No. 21-1538

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 a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The Fair Labor Standards Act requires employers to pay a premium rate for employees' overtime hours. May employers avoid FLSA overtime liability by reducing their employees' regular wages?

2. When a court evaluates an agency's interpretation of a statute, may it consider the factors identified in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)?

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STATEMENT OF THE CASE

A. Legal background

The Fair Labor Standards Act (FLSA) seeks to combat labor conditions that are detrimental to the "health, efficiency, and general well-being of workers." 29 U.S.C. § 202. To that end, the FLSA rests on two core pillars: A federal minimum-wage provision and—at issue in this case—a federal overtime provision. 29 U.S.C. §§ 206-07. Under the overtime provision, once an employee has worked 40 hours in a week, additional hours must generally be compensated at a premium rate "not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

"Overtime-gap-time" claims arise when an employer reduces an employee's straight-time pay (that is, their pay for the first 40 hours worked) in an attempt to evade the FLSA's requirement to pay a premium rate for overtime work. In weeks where the employee works overtime, the employer claims to pay those additional hours at the required premium rate. But he does so by reducing the employee's straight-time wages, thus creating a "gap" in the employee's compensation. The net effect on an employee's paycheck is the same as if the employer simply paid less than the required overtime.

Consider a hypothetical overtime-gap-time claim: An employee is contractually entitled to $400 for working a 40-hour week. One week, she works an

extra 5 hours, for a total of 45. Under the FLSA, her employer is required to pay her 1.5 times her regular rate for each hour over 40. The employee thus looks forward to a $475 paycheck: $400 for her 40 regular hours (at $10 per hour) plus $75 for the 5 overtime hours (at $15 per hour). But at the end of the week, she receives the usual $400 paycheck. If the employer were to acknowledge that it paid her $400 in straight-time pay and no overtime, it would have committed a classic FLSA overtime violation. But suppose instead that the employer issues the same $400 paycheck with a paystub showing $325 in straight-time pay and $75 in overtime pay. This stratagem—where the employer siphons $75 from the employee's straight-time pay and labels it as overtime—gives rise to an overtime-gap-time claim.

In 1968, the Department of Labor issued a regulation affirming that the FLSA prohibits this type of wage manipulation. *See* 33 Fed. Reg. 986, 1003 (Jan. 26, 1968) (later codified at 29 C.F.R. pt. 778). The regulation states that pay cannot be labeled as "overtime" unless the employer has first paid all straight-time wages: "Th[e] 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 nonovertime hours under his contract (express or implied) or under any applicable statute has been paid." 29 C.F.R. § 778.315 (2022). The regulation has remained unchanged for 54 years. *Compare id.*, *with* 33 Fed. Reg. 986, 1003 (Jan. 26, 1968).

B. Factual background

Sara Conner began working as an emergency medical services responder for petitioner Cleveland County in 2007. Conner Decl. ¶ 2, ECF No. 37. In that role, Ms. Conner administered medical care and transported sick and injured persons in response to emergency calls. First Am. Comp. ¶¶ 20-21, ECF No. 22. She was scheduled pursuant to a repeating 21-day schedule whereby she worked a 24-hour shift, followed by 48 hours off. *Id.* ¶ 24. This schedule required Ms. Conner to work either 48 hours or 72 hours in a given week, resulting in 8 or 32 hours of scheduled overtime. *See* Pet. App. 4a.

In 2017, Ms. Conner's regular salary was set by ordinance at $36,900. Pet. App. 6a. In addition, petitioner's pay policy established a discounted overtime rate of $18.90 per hour: 1.5 times Ms. Conner's regular salary divided by 2,928, the total annual hours an emergency medical services responder would theoretically work on the 24-on/48-off schedule. *Id.* The parties thus agreed that if Ms. Conner worked all of her scheduled overtime hours, she would earn $16,027 annually for overtime. *Id.* 6a-7a.

Ms. Conner claims her total 2017 compensation should have been $52,927: The $16,027 in overtime plus the $36,900 salary promised to her by ordinance. Pet. App. 6a. But she was paid only $42,235. *Id.* 7a. Ms. Conner alleges that rather than paying the $36,900 of straight-time compensation specified in the ordinance, petitioner reduced that straight-time compensation to $26,208, creating a more-than-

$10,000 gap in her pay and effectively denying her most of the overtime she was owed. *Id.*

Effective January 1, 2018, petitioner abandoned that practice. Pet. App. 7a. It now pays emergency medical services personnel the way Ms. Conner argues they should have been compensated all along. *Id.*

C. Procedural history

On January 2, 2018, Ms. Conner filed suit, bringing claims under both the FLSA and state law for underpayment during each of the prior three years. Pet. App. 7a-8a, 48a. As relevant here, Ms. Conner raised an overtime-gap-time claim, arguing that petitioner violated the FLSA by labeling a portion of her regular wages as "overtime" and reducing her straight-time wages. *Id.* 8a. The district court dismissed that claim. *Id.* 43a.

