claims Act cases. *Ibid.*

The Attorney General has recently rolled back these limitations and will allow Department of Justice attorneys to use guidance documents moving forward. Mem. from the Off. of the Att'y Gen., *Issuance and Use of Guidance Documents by the Department of Justice* (July 1, 2021), https://www.justice.gov/opa/page/file/1408606/download. On July 1, 2021, the Attorney General issued a memorandum retracting both the November 2017 and January 2018 memoranda. Under current Department policy, the Department's civil attorneys may now rely on guidance documents and the deference given to them to seek penalties on behalf of the United States.

The Department's renewed focus on informal agency guidance will surely shape future enforcement proceedings. In public comments, the Assistant Attorney General expressed the Department's view that "the False Claims Act will play a significant role in the coming years as the government grapples with the consequences of" the Covid-19 pandemic. Dep't of Just., *Acting Assistant Att'y Gen. Brian M. Boynton Delivers Remarks at the Fed. Bar Ass'n Qui Tam Conf.* (Feb. 17, 2021). With a renewed and "significant" focus on the False Claims Act, *Skidmore* is likely to play a role in the lower courts for years to come. As a result, this Court should grant certiorari to clarify how it should be applied.

IV. This Case is the ideal vehicle to resolve the Questions Presented.

This case presents a compelling vehicle to resolve the Questions Presented. Both are pure legal questions.

On the FLSA question, without § 778.315, Respondent's claim would fail. The County paid Respondent one and one-half times her regular rate for each overtime hour that she worked. Even if this overtime rate were less than one and one-half times the rate that the County had promised, it still exceeded the statutory minimum wage and satisfied the FLSA's overtime provision.

Likewise, the *Skidmore* question was briefed and decided below, and core to the parties' dispute.

The parties briefed both issues below, and the court passed upon them. The County argued that the Fourth Circuit owed the Administrator's interpretation no deference because it conflicted with the FLSA's text and because it failed to further the FLSA's policy. Given the discrete nature of the issues to be briefed, this case is the ideal vehicle to review both Questions Presented.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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