The Fourth Circuit reversed. First, the court held that *Monahan v. County of Chesterfield*, 95 F.3d 1263 (4th Cir. 1996), had recognized FLSA remedies for overtime-gap-time claims 26 years earlier. Pet. App. 24a.

Second, the Fourth Circuit "turn[ed] as a 'resort for guidance' to" the Department of Labor's interpretation of the FLSA, captured at 29 C.F.R. § 778.315. Pet. App. 15a (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The court deemed the text of the FLSA ambiguous. *See* Pet. App. 15a. It then recognized that Section 778.315 was "not controlling upon the courts by reason of [its] authority." *Id.* (quoting *Skidmore*, 323 U.S. at 140). That being said, the court concluded that the Department's reasoning

was sound: Section 778.315 simply clarifies that employers may not invent "creative payment schemes" to shirk their obligations under the FLSA. Pet. App. 18a (citation omitted).

Bound by *Monahan* and persuaded by the Department of Labor's regulation, the Fourth Circuit held that Ms. Conner's overtime-gap-time claim was cognizable under the FLSA. Pet. App. 25a.

The case is now proceeding before the district court. *See Conner v. Cleveland County*, 2022 WL 4476739 (W.D.N.C. Sept. 26, 2022). Meanwhile, petitioner declined to seek en banc review and instead filed a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The questions presented do not warrant this Court's review. There is no disagreement among the courts of appeals, the Fourth Circuit's analysis was correct, and this case is the wrong vehicle for this Court's intervention.

I. The first question presented does not warrant this Court's review.

Neither lower courts nor employers are in need of this Court's guidance regarding the first question presented. The Fourth Circuit is the only federal appellate court to squarely decide whether overtime-gap-time claims are cognizable under the FLSA. And employers already know they cannot underpay straight-time wages to avoid paying full overtime wages because state law prohibits that conduct in any event. This case is also the wrong vehicle for this Court to elaborate on overtime-gap-time claims.

Furthermore, the decision below was correct. Text, precedent, and the statutory framework make clear that overtime-gap-time schemes violate the FLSA. By contrast, petitioner's interpretation would severely undercut the FLSA's overtime protections.

A. There is no circuit split.

Petitioner claims a split between the Second Circuit on one side and the Fourth and Ninth Circuits on the other. Pet. 13. Petitioner is wrong.

1. The Second Circuit's decision in *Lundy v. Catholic Health System of Long Island Inc.*, 711 F.3d 106 (2d Cir. 2013), does not depart from the decision below. In *Lundy*, the plaintiffs' "sparse allegations could not support a claim for time in excess of 40 hours." 711 F.3d at 112. As to two of the three named plaintiffs (Lundy and Wolman), the complaint did not sufficiently allege that they had ever worked overtime. *Id.* at 114-15. The third plaintiff (Iwasiuk) may have worked overtime in some weeks but did not sufficiently allege that she was underpaid at all. *Id.* at 115.

In this case, of course, Ms. Conner sufficiently alleged both that she worked overtime and that she was underpaid. Pet. App. 3a-5a. The Second Circuit was not presented with such a case. Conversely, the plaintiffs in *Lundy* would have no claim in the Fourth Circuit, either. *See id.* 14a. "Courts uniformly reject" claims under the FLSA's overtime provision where the plaintiffs did not work any overtime (Lundy and Wolman) or were fully compensated in the weeks that they did (Iwasiuk). Pet. 7.

To be sure—and as the Fourth Circuit noted in this case—the Second Circuit in *Lundy* went on to

opine that if the plaintiffs had worked overtime, their claims would not have been cognizable under the FLSA (though they would have been under state law). *See* Pet. App. 24a; *Lundy*, 711 F.3d at 115-16. But that explanation was unnecessary to resolve the case. Any disagreement between the Second and Fourth Circuits is more theoretical than real.

2. Beyond *Lundy*, the most petitioner has shown is that the two circuits to have even plausibly addressed the issue (the Fourth and the Ninth) agree. Pet. 14-15. Agreement among circuits, of course, does not create a need for review.

But even petitioner's inclusion of the Ninth Circuit in its alleged split is a stretch. Petitioner points to a forty-year-old decision, *Donovan v. Crisostomo*, 689 F.2d 869, 876 (9th Cir. 1982). Pet. 14. But in the decades since, the Ninth Circuit itself has said it is "not clear" whether "a gap time claim may be asserted under the FLSA." *Adair v. City of Kirkland*, 185 F.3d 1055, 1062 n.6 (9th Cir. 1999); *see also Young v. Beard*, 2015 WL 1021278, at *12 (E.D. Cal. Mar. 9, 2015) ("The Ninth Circuit has not resolved whether a plaintiff may bring 'gap time' claims under the FLSA.").

3. At the very least, petitioner is wrong that the decision below "deepens" any circuit split. Pet. 13. Petitioner ignores that the opinion below merely reaffirmed *Monahan v. County of Chesterfield*, 95 F.3d 1263 (4th Cir. 1996), a 1996 Fourth Circuit case. *See* Pet. App. 20a-24a. Even accepting petitioner's reading of *Lundy*, any split between the Second and Fourth

Circuits emerged when the 2013 *Lundy* decision split with *Monahan* and is thus at least a decade stale.

B. The first question presented is not important.

1. This Court needn't intervene to provide guidance to employers. It is undisputed that the opinion below did not place any primary conduct off limits beyond what state law already forbids. *See* Pet. 8. As petitioner acknowledges, an overtime-gap-time claim necessarily involves breach of an employment agreement. *Id.* State law proscribes such breaches, either by statute or at common law. *See, e.g.*, N.C. Gen. Stat. § 95-25.6 (2022); *Bigelow v. Sassafras Grove Baptist Church*, 786 S.E.2d 358, 360 (N.C. Ct. App. 2016); *Lundy*, 711 F.3d at 116. Contrary to petitioner's claim, there will be no "acute uncertainty for businesses," Pet. 23, so long as those businesses comply with state law.

Resolution of the question presented will not even affect petitioner's primary conduct. In 2018, petitioner changed its policies to accord with Ms. Conner's position regarding the proper compensation for its employees. Pet. App. 7a.

2. This Court's guidance is not necessary for lower courts, either. Courts rarely encounter overtime-gap-time claims. Even on petitioner's telling, only three circuits have weighed in on the question presented in the 84 years since the FLSA's passage. And although the Fourth Circuit has recognized overtime-gap-time claims under the FLSA since 1996, counsel for respondent could find only five cases in that circuit where the question presented was even arguably

dispositive.[1] Of the few overtime-gap-time claims nationwide, a large portion challenge the suspect business practices of just one or two companies. *See* Pet. 23 (collecting cases against First Student Management); *Lasater v. DirecTV*, 772 Fed. Appx. 582 (9th Cir. 2019) (reversing eight overtime-gap-time cases against DirecTV on other grounds).

Nor will recent changes in overtime eligibility meaningfully increase the frequency of these suits. Petitioner points to "an additional 1.2 million" workers who will be covered by the FLSA's overtime provision. Pet. 24-25 (citing 84 Fed. Reg. 51,230). But the more than 100 million workers already covered by the FLSA file only a handful of overtime-gap-time suits. *See* 84 Fed. Reg. 51,230, 51,257 (Sept. 27, 2019); *supra* note 1. A mere 1% increase in the number of workers covered by the FLSA is not enough to justify this Court's intervention, particularly since 86% of the newly covered employees "work zero usual hours of overtime." 84 Fed. Reg. at 51,262.

3. Amicus International Municipal Lawyers Association argues that overtime-gap-time lawsuits would "significantly hinder[]" municipal governments' "ability to carry out important governmental functions

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[1] Only a handful of Fourth Circuit cases have mentioned overtime-gap-time claims, *Monahan*, or Section 778.315 in the 26 years since *Monahan.* And of those, the question presented was dispositive in at most five cases. *See Balducci v. Chesterfield County*, 187 F.3d 628, at *7 (4th Cir. 1999) (unpublished); *Mackey v. Macsons, Inc.*, 2017 WL 11506359, at *2 (E.D. Va. Nov. 27, 2017); *Ramsay v. Sanibel & Lancaster Ins., LLC*, 2012 WL 12821744, at *8 (E.D. Va. Mar. 28, 2012); *Koelker v. Mayor & City Council of Cumberland*, 599 F. Supp. 2d 624, 632-33 (D. Md. 2009); *Carter v. City of Charleston*, 995 F. Supp. 620, 621-22 (D.S.C. 1997).

such as police, fire, and emergency services." Br. of Int'l Municipal Laws. Ass'n (IMLA) as Amicus Curiae 2. That claim is overblown. For starters, municipal governments, unlike other employers, can avoid paying overtime altogether by awarding compensatory time off work instead. 29 U.S.C. § 207(o). And even where a municipality chooses to pay overtime, it can take advantage of relaxed overtime rules for core municipal workers.[2]

It is telling indeed that amicus fails to identify a single one of its 2,500-member local government entities that face overtime-gap-time claims with any meaningful frequency. *See* Br. of IMLA 1. And counsel for respondent could not identify any other overtime-gap-time cases brought against local governments in the past five years—hardly the crippling flood of litigation that amicus describes.[3] That's presumably

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[2] *See, e.g.*, 29 U.S.C. § 213(b)(20) (firefighters and law enforcement personnel in small municipalities); *id.* § 207(k) (firefighters and law enforcement personnel in large municipalities); *id.* § 207(j) (hospital workers); *id.* § 213(a)(1) (executive, administrative, and professional employees, including elementary and secondary school teachers); *id.* § 213(a)(16) (criminal investigators).

[3] Besides this case, counsel for respondent could find only five suits against local governments in the past five years that even mentioned "overtime gap time" or cited 29 C.F.R. § 778.315. None actually raised an FLSA overtime-gap-time claim. *See Carter v. City of Philadelphia*, 2022 WL 169868, at *6 (E.D. Pa. Jan. 19, 2022) (plaintiffs' claim was "not" a "gap pay" issue); *Woodburn v. City of Henderson*, 2021 WL 5605177, at *5-6 (D. Nev. Nov. 29, 2021) (city tried to characterize the claim as for gap time, but court found it was a garden-variety overtime claim); *McKinney v. Chester County*, 2021 WL 1534542, at *1 & n.2 (E.D. Pa. Apr. 19, 2021) (addressing garden-variety overtime claim);

because—unlike petitioner—most municipalities do not break state law by reducing straight-time wages to avoid paying overtime.

C. This case is an unsuitable vehicle to resolve the first question presented.

Even if the question presented were otherwise worthy of this Court's consideration, this case does not present a good opportunity to answer it.

1. This case's interlocutory posture—an appeal from the denial of a motion to dismiss—"counsel[s] against this Court's review at this time." *Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (Kavanaugh, J., respecting the denial of certiorari). There has been limited discovery and no factfinding. This lack of a factual record alone "furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

In particular, the parties continue to dispute a critical fact in this case: Ms. Conner's straight-time wages. *See* Pet. App. 7a n.3, 31a. Ms. Conner claims she was entitled to the $36,900 specified in Cleveland County's ordinance; petitioner instead maintains that $36,900 is "just a number used to calculate the applicable hourly wage." *Id.* 7a n.3. Meanwhile, the parties' multiple alleged employment agreements have yet to be interpreted by any court. *Id.*

Gurrieri v. County of Nassau, 2018 WL 6590564, at *3 (E.D.N.Y. Dec. 14, 2018) (plaintiffs "made no gap-time claims" in their complaint); *Wallace v. City of San Jose*, 2018 WL 2197721, at *8 (N.D. Cal. May 14, 2018), *aff'd*, 799 Fed. Appx. 477 (9th Cir. 2020) (plaintiffs insisted they were "not making" a gap-time claim).

2. This case is also procedurally irregular. Petitioner's position regarding Ms. Conner's "regular rate"—a core question in this litigation—has evolved over the course of this lawsuit. Petitioner's entire textual argument now turns on the premise that Ms. Conner's "regular rate" depends entirely on "what she was *actually paid* on a per-hour basis," Pet. 8, and is "not set by her employment contract," *id.* 19.

But petitioner did not press this argument below. Far from urging the Fourth Circuit to ignore Ms. Conner's contract, petitioner argued that the court must in fact "*first* look to the employment agreement." Petr. C.A. Br. 32-33 (emphasis added) (citation omitted). Petitioner contested *which* contracts were relevant to determine Ms. Conner's regular rate, advocating for "[a] holistic view of the County's ordinances and related policies." *Id.* 32. It never claimed, though, that the employment agreements were irrelevant. *See id.* 32-34. This Court should at least await a case where the relevant arguments were fully aired below.

3. Finally, the underlying facts of this case complicate the legal question petitioner would like this Court to address. The parties agreed to use an esoteric formula to calculate Ms. Conner's overtime wages. *See* Pet. App. 4a-5a. That formula applies a discounted "regular rate" by dividing $36,900—an amount set by ordinance—by 2,928, the total number of hours an emergency responder would theoretically work in a given year on the 24-on/48-off schedule. *Id.* But according to binding Department of Labor regulations, an employer is generally required to calculate a salaried employee's regular rate by dividing the

annual salary by 2,080, the number of straight-time hours per year (52 weeks multiplied by 40 hours per week). *See* 29 C.F.R. § 778.113.

The complex legal fiction governing Ms. Conner's regular rate has forced the parties and the Fourth Circuit to rely on hypotheticals. Pet. 7-8; Pet. App. 17a-18a; *supra* at 1-2. This Court would be better served by a case in which the legal question can be answered by looking to concrete facts.

D. The Fourth Circuit's FLSA holding is correct.

Recall the hypothetical above. *Supra* at 1-2. An employee receives $400 for working a 40-hour week. The next week, she works an extra 5 hours, expecting a $475 paycheck. She instead receives her usual $400 paycheck. If the employer admits that he is paying $0 in overtime and $400 in straight-time, the employee has an FLSA claim. But on petitioner's reading, if the employer simply labels $75 as overtime pay and $325 as straight-time pay, there is no FLSA violation.

That cannot be right. Clever labeling can turn virtually any overtime claim into an overtime-gap-time claim. If petitioner is correct, the overtime requirement would become a toothless accounting rule: Label $400 as entirely straight-time pay and face the FLSA's penalties; move $75 of that $400 into an overtime column, and the FLSA has nothing to say.

Petitioner's interpretation would entirely kneecap the FLSA's overtime provision. And the FLSA's text, this Court's precedent, and the statutory scheme all confirm that petitioner's stratagem is prohibited.

1. *Text.* Overtime-gap-time schemes violate the plain text of the FLSA.

a. Start with the operative overtime provision itself, 29 U.S.C. § 207(a)(1). That provision doesn't just require paying an employee a premium rate; it requires that premium rate be "*for* his employment in excess of" 40 hours. *Id.* (emphasis added). If an employer instead uses straight-time wages to pay its employee's overtime compensation, the pay labeled "overtime" is not "for" those "hours in excess of" 40. It is "for" the employee's straight-time hours.

No ordinary speaker would say otherwise. Imagine a physician instructs a patient to take 400 milligrams of Aspirin each day for back pain and 75 additional milligrams "for" pain "in excess of" the norm. One day, the patient experiences excess back pain but still takes only 400 milligrams. If the physician asked the patient why he didn't take anything "for" the "excess" pain, it would be no answer at all for the patient to respond that he *did* take 75 milligrams "for" the "excess" pain; he just reduced his regular dose to 325 milligrams in the process. Any reasonable person would say the patient has ignored the physician's orders and taken nothing "for" his "excess" pain.

Lest there be any doubt about the meaning of the overtime provision, it also mandates that an employee be paid "one and one-half times the *regular rate at which he is employed*," not just one and one-half times the minimum wage. 29 U.S.C. § 207(a)(1) (emphasis added). But on petitioner's reading, no matter how high an employee's regular rate, his employer can

always functionally reduce the overtime rate to one and one-half times the federal minimum wage simply by relabeling the paycheck. *See* Pet. 8; *cf.* 29 U.S.C. § 206(a). Petitioner's reading would erase Congress's deliberate choice to peg the overtime rate to an employee's "regular rate," rather than to the minimum wage. *See* 29 U.S.C. § 207(a)(1); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942) ("[T]he [FLSA] was designed to require payment for overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum.").

b. Despite claiming the mantle of textualism, petitioner does not once analyze the text of Section 207(a)(1). *See* Pet. 19. Instead, petitioner insists that overtime-gap-time claims are foreclosed by another provision of the FLSA, Section 207(e). *Id.* Petitioner's focus is misdirected.

Section 207(a)(1) creates the FLSA's overtime requirement and references an employee's "regular rate." 29 U.S.C. § 207(a)(1). Section 207(e), on the other hand, deals with miscellaneous categories of "remuneration" that need not be included in Section 207(a)(1)'s "regular rate." 29 U.S.C. § 207(e). Per Section 207(e), the regular rate must "include all remuneration for employment paid to, or on behalf of, the employee" but "shall not be deemed to include" various odds and ends such as Christmas gifts, travel reimbursements, and income from stock options. *Id.*

According to petitioner, because Section 207(e) discusses "remuneration for all employment *paid to*" an employee, the "regular rate" is calculated by

looking only to an employee's paycheck. *See* Pet. 8, 19. Per petitioner, that use of the past tense would somehow justify paying our hypothetical employee even *less* than $400 for her 45-hour workweek. *Id.* 8.

If petitioner were correct, Section 207(e)—a provision that hashes out how to handle Christmas gifts and the like—would gut Section 207(a), one of the statute's core pillars. It would be passing strange for Congress to "alter the fundamental details" of the FLSA—to essentially nullify the overtime requirement—in an "ancillary provision[]" like Section 207(e). *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). After all, Congress "does not, one might say, hide elephants in mouseholes." *Id.*[4]

2. *Precedent.* This Court has warned against interpreting the FLSA so as to "exalt ingenuity over reality" and "open the door to insidious disregard of the rights protected by" the FLSA. *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944). In particular, this Court has explained that the FLSA's overtime requirement cannot be defeated by "an arbitrary label." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461 (1948) (citation omitted); *see also Walling*, 323 U.S. at 42 (overtime wages cannot be

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[4] Petitioner also cites *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948), for the proposition that an employment agreement cannot be considered in calculating the "regular rate." Pet. 19. But *Bay Ridge* said no such thing. In fact, *Bay Ridge* instructs that "[t]he regular rate by its very nature must reflect all payments which the parties *have agreed* shall be received regularly during the workweek." 334 U.S. at 461 (emphasis added) (citation omitted).

calculated in a "wholly unrealistic and artificial manner so as to negate the statutory purposes").

In other areas of law, too, this Court has repeatedly held that an actor cannot evade a prohibition by cleverly labeling parts of what is ultimately one pot of money. A defendant cannot evade the statutory prohibition on withdrawing ill-gotten money from a bank account, 18 U.S.C. § 1956, by labeling the withdrawn funds as "clean" when they come from an account that commingles legitimate and ill-gotten funds. *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352-53 (D.C. Cir. 2002) (collecting cases). A defendant cannot evade the prohibition on donating money to foreign terrorist organizations, 18 U.S.C. § 2339B(a)(1), by labeling the money as humanitarian aid when "[s]uch support frees up other resources within the organization that may be put to violent ends." *Holder v. Humanitarian L. Proj.*, 561 U.S. 1, 30 (2010). And a public-sector union cannot evade the rule against spending dues on political activity by labeling political funds as coming from sources other than dues. *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 317 n.6 (2012) ("[O]ur cases have recognized that a union's money is fungible, so even if the new fee were spent entirely for nonpolitical activities, it would free up other funds to be spent for political purposes.").

Yet petitioner's interpretation of the FLSA would do what these reams of precedent prohibit: Allow a statute to be evaded by creative accounting. Indeed, petitioner's reading would have the FLSA—uniquely among legal regimes—ignore the fact that money is fungible. The Fourth Circuit was right to reject petitioner's argument.

3. *Statutory Scheme.* The FLSA's overtime provision reflects Congress's decision to "compensate those who labor[] in excess" of 40 hours each week "for the wear and tear of extra work." *Bay Ridge*, 334 U.S. at 460; *see* 29 U.S.C. § 207(a). It also seeks to "spread employment" by placing a financial penalty on employers who require fewer employees to work more hours. *Bay Ridge*, 334 U.S. at 460. The overtime provision thus effects the simple principle that workers are entitled to higher rates and larger paychecks when they work overtime. Congress backed that decision with a statute that goes well beyond most state laws: The FLSA provides for collective actions, attorneys' fees, liquidated or double damages, and equitable remedies, and it gives the Department of Labor enforcement authority. 29 U.S.C. § 216.

Petitioner claims to have found a chink in the FLSA's armor: Employers can evade the statute's clear command simply by manipulating paystubs. According to petitioner, an employer can hand its employee the same $400 paycheck each week—regardless of whether she worked 40 hours, 45 hours, or more, subject only to the minimum wage's floor. *See* Pet. 8. At the 2022 federal minimum wage of $7.25 per hour, our hypothetical worker could be required to log more than 50 hours to receive the $400 paycheck she was promised for 40 hours of work. *See* 29 U.S.C. § 206(a)(1)(C). Employees' "wear and tear" goes uncompensated, and employers have no incentive to "spread employment." As the Fourth Circuit recognized, allowing straight-time wages to be labeled as "overtime" would "frustrate the purposes of the

FLSA just as surely as would nonpayment" of overtime. Pet. App. 23a.

Petitioner's interpretation would also waste judicial resources by forcing employees to file two separate lawsuits to recover overtime wages. Consider petitioner's own hypothetical: An employee who is promised $10 per hour suddenly finds that her employer has reduced her straight-time pay to $8 per hour and her overtime pay to $12 per hour. Pet. 8. Under petitioner's reading, the employee cannot sue under the FLSA at that point; she only has a state-law claim. *Id.* But once that employee wins her state-law suit and gets her $10 per hour straight-time wage, her $12 overtime rate violates the FLSA. *See* 29 U.S.C. § 207(a)(1). Per petitioner, only *then*—after completing a full round of litigation under state law—could the employee sue under the FLSA to recover her proper $15 overtime rate. The statutory scheme, though, does not require two separate complaints to vindicate the promise of overtime pay.

II. The second question presented does not warrant this Court's review.

Perhaps recognizing that the first question presented arises infrequently and does not implicate a circuit split, petitioner also asks the Court to use this case to elucidate *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. 15. Petitioner posits that lower courts have been misapplying the doctrine. *Id.* 15-19, 21. But as with the first question presented, petitioner cannot justify this Court's intervention.

1. *Split.* Relying almost entirely on a single fifteen-year-old law review article hypothesizing two

different "moods" of *Skidmore* analysis, petitioner claims a split between "sliding scale" and "independent judgment" circuits. *See* Pet. 16-17 (citing Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1251-52, 1270-71 (2007)); Hickman & Krueger, *supra*, at 1238. But petitioner cites no cases that actually accord with its own characterization of the two "moods." And even assuming that particular cases could be allocated to a particular "mood," petitioner hasn't shown that any circuit consistently applies only one mood or the other.

According to petitioner, so-called "sliding scale" circuits believe they "must" defer to a "longstanding and consistent" agency interpretation, without independently analyzing the validity of the agency's reasoning. Pet. 2. But none of the cases petitioner points to in fact ignores the validity of the agency's reasoning. *Id.* 17.[5] Moreover, the circuits petitioner claims as "sliding scale" circuits—the Fourth, Sixth, Seventh, and Ninth—often apply *Skidmore* in ways

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[5] *See* Pet. App. 17a (agency's interpretation "makes sense as it reflects 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"); *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 908 (6th Cir. 2021) (en banc) ("[I]gnoring all deference, ATF's interpretation of the statute is the best one."); *Larson v. Saul*, 967 F.3d 914, 922-25 (9th Cir. 2020) (court "independently examine[d] the text and context of the statute" to confirm validity of agency interpretation). In *United States ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649 (7th Cir. 2022), *Skidmore* played no role in the disposition. *See id.* at 652-53, 662 (considering whether certain categories of guidance qualified as "authoritative" for False Claims Act; using *Skidmore* only in a quoting parenthetical).

even petitioner would not classify as "sliding scale." *Id.*[6]

Petitioner also claims that so-called "independent judgment" circuits believe they must "evaluate an agency's interpretation based solely on the force of its reasoning," Pet. 2, and do not "analyze any of the factors identified in *Skidmore*," *id.* 17. But here too, petitioner points to no case suggesting that a court must ignore the *Skidmore* factors; indeed, some of petitioner's cases explicitly consider those other factors. *Id.* 17-18.[7] And the "independent judgment"

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[6] *See, e.g.*, *A.T. Massey Coal Co. v. Holland*, 472 F.3d 148, 169 (4th Cir. 2006) (invalidating agency interpretation where the agency provided little reasoning, but "what reasoning does appear is invalid"); *OfficeMax, Inc. v. United States*, 428 F.3d 583, 595 (6th Cir. 2005) (rejecting a longstanding interpretation that "stray[ed] from the ordinary meaning of the language in the statute"; noting that "[a]gencies in the end receive *Skidmore* respect because of the persuasiveness of their reasoning, not in spite of it"); *Vulcan Const. Materials, L.P. v. Fed. Mine Safety & Health Rev. Comm'n*, 700 F.3d 297, 317 (7th Cir. 2012) (invalidating agency decision under *Skidmore* where it did not "account[] for the explicit language and context" of the statute); *Wilderness Soc'y. v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1068-69 (9th Cir. 2003), *amended on reh'g*, 360 F.3d 1374 (9th Cir. 2004) (invalidating agency decision that was inconsistent with the statute and thus lacked "rational validity"). Even the law review article petitioner cites categorizes many opinions from these circuits as "independent judgment" decisions. Hickman & Krueger, *supra*, at 1311-20 (identifying, for example, *Matz v. Household Int'l Tax Reduction Inv. Plan*, 265 F.3d 572 (7th Cir. 2001), as an "independent judgment" decision).

[7] *See, e.g.*, *Rafferty v. Denny's, Inc.*, 13 F.4th 1166, 1186-88 (11th Cir. 2021) (concluding that agency interpretation "contradict[ed]" the agency's "long-standing prior interpretation"

circuits petitioner identifies—the Second, Fifth, Tenth, Eleventh, and Federal—often apply what petitioner would call a "sliding scale" analysis. *Id.*[8]

2. *Importance*. Even if the "sliding scale" and "independent judgment" models exist in theory, petitioner fails to adduce any evidence that the distinction between them matters in practice. The law

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and was not entitled to deference under *Auer* or *Skidmore*); *N.N.M. Stockman's Ass'n v. U.S. Fish & Wildlife Serv.*, 30 F.4th 1210, 1226-27 (10th Cir. 2022) (recognizing agency's "regulatory expertise"). The other cases petitioner cites do not suggest that a court must ignore the *Skidmore* factors. *See Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 105-06 (2d Cir. 2019); *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 327 n.9 (5th Cir. 2018). In *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1354 (Fed. Cir. 2020), the court concluded that the *Skidmore* argument was not properly preserved on appeal and that the statute was unambiguous in any event.

[8] *See, e.g.*, *Sai Kwan Wong v. Doar*, 571 F.3d 247, 260-62 (2d Cir. 2009) (considering that the agency was "highly expert" and its interpretation was "final and long-standing"); *Baylor Cnty. Hosp. Dist. v. Price*, 850 F.3d 257, 261-65 (5th Cir. 2017) (considering agency's "core expertise" and the interpretation's temporal consistency); *Flores-Molina v. Sessions*, 850 F.3d 1150, 1167 (10th Cir. 2017) (emphasizing the lack of formality and care in agency process); *United States v. US Stem Cell Clinic, LLC*, 998 F.3d 1302, 1309 (11th Cir. 2021) (noting that agency's interpretation was "consistent with its early (as well as its recent) pronouncements"); *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1366-67 (Fed. Cir. 2005) (noting that agency interpretation had "been adhered to consistently by the agency" and was a product of "specialized expertise"). Petitioner's law review article also categorizes many opinions from these circuits as "sliding scale" decisions. Hickman & Krueger, *supra*, at 1311-20 (identifying, for example, *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354 (Fed. Cir. 2001), as a "sliding scale" decision).

review article that hypothesized two "moods" of *Skidmore* analysis could not claim that any difference in outcomes amounts to more than random chance. *See* Hickman & Krueger, *supra*, at 1275-79. The authors did not purport to control for different statutes, agencies, or underlying facts. And of course, not every case considering an agency interpretation will cite *Skidmore* or its progeny—something the authors' dataset does not account for.

In any event, this Court "reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Still less does it review "moods."

3. *Vehicle.* Nor does this case provide an opportunity to address the applications of *Skidmore* that have troubled some Members of this Court. Petitioner suggests certiorari is warranted because "agencies have increasingly insisted that courts defer to their litigating positions"—that is, interpretations advanced for the first time in litigation. Pet. 3 (citing *E.I. Du Pont de Nemours & Co. v. Smiley*, 138 S. Ct. 2563, 2563 (2018) (Gorsuch, J., respecting the denial of certiorari)). But this case involves no "litigating position": The regulation here predates this lawsuit by half a century. Thus, the decision below provides no occasion to consider the propriety of applying *Skidmore* to a litigating position.

Petitioner also suggests certiorari is warranted because it predicts an expansion of the use of informal guidance documents in agency enforcement actions. Pet. 25-27. But again, this case bears no connection to that question. This is a private lawsuit, where the

agency is not a party. It thus does not raise the concern that a court is acting like an "[u]mpire in games at Wrigley Field" who is "defer[ring] to the Cubs manager's in-game interpretation of Wrigley's ground rules." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring).

4. *Merits*. The Fourth Circuit correctly stated and applied *Skidmore*. Petitioner has identified no error in the opinion below and certainly no error worthy of this Court's attention. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

a. Petitioner urges this Court to decide whether *Skidmore* "allows" courts to independently evaluate an agency's interpretation of a statute. Pet. i. The answer is yes, and no court thinks otherwise. *Skidmore* made clear that courts can consider "the validity of [the agency's] reasoning." 323 U.S. at 140. And contrary to petitioner's suggestion, Pet. 21, the decision below understood as much, Pet. App. 16a (quoting *Skidmore*, 323 U.S. at 140).

b. Petitioner is mistaken to argue that the Fourth Circuit should have ignored the *Skidmore* factors other than the validity of the agency's interpretation. *See* Pet. 16, 21. That is contrary to precedent and ordinary notions of statutory interpretation.

The Fourth Circuit properly looked to the temporal consistency of the relevant regulation, which has "remained unchanged for the past fifty-three years." Pet. App. 16a-17a. This Court has made clear that the longevity of an agency's position is an important consideration. *See, e.g.*, *Barnhart v.*

Walton, 535 U.S. 212, 220 (2002) ("[T]his Court will normally accord particular deference to an agency interpretation of 'longstanding' duration.").

This Court's precedent to that end is consistent with the general principle of statutory interpretation that "Congress legislates against the backdrop of existing law." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019); *see* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 942-44 (2017). Since the Department published Section 778.315 in 1968, Congress has amended the FLSA's overtime provision six times and expressed no disagreement with the regulation. *See* 29 U.S.C. § 207 note (Amendments).

The Fourth Circuit's recognition of the Department's expertise, *see* Pet. App. 17a-18a, was also entirely proper. "Just as a court would want to know what John Henry Wigmore said about an issue of evidence law or what Arthur Corbin thought about a matter of contract law, so too should courts carefully consider what the Food and Drug Administration thinks about how its prescription drug safety regulations operate." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2442 (2019) (Gorsuch, J., concurring) (cleaned up).

c. Ultimately, petitioner's gripe is that the Fourth Circuit thought that the Department of Labor's interpretation of the FLSA is correct. *See* Pet. 19, 21. Petitioner and its amici attribute this outcome to an "ill-advised form[] of administrative deference that must be put to rest." Br. of State of West Virginia and 15 Other States as Amici Curiae 2; *see* Pet. 21-22. But

as Chief Justice Roberts put the point, "there is a difference between holding that a court ought to be persuaded by an agency's interpretation and holding that it should defer to that interpretation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2424 (2019) (Roberts, C.J., concurring). And because *Skidmore* is simply "a trifling statement of the obvious"—a "judge should take into account the well-considered views of expert observers"—policing the precise formulation of that "empty truism" does not warrant this Court's attention. *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

CONCLUSION

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

Respectfully submitted,

